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NORTH CAROLINA REPORTS

VOL. 172

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1916

ROBERT C. STRONG
REPORTER

RALEIGH
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2 Iredell Equity	"	37	"
3 Iredell Equity	"	38	"
4 Iredell Equity	"	39	"
5 Iredell Equity	"	40	"
6 Iredell Equity	"	41	"
7 Iredell Equity	"	42	"
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Busbee Law	"	44	"
Busbee Equity	"	45	"
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4 Jones Equity	"	57	"
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1916

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,
GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

T. W. BICKETT.

ASSISTANT ATTORNEY-GENERAL:

T. H. CALVERT.

SUPREME COURT REPORTER:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
H. W. Whedbee	Fifth	Pitt.
O. H. Allen	Sixth	Lenoir.
Albert L. Cox	Seventh	Wake.
W. P. Stacy	Eighth	New Hanover.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
E. B. Cline	Seventeenth	Catawba.
M. H. Justice	Eighteenth	Rutherford.
Frank Carter	Nineteenth	Buncombe.
G. S. Ferguson	Twentieth	Haywood.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
Charles L. Abernethy	Fifth	Carteret.
H. E. Shaw	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. L. Lyon	Eighth	Columbus.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Caldwell.
J. J. Hayes	Seventeenth	Wilkes.
Michael Schenck	Eighteenth	Henderson.
J. E. Swain	Nineteenth	Buncombe.
G. L. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

FALL TERM, 1916

The following were licensed to practice law by the Supreme Court, August Term, 1916:

Name.	*County.*
Sidney Sherrill Alderman	Guilford
Reynold Tatum Allen	Lenoir
Arthur Aaron Aronson	Wake
Benjamin Franklin Aycock	Wayne
Isaac Mayo Bailey	Onslow
Alfred Walter Bailey	Beaufort
Wiley Goodlow Barnes	Wake
George Urias Baucom	Wake
William Stover Bogle	Alexander
Ephraim Leigh Brickhouse	Tyrrell
George Grady Brinson	Pamlico
Arnold Wesley Byrd	Duplin
John Edwin Carter	Surry
Charles Lee Coggin	Rowan
James Caswell Coggins	Washington
John Henry Cook	Cumberland
Benjamin McLaughlin Covington	Anson
Gillam Craig	Union
George Winston Craig	Buncombe
Samuel Clifton Cratch	Beaufort
Arnold Cleo Davis	Guilford
Junius Davis	New Hanover
Roy Linney Deal	Alexander
George Edgar Eddins	Stanly
Samuel Erwin Edwards	Madison
Frank Lanneau Fuller, Jr.	Durham
Frank Herbert Gibbs	Cumberland
Charles Alphia Gosney	Wake
James Haywood Gray	Wake
James Selkirk Griffin	Wake
Franklin Wills Hancock, Jr.	Granville
Herbert Bascom Harrell, Jr.	Halifax
Elisha Carter Harris	Pasquotank
Peter Richardson Hines	Pitt
George Ricks Holton	Forsyth
Walter Lee Johnson	Wake
Ellis Coleman Jones	Jackson
James Nathaniel Keelin, Jr.	Wake

Name.	*County.*
John Archibald Leitch, Jr.	Rowan
Richard Mullington Lewis	Columbus
Oliver Milton Litaker	Caldwell
Robert Eugene Little, Jr.	Anson
James Andrew McCoy	Robeson
Robert Strange McNeill	Cumberland
Peyton McSwain	Cleveland
John Rives Manning	Vance
Grover Adlai Martin	Yadkin
Eura Atkins Mathews	Pender
Allen Jay Maxwell	Wake
William Franklin Midgett	Pasquotank
Edgar Mitchell	Wake
Roland Franklin Mintz	Wayne
Harry Edwin Moore	Dillon, S. C.
Joseph Edmund Pearson	Wake
Hunter Kirby Penn	Rockingham
Wood Hayes Powell	Iredell
James Thaddeus Reece	Yadkin
Albert Emmett Reitzel	Guilford
Kenneth Claiborne Royall	Wayne
Robert Harper Rouse	Lenoir
Conrad William Sandrock	Cumberland
Levi Leachmond Self	Rockingham
Alexander Turner Shaw	Wake
Enoch Spencer Simmons	Beaufort
Mack Preston Spears	Mecklenburg
Leon Gladstone Stevens	Johnston
Isaac Richerson Strayhorn	Durham
Herbert Linwood Swain	Tyrrell
James Alexander Taylor	Granville
Alan Turner	Iredell
Henry Clay Turner	Stanly
Robert Andrews Wellons	Johnston
William Pell Whitaker, Jr.	Wilson.
Thomas Lacy Williams	Wake
Lloyd Tilghman Wilson, Jr.	Richmond, Va.
Adolphus Harrison Wolfe	Surry
Willliam Gerney Womble	Wake
William Thomas Woodley	Wake
Ethelred Henry Woodard	Wilson

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1917

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1917.
First District	August 28
Second District	September 4
Third and Fourth Districts	September 11
Fifth District	September 18
Sixth District	September 25
Seventh District	October 2
Eighth and Ninth Districts	October 9
Tenth District	October 16
Eleventh District	October 23
Twelfth District	October 30
Thirteenth District	November 6
Fourteenth District	November 13
Fifteenth and Sixteenth Districts	November 20
Seventeenth and Eighteenth Districts	November 27
Nineteenth District	December 4
Twentieth District	December 11

SUPERIOR COURTS, FALL TERM, 1917

The parenthesis numeral following the date of a term indicates the number of weeks during which the court may hold.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Kerr.*
Camden—July 16† (1); Nov. 5 (1).
Gates—July 30 (1); Dec. 10 (1).
Washington—Aug. 6 (1).
Currituck—Sept. 3 (1).
Chowan—Sept. 10 (1); Dec. 3 (1).
Pasquotank—Sept. 17 (1); Sept. 24† (1); Nov. 12† (1).
Beaufort—Oct. 1† (2); Nov. 19 (1); Dec. 17† (1).
Hyde—Oct. 15 (1).
Dare—Oct. 22 (1).
Perquimans—Oct. 29 (1).
Tyrrell—Nov. 26 (1).

SECOND JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Daniels.*
Nash—Aug. 27 (1); Oct. 8 (1); Nov. 26 (2).
Wilson—Sept. 3 (1); Oct. 1 (1); Nov. 12† (2); Nov. 29† (2); Dec. 17* (1).
Edgecombe—Sept. 10 (1); Oct. 29† (2); Nov. 12† (2).
Martin—Sept. 17 (2); Dec. 10 (1).

THIRD JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Whedbee.*
Bertie—July 2† (1); Aug. 27 (2); Nov. 12 (2).
Hertford—July 30 (1); Oct. 15 (2).
Northampton—Aug. 6 (1); Oct. 29 (2).
Halifax—Aug. 13 (2); Nov. 26 (2).
Warren—Sept. 17 (2).
Vance—Oct. 1 (2).

FOURTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Allen.*
Lee—July 16 (2); Sept. 17 (1); Nov. 29 (2).
Chatham—Aug. 6† (2); Oct. 29 (1).
Johnston—Aug. 13* (1); Sept. 24† (2); Dec. 10 (2).
Wayne—Aug. 20 (2); Oct. 8† (2); Nov. 26 (2).
Harnett—Sept. 3 (1); Sept. 10† (1); Nov. 12† (2).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Cox.*
Pitt—Aug. 20† (1); Aug. 27* (1); Sept. 17 (1); Nov. 5† (1); Nov. 12* (1); Nov. 19† (2).
Craven—Sept. 3* (1); Oct. 1† (2); Nov. 19† (2).
Carteret—Oct. 15 (1).
Pamlico—Oct. 22 (2).
Jones—Dec. 3 (1).
Greene—Dec. 10 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Stacy.*
Onslow—July 16† (1); Oct. 8 (1); Dec. 3† (1).
Duplin—July 23* (1); Aug. 27† (2); Nov. 19 (1); Nov. 26† (1).
Sampson—Aug. 6 (2); Sept. 17† (2); Oct. 22 (2).
Lenoir—Aug. 20* (1); Oct. 15‡ (1); Nov. 5† (2); Dec. 10* (1).

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Lyon.*
Wake—July 2† (2); July 16‡ (1); Sept. 10* (1); Sept. 17† (2); Oct. 22* (1); Oct. 29† (2); Nov. 26* (1); Dec. 3† (2).
Franklin—Aug. 27† (2); Oct. 15* (1); Nov. 12† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Devin.*
Brunswick—Aug. 20† (1); Oct. 8 (1).
Columbus—Aug. 27 (2); Nov. 19† (2); Dec. 7* (1).
New Hanover—Sept. 10* (2); Oct. 22† (2); Nov. 12 (1); Dec. 3† (2).
Pender—Sept. 24† (2); Nov. 5 (1).

NINTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Bond.*
Robeson—July 9* (1); Sept. 3† (2); Oct. 1† (2); Nov. 5* (1); Dec. 3† (2).
Bladen—Aug. 6* (1); Oct. 15† (1).
Hoke—Aug. 13 (2); Nov. 26 (1).
Cumberland—Aug. 27* (1); Sept. 17† (2); Oct. 22† (2); Nov. 19* (1).

TENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Connor.*
Granville—July 23 (1); Nov. 12 (2).
Person—Aug. 13 (1); Oct. 15 (1).
Alamance—Aug. 20* (1); Sept. 10† (2); Nov. 26* (1).
Durham—Aug. 27* (1); Sept. 24† (2); Nov. 5† (1); Dec. 10* (1).
Orange—Sept. 3 (1); Dec. 3 (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Adams.*
Ashe—July 9 (2); Oct. 15 (1).
Forsyth—Aug. 6* (2); Sept. 10† (3); Oct. 1‡ (2); Nov. 5† (2); Dec. 10* (1).
Rockingham—Aug. 6* (2); Nov. 19† (2).
Caswell—Aug. 20 (1); Dec. 3 (1).
Surry—Aug. 27 (2); Oct. 22 (2).
Alleghany—Sept. 24 (1).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Harding.*
Davidson—July 30 (2); Nov. 19† (2).
Guilford—Aug. 13† (2); Sept. 3† (2); Sept. 17* (1); Sept. 24† (1); Oct. 8† (2); Nov. 5† (2); Dec. 3† (1); Dec. 10* (2).
Stokes—Oct. 22* (1); Oct. 29† (1).

THIRTEENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Long.*
Richmond—July 2† (1); July 16* (1); Sept. 3† (1); Sept. 24* (1); Dec. 3† (1); Dec. 17† (1).
Stanly—July 9 (1); Oct. 8† (1); Nov. 19 (1).
Union—July 30* (1); Aug. 20† (2); Oct. 15 (1); Oct. 22† (1).
Moore—Aug. 13* (1); Sept. 17† (1); Dec. 10† (1).
Anson—Sept. 10* (1); Oct. 1† (1); Nov. 12† (1).
Scotland—Oct. 29† (1); Nov. 26 (1).

FOURTEENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Webb.*
Mecklenburg—July 9* (2); Aug. 27* (1); Sept. 3† (2); Oct. 1* (1); Oct. 8† (2); Oct. 29† (2); Nov. 12* (1); Nov. 19† (2).
Gaston—Aug. 13† (1); Aug. 20* (1); Sept. 17† (2); Oct. 22* (1); Dec. 3† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Cline.*
Randolph—July 16† (2); Sept. 3* (1); Dec. 3 (2).
Iredell—July 30 (2); Oct. 22 (1).
Cabarrus—Aug. 13 (2); Oct. 29 (2).
Davie—Aug. 27 (1); Nov. 12 (1).
Rowan—Sept. 10 (1); Oct. 8† (1); Nov. 19 (2).
Montgomery—July 9‡ (1); Sept. 24† (1); Oct. 1, (1).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Justice.*
Lincoln—July 17 (1); Oct. 15 (1); Oct. 22† (1).
Cleveland—July 23 (2); Oct. 29 (2).
Burke—Aug. 6 (2); Oct. 1† (2); Dec. 3† (2).
Caldwell—Aug. 20 (2); Nov. 12 (2).
Polk—Sept. 27 (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Carter.*
Avery—July 2† (1); Oct. 15 (2).
Catawba—July 9 (2); Oct. 29 (2).
Mitchell—July 23† (2); Nov. 12 (2).
Wilkes—Aug. 6 (2); Oct. 1† (2).
Yadkin—Aug. 20 (1); Nov. 26 (1).
Watauga—Sept 3 (2).
Alexander—Sept 17 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Ferguson.*
McDowell—July 9 (2); Sept. 17 (2).
Transylvania—July 23 (2); Nov. 26 (2).
Yancey—Aug. 13† (1); Oct. 29 (2).
Rutherford—Aug. 20† (2); Oct. 15 (2).
Henderson—Oct. 1* (2); Nov. 12† (2).

NINETEENTH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Lane.*
Buncombe—Aug. 6† (3); Sept. 3‡ (3); Oct. 1† (3); Nov. 5‡ (3); Dec. 3† (3).
Madison—Aug. 27‡ (1); Sept. 24‡ (1); Oct. 22‡ (1); Nov. 19‡ (1).

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1917—*Judge Shaw.*
Haywood—July 9 (2); Sept. 17 (2).
Swain—July 23 (2); Oct. 22 (2).
Cherokee—Aug. 6 (2); Nov. 5 (2)
Macon—Aug. 20 (2); Nov. 19 (2).
Graham—Sept. 3 (2); Dec. 3 (2).
Jackson—Oct. 8 (2).
Clay—Oct. 1 (1).

*Criminal cases. †Civil cases. ‡Civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, Judge, Wilson.

Western District—JAMES E. BOYD, Judge, Greensboro.

EASTERN DISTRICT

Terms.—District terms are held at the time and place, as follows:

Raleigh, fourth Monday after the fourth Monday in April and October. LEO. D. HEARTT, Clerk.

Elizabeth City, second Monday in April and October, HARRY T. GREENLEAF, JR., Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. WALTER DUFFY, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. SAMUEL P. COLLIER, Deputy Clerk, Wilmington.

Terms of court for Laurinburg and Wilson are now created, but not definitely fixed.

OFFICERS

J. O. CARR, United States District Attorney, Wilmington.

E. M. GREENE, Assistant United States District Attorney, New Bern.

W. T. DORTCH, United States Marshal, Raleigh.

LEO D. HEARTT, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

Terms.—District terms are held at the time and place, as follows:

Greensboro, first Monday in June and December. J. M. MILLIKEN, Clerk, Greensboro.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

WILLIAM C. HAMMER, United States District Attorney, Asheboro.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1916

AMERICAN POTATO COMPANY v. JENETTE BROTHERS.

(Filed 13 September, 1916.)

1. Contracts, Written—Clearly Expressed—Parol Evidence.

Where the terms of a written contract are therein clearly and unambiguously expressed, and there is no allegation or evidence of fraud or mutual mistake, they will be enforced as they are written, and parol testimony, contradictory thereof, is inadmissible.

2. Same—Prior Negotiations.

Evidence of negotiations leading up to the making of a contract which the parties have afterwards put in writing is incompetent to contradict the clearly and unambiguously expressed terms of the written contract, for the previous negotiations merge therein.

3. Same—Common Understanding.

The common understanding between the parties is gathered from their written contract, and where this has been clearly and unambiguously expressed it is incompetent to show, in contradiction, what one of them understood the contract to be.

4. Contracts, Written—Equity—Correction—Parol Evidence—Pleadings.

The question whether parol evidence is competent in equity to correct a written contract in accordance with the true agreement of the parties does not arise in the absence of allegation and evidence of fraud or mutual mistake of the parties. It is competent to reform a deed, but not to vary or contradict it.

5. Contracts, Written—Enlargement—Parol Evidence—Trials—Issues.

In vendor's action upon his contract to furnish the purchaser with the best potatoes of a certain kind he shipped his customers

"from Aroostook County in the State of Maine" it is reversible error for the court to submit to the jury an issue upon the purchaser's liability controlling the question whether the potatoes furnished were the best raised in and shipped by any one from that county in the same year, for this enlarged the obligations of the vendor beyond those stated in the contract. There was no issue in this case as to whether the potatoes were worthless or unfit for the purposes for which they were sold.

APPEAL by plaintiff from *Cooke, J.*, at November Term, 1915, of PASQUOTANK.

Plaintiff sued to recover damages for a breach of contract in the sale of potatoes. It was agreed between the parties that on 25 October, 1912, plaintiff would sell and deliver at Elizabeth City, N. C., 1,000 sacks of potatoes, known in the trade as Irish Cobbler and White Bliss, at $2.90 per sack of 11 pecks, the same to be sacked and shipped between 1 January, 1916, and 28 February, 1916, in cars of 250 sacks each, upon receipt of a written order of shipment from the defendants two weeks before the first named date, the potatoes "to be the best quality shipped from Aroostook County, State of Maine, by the said first party (plaintiff in this case), and in sacks of 165 pounds each, net; the same now being stored in warehouses in Maine which are owned and operated by the said party." There was a further stipulation as to the price and the payment thereof by stated installments.

Defendant alleged, and offered proof to show, that plaintiff failed to comply with this contract, in that instead of shipping potatoes of the quality described in their agreement, "it had shipped a bad lot of potatoes, being anything that grows in potato fields, from the smallest culls to the largest, being mixed and of three different kinds, the smallest being the size of a turtle egg and some as large as a cocoanut."

Plaintiff tendered issues based on the terms of the contract, which the court rejected, and submitted issues which, with the answers of the jury thereto, are as follows:

"1. Was the plaintiff ready, willing, and able to deliver to the defendants 580 bags of Cobblers and 180 bags of White Bliss Irish potatoes, the best quality shipped from Aroostook County in 1913? Answer: 'No.'

"2. Did defendants wrongfully refuse to take the potatoes and pay for same? Answer: 'No.'

"3. What damages, if any, is plaintiff entitled to recover? Answer: 'Nothing.'"

The court admitted evidence, over plaintiff's objection, as to correspondence and dealings between the parties prior to the execution of the written contract of 25 October, 1912, and as to the quality of the potatoes defendants had purchased from the plaintiff in 1912; and also oral evidence as to the kind and quality of potatoes the defendants contracted to buy, which were to be good, medium size, smooth, and bright.

There was no evidence as to the kind or quality of potatoes which were shipped from Aroostook County, Maine, by the plaintiff in 1913, and plaintiff asked for an instruction based upon this lack of evidence, which was refused.

Judgment was entered upon the verdict, and plaintiff, having reserved all exceptions taken during the trial, appealed to this Court.

George J. Spence, Aydlett & Simpson for plaintiff.
Ehringhaus & Small for defendant.

WALKER, J., after stating the case: The parties had the legal right to make their own contract, and if it is clearly expressed, it must be enforced as it is written. We have no power to alter the agreement, but are bound to interpret it according to its plain language. There is no rule of evidence better settled than that prior negotiations and treaties are merged in the written contract of the parties, and the law excludes parol testimony offered to contradict, vary, or add to its terms as expressed in the writing. *Moffitt v. Maness,* 102 N. C., 547. The principle lies at the very foundation of all contracts, and if permitted to be violated the ultimate injury to the commercial world and to society generally would be incalculable and certainly far-reaching. It is unfortunate that loose dicta in occasional and ill-considered cases are to be found which seem to be hostile to this safe and sound axiom of the law, because they have strained the law in order to defeat or circumvent some suspected fraud, perhaps gross and vicious; but the method of preventing the consummation of the wrong will be far more disastrous in its results than a steady adherence to the rules of the law, although in special cases actual imposition or fraud may be perpetrated. The rules of law are and must needs be universal in their application, this being essential to certainty in business transactions and to the integrity of contracts; for, otherwise, "commerce may degenerate into chicanery and trade become another name for trick." *Benwick v. Benwick,* 3 Harris, 66. It is true that Cicero in his eloquent defense of the poet Archias denied the superiority of the record, or the written memorial, over the spoken word, upon the ground that the witness is subjected to an oath and cross-examination, with other safeguards against falsehood, while the record has no such test to assure its accuracy; but his plausible argument has never been accepted by the wiser sages of the law, who have consistently adhered to the safer rule and so arranged the degrees of proof as to give decided preference to written over unwritten evidence. *Chief Justice Taylor,* in referring to this view of the law, expressed the belief that the fallibility of human memory weakens the effect of oral testimony to such an extent that even the most upright mind, though awfully impressed with the solemnity of an oath, perfectly honest and sincere in

its processes, and aiming solely at a disclosure of the truth, may still err, and thereby unconsciously substitute falsehood for it. He said that "Time wears away the distinct image and clear impression of facts and leaves in the mind uncertain opinions, imperfect notions, and vague surmises." It is better, therefore, to rely upon the written word, as less apt to deceive or falsify. *Smith v. Williams*, 5 N. C., 426.

Nor can this beneficent rule be evaded by substituting the understanding of one party for the agreement of both. The minds of the parties must have met at the same time, and with a common understanding, upon the same subject-matter; and when the agreement is reduced to writing it is conclusively presumed to state that common understanding, and to be their last expression and the chosen memorial of what the contract shall be. We said in *Lumber Co. v. Lumber Co.*, 137 N. C., at p. 436: "It is not the understanding, but the agreement, of the parties that controls, unless that understanding is in some way expressed in the agreement. Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the court proceeds, not upon the understanding of one of the parties, but upon the agreement of both. No principle is better settled." *Brunhild v. Freeman*, 77 N. C., 128. (*Pendleton v. Jones*, 82 N. C., 249; *Prince v. McRae*, 84 N. C., 674; *McRae v. R. R.*, 88 N. C., 534; *King v. Phillips*, 94 N. C., 558; *Bailey v. Rutjes*, 86 N. C., 520.)

There is no contention here, and could not be, that any part of the contract rested in parol, for the rule in respect to such cases is thoroughly settled, that "Where the contract lies partly in parol, that part which is in writing is *not* to be contradicted." *Moffitt v. Maness*, 102 N. C., at pp. 461, 462, and cases there cited. When parol evidence is admitted to show that all of the agreement was not inserted in the writing, "it does not contravene this rule, but the competency of the proof rests upon the idea that the writing does not contain the whole contract, but is only one part of it." *Ray v. Blackwell*, 94 N. C., 10; *Manning v. Jones*, 44 N. C., 368; *Sherrill v. Hagan*, 92 N. C., 345; *Cummings v. Barbee*, 99 N. C., 332; *Twidy v. Sanderson*, 31 N. C., 5; *Dunphy v. Booth*, 49 N. C., 83, and *Moffitt v. Maness, supra*.

With reference to oral proof of a collateral contract, the law is well understood. It was said by us in *Evans v. Freeman*, 142 N. C., 61, 64, that "Where a contract does not fall within the statute, the parties may, at their option, put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided, varied, or contradicted, by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract. In such a case there is no viola-

tion of the familiar and elementary rule we have before mentioned, because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but, leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing."

Insisting on the strict enforcement of the rule excluding parol evidence where the meaning is clear, we said in *Cobb v. Clegg,* 137 N. C., at p. 157: "The defendant's counsel, on the contrary, argued that the above stated rule, upon which plaintiffs rely, does not apply to the facts of this case, and that parol evidence is not competent, as its effect will be, not to prove an independent part of the agreement which was not reduced to writing, but to vary and contradict the contract as written by the parties, and which the law presumes contains all the provisions by which they intended to be bound. In support of their view they cited *Parker v. Morrill,* 98 N. C., 232; *Meekins v. Newberry,* 101 N. C., 17; *Bank v. McElwee,* 104 N. C., 305, and especially relied on *Moffitt v. Maness,* 102 N. C., 457, in which the Court, through *Shepherd, J.,* admonishes us that the rule against the admissibility of parol testimony to vary the terms of a written instrument has perhaps been relaxed too much, and that the farthest limit has been reached in admitting such testimony, beyond which it will not be safe to go. The Court sounds the alarm and warns us against the dangers ahead. It may be better, we admit, to trust to the writing—the memorial selected by the parties for preserving the integrity of their treaty—than to confide in human memory for the exact reproduction of the facts."

The authorities relied on by the defendants all relate to a case where the terms of the written instrument in question are ambiguous. It is competent in such a case to consider internal as well as external matters in order to ascertain the meaning of the parties. This is very far from saying that you may vary or contradict a written contract by parol, but, on the contrary, it merely allows you to make plain what is uncertain by reason of the language employed. *Wilkie v. N. Y. L. Ins. Co.,* 146 N. C., 513; *Neal v. Camden Ferry Co.,* 166 N. C., 563. This contract is not within that rule of evidence, for it is manifest what its meaning is. The correct rule applicable here is the other one, stated by defendants, which declares that "The one purpose of a written contract is to make certain what the contract is," *Bridgers v. Ormand,* 153 N. C., 113, and as again expressed in defendant's brief, "The intention of the parties as embodied in the words they have used is the true principle in the consideration of all contracts," citing and quoting from *Kirkman v. Hodgin,* 151 N. C., 588; *Edwards v. Bowden,* 99 N. C., 79, 80.

Applying these familiar principles to the facts of this case, we are led to the conclusion that the court erred in the trial of this cause. The contract here calls for potatoes from plaintiff's stock as good as any sold by *it* to others from Aroostook County in the State of Maine. In other words, the plaintiff was to fare as well as defendant's most favored customer; but they were not entitled, by the terms of the agreement, to potatoes of a better quality than were sold to others from said stock, nor to potatoes of as good a kind and quality as sold by any other dealer *from* that county. If we should so hold, we would enlarge the terms of the contract and read into it a material and important stipulation not appearing therein. This would be making a contract for the parties, and not merely declaring the meaning of the one they have made for themselves, which we are not permitted to do. The issue, therefore, was broader than the obligation of the contract, as expressed in it, and consequently required more to be done by the plaintiff than it had undertaken to do for the consideration stated; and the same may be said of the evidence admitted against plaintiff's objection. The ruling allowed defendants to defeat the recovery upon the true contract by increasing the measure of plaintiff's responsibility, or, in other words, the issue and evidence handicapped the plaintiff at the very outset, by trying the case on the wrong theory, and one not consistent with the contract declared on, and utterly foreign to the case.

It is not suggested, by proper pleading, that there was any fraud or mutual mistake in drawing the contract, by reason of which the true intention was not expressed. Where there is such an equity, the real agreement can be shown by oral proof, because this is not varying or contradicting the written agreement, but merely showing what it was intended, by the parties, to be, for the purpose of reforming it, in order that it may be made to speak the truth.

We must not be understood as holding that plaintiff could fulfill its obligation to sell as good seed potatoes as it shipped to others from Aroostook County by sending to defendants a lot of potatoes which were worthless and wholly unfit for the use to which it was intended, with its knowledge, they would be applied. But the case was tried upon no such theory, and we do not pass upon that feature of it. Even if it had been, the form of the issue and the nature of the proof were not germane to it. So that, in any view we may take of the trial, there was error.

New trial.

STATE EX REL. P. N. BRAY v. T. W. BAXTER.

(Filed 13 September, 1916.)

Pleadings—Issues—Title to Office—Damages.

In an action to determine the title to the office of register of deeds, the complaint alleged that the plaintiff had been duly elected in November, 1914, was entitled to the office, and that defendant had been wrongfully sworn in and installed and had received the emoluments of said office, which he sought to recover. The lower court held with defendant, but on appeal it was decided that the vote was a tie, and the case remanded to the county board of elections, who decided with defendant. *Held*, an issue to determine what sum the plaintiff should recover of the defendant for fees received for services performed by him prior to 1914 does not arise upon the pleadings, and was properly refused.

CIVIL ACTION tried before *Bond, J.*, at January Term, 1916, of CURRITUCK.

This was an action to try the title to the office of register of deeds of Currituck County, the plaintiff alleging that he was duly elected to that office at the election in November, 1914, when he and the defendant were opposing candidates.

After this election the board of canvassers of Currituck County met at the proper time and place, canvassed the result of the election, and, instead of declaring the result a tie, as they should have done, erroneously declared the defendant Baxter the rightfully elected candidate, and gave him a certificate of election.

The plaintiff Bray denied that the defendant was elected, and appeared before the meeting of the board of county commissioners of Currituck County on the first Monday in December, 1914, and protested against the induction of defendant into said office.

The board of commissioners, upon the defendant's tendering the bond required by law, accepted it and inducted him into the office.

On 19 December, 1914, this suit was instituted, and plaintiff alleged that he was duly elected in 1914 and "that the defendant was wrongfully sworn in and installed as register of deeds for said county, and has ever since that time wrongfully exercised, and is still wrongfully exercising, said office, and wrongfully and unlawfully receiving the emoluments thereof," and prayed judgment "that the said defendant be adjudged wrongfully in the said office, that he be evicted therefrom, and that this relator be adjudged rightfully entitled thereto and be installed therein, and that he recover of the defendant and his sureties such amount as he received in such office."

The defendant answered and the cause was referred to a referee, and, upon exceptions to his report, heard before *Whedbee, J.*, at March Term,

1915, at which time judgment was rendered declaring the defendant entitled to the office.

From this judgment the plaintiff appealed to the Supreme Court, and it decided that the vote at the November (1914) election was a tie, and that neither of the candidates was elected, and remanded "the case to the county board of elections, who shall determine which shall be elected."

After this decision the board of elections of Currituck County met and elected the defendant to the office.

At the next term of the Superior Court thereafter the plaintiff moved the court to submit to the jury an issue to determine what sum he was entitled to recover of the defendant as fees for the time preceding the date upon which the board of elections elected the said defendant.

The contention of the plaintiff is based upon the fact that he was elected register of deeds in 1912, and he therefore contends that he is entitled to the fees of the office up to the time the defendant was elected by the board of elections.

The court refused to submit the issue tendered by the plaintiff, and the plaintiff excepted and appealed.

Aydlett & Simpson and Ward & Thompson for plaintiff.
A. M. Simmons and Ehringhaus & Small for defendant.

ALLEN, J. It has been judicially determined that the plaintiff was not elected in 1914, and he is now seeking to recover fees for work done, not by himself but by the defendant.

His appeal presents the single question of his right to have the issue submitted to the jury to determine what sum he was entitled to recover of the defendant as fees, and this depends upon the pleadings.

When we turn to the pleadings we find no allegation that he was elected to the office of register of deeds in 1912, and the whole complaint, including the demand for fees, is based upon the contention that he was duly elected in 1914, and this has been decided against him.

The issue, therefore, which he tendered did not arise upon the pleadings, and his Honor ruled correctly in refusing to submit it.

Affirmed.

JOHN R. WHEELER v. NORFOLK-CAROLINA TELEGRAPH AND TELEPHONE COMPANY.

(Filed 13 September, 1916.)

1. Telephone Companies—Streets—Abutting Owners—Shade Trees—Damages—Municipal Corporations—Title—Sanction.

The owner of land abutting upon the streets of a town may recover damages for cutting shade trees on the sidewalks in front of his property which afforded protection thereto, in his action against an individual or corporation so mutilating the trees in furtherance of some private interest, though the ultimate title to the streets is in the municipality, and the acts complained of were done with its sanction.

2. Telephone Companies—Streets—Abutting Owners—Shade Trees—Damages—Punitive Damages.

Where in an action for damages against a telephone company it is shown that defendant's employees cut shade trees on the sidewalk in front of plaintiff's dwelling in a town; that they had commenced to cut the trees before the owner was aware, and continued to cut after having been forbidden by his wife, claiming permission from the municipal authorities, and replied to the objection of the plaintiff's wife with the statement that they would cut down the trees, if this would be no more objectionable than trimming them: *Held*, sufficient to sustain a verdict awarding punitive damages.

3. Telephone Companies—Shade Trees—Damages—Torts—Abutting Owner—Title—Possession—Presumptions.

One who is in possession of a town lot abutting on a street on the sidewalk of which a telephone company has cut the trees to run its wires through, and who asserts ownership of the lot under a deed, may maintain his action against the company as a wrongdoer, nothing else appearing, for as to it such occupant will be presumed to be the owner until the contrary is made to appear. *Daniel v. R. R.*, 158 N. C., 418, cited and distinguished.

CIVIL ACTION tried before *Peebles, J.*, and a jury at September Term, 1915, of CHOWAN.

The action was by abutting owner to recover damages of defendant for wrongfully cutting trees on a sidewalk, which afforded shade and shelter to plaintiff's property.

It was admitted in the pleadings, or there was evidence on part of plaintiff tending to show, that plaintiff occupied a home and lot abutting on Oakum Street in the town of Edenton, N. C., claiming to own same under a deed bearing date in 1893; that in the summer of 1914 two of defendant's employees, acting under defendant's instructions, "mutilated and badly cut some shade trees which plaintiff had planted on the outer edge of the sidewalk, seriously impairing their capacity for shade and for beautifying said lot," etc.; that plaintiff's wife was present forbidding, and, on the question of damages, testified as follows: That the

trees were cut by two linemen of defendant company; that she was at home when they came for that purpose, and seriously objected to the men cutting them, when they told her they had permission from the town councilmen. "But I told them that I was sure they did not, as my husband was one of the councilmen. They then said they had permission from the mayor, and I asked them to wait until I could send for my husband. They refused. I told them that I had as soon the trees were cut down as to be done in that way, and they answered me that they could do that, too."

On cross-examination, Mrs. Wheeler further testified: That when she went out the linemen were already up the trees and had already cut out a large limb from one of the trees, "and after I asked him not to, he cut off one of the largest limbs and other of the smaller branches. I asked them to wait until my husband came."

J. R. Wheeler testified: That the said trees were badly cut, and that the damage to the property was large; that these trees were upon the west side of the house, and that without them he had no shade, and that the cutting and mutilation done by the defendant largely destroyed his shade.

The evidence on the part of the defendant tended to show that the trees were small, and the cutting had not sensibly impaired the value of the trees, and, further, that the linemen only cut limbs they had already started to cut when plaintiff's wife appeared, and that their manner on the occasion was polite and quiet.

The jury rendered the following verdict:

1. Was plaintiff the owner of the house and lot described in complaint at time of the alleged injury? A. "Yes."

2. Did the defendant trespass upon said property, as alleged? A. "Yes."

3. What actual or compensatory damages, if any, has plaintiff sustained? A. "$150."

4. What punitive damage, if any, is plaintiff entitled to recover of the defendant? A. "$50."

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning for error chiefly the refusal of defendant's motion to nonsuit and allowing recovery for punitive damages.

No counsel for plaintiff.
P. W. McMullan for defendant.

HOKE, J. Our cases hold that an abutting owner may recover damages for cutting shade trees on the sidewalk, which afford protection to his property, where such cutting is done in furtherance of some private interest, individual or corporate; and this though the act complained of may have been sanctioned by the municipal authority. *Moore v. Power Co.,*

163 N. C., 300; *Brown v. Electric Co.,* 138 N. C., 535. Referring to these cases and the position they uphold, in *Wood v. Land Co.,* 163 N. C., at p. 371, the Court said: "That case, *Brown v. Electric Co.,* was made to rest chiefly on the position that, notwithstanding a previous dedication and use as a public street, an abutting owner continued to have a proprietary interest in a shade tree standing on or near his sidewalk and affording shade and shelter to his lot which the law would protect and which could not be taken from him without compensation except when required by the public interests."

It is also held here, and by well considered cases elsewhere, that the principle is not affected by the fact that the ultimate title to the streets is in the municipality. *Moore v. Power Co., supra; Donahue v. Keystone Gas Co.,* 181 N. Y., 313; *Norman Milling Co. v. Bethurem,* 41 Ark., 735, reported also in L. R. A., N. S., p. 1082. And, on the facts of the present case, authority is to the effect, further, that punitive damages may be awarded (*Carmichael v. Telephone Co.,* 157 N. C., 21; *Williams v. R. R.,* 144 N. C., 498; *Brown v. Electric Co.,* 138 N. C., 535); such damages, when permissible, and the amount, being properly referred to the jury for decision. *Billings v. Observer Co.,* 150 N. C., 540.

It was further insisted for defendant that the motion for nonsuit should have been allowed, for the reason that the injury complained of was to the freehold and no title in plaintiff had been shown, citing *Daniel v. R. R.,* 158 N. C., 418.

It is not at all clear that the damage complained of in this case is entirely to the freehold; but if this be conceded, we are of opinion that defendant's motion to nonsuit on this ground was properly denied. It is the recognized position in this State that an action of this character may be maintained by one who shows that he is in peaceable possession of the property at the time of the alleged trespass, and we think it a proper deduction from the cases on the subject that one in possession, claiming title, and particularly when in the assertion of ownership under a deed, may, as against a wrong-doer, and nothing else appearing, recover the entire damage done, for, as to him, the occupant is presumed to be the owner until the contrary is made to appear. *Frisbee v. Marshall,* 122 N. C., 760; *Nelson v. Ins. Co.,* 120 N. C., 302; *Gwaltney v. Lumber Co.,* 115 N. C., 579; *Aycock v. R. R.,* 89 N. C., 321; *Lamb v. Swain,* 48 N. C., 370. In the last case the headnote is: "The claimant of a tract of land under color of title who puts a servant in a house situated upon it with the privilege of getting firewood is in possession of the whole tract as against a wrong-doer, and can maintain an action against one who enters and cuts timber on the woodland." And in *Nelson v. Ins. Co.* it was held, among other things: "The possession of land under a deed apparently good and sufficient, properly acknowledged and recorded, and unim-

peached, is sufficient evidence of title; and where such facts appeared on the trial of an issue as to whether plaintiff was the owner of certain property it was not error to instruct the jury that, if they believed the evidence, they should answer in the affirmative."

The statement in *Daniel v. R. R.,* relied upon by counsel, to the effect that for injuries to the freehold only the owner can recover, was made in reference to a proposition where all of the relevant facts were disclosed and it affirmatively appeared that the original owner and claimant had conveyed the title, and, so understood, the position is undoubtedly correct, but it was not intended by the learned judge to trench upon or impair the wholesome doctrine that one in the peaceable possession of property, as against a wrong-doer, and assuredly so when the possession has been maintained, is presumed to be the owner until the contrary appears, and is not put to the expense and trouble of always establishing his title against any and every one who may have wrongfully and temporarily trespassed upon him. Speaking to the position in *Myrick v. Bishop,* 8 N. C., pp. 485-486, *Henderson, J.,* said: "Possession alone is sufficient to maintain trespass against a wrong-doer. . . . . And it is consistent with first principles, and, in fact, it would be strange if it were not so, for wretched would be the policy which required the title to be shown in every instance where the peaceable possession was disturbed by the intruder, who had no right," etc.

There is no error, and the judgment for plaintiff must be affirmed.

No error.

J. P. LOVELACE ET ALS. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 13 September, 1916.)

1. Carriers of Goods—Delay in Shipment—Damages—Evidence—Hearsay.

Where damages are sought in an action against a railroad company for injury to a shipment of tobacco by water, caused by an unreasonable delay in its shipment, evidence offered in defendant's behalf that tobacco dealers told the agent, after the injury was done, there was nothing to do but ship it, has no bearing upon the defendant's liability, and was incompetent for this and for the further reason that it was hearsay.

2. Carriers of Goods—Instructions—Special Requests—Appeal and Error.

In this action to recover damages against a railroad company for an unreasonable delay in shipping tobacco, the defendant's objection to the charge of the court that the defendant would be liable if the tobacco had been delivered to it on the day preceding that of the damage, is not

sustained by the charge, and if it desired more specific instructions it should have presented requests therefor.

3. Appeal and Error—Exceptions—Appellant's Brief—Supreme Court Rules.
All exceptions not discussed in appellant's brief are deemed to be abandoned on appeal.

CIVIL ACTION tried before *Allen, J.*, at May Term, 1916, of BEAUFORT.

This is an action to recover damages for injury to a shipment of tobacco, caused, as the plaintiff alleges, by the negligence of the defendant.

There was evidence on the part of the plaintiff tending to prove that the tobacco was delivered to the defendant at its depot in Washington, N. C., on the morning of 2 September, 1913, in time to be transported on that day to Wilson, N. C., the point of destination; that the defendant, instead of shipping the tobacco on 2 September, placed it in its warehouse, where it was injured on 3 September by water.

The defendant offered evidence that it shipped the tobacco as soon as it reasonably could, after it was injured.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. Two exceptions are discussed in the brief of the appellant, and under the rules of the Supreme Court all others are abandoned.

The first is to the refusal of his Honor to permit the defendant to prove that after the tobacco was injured by the water several shippers of tobacco told the agent of the defendant there was nothing for him to do but to ship the tobacco.

This evidence was incompetent, because it had no tendency to relieve the defendant from liability, as the loss had already occurred, and there is no allegation or contention of the plaintiff of negligence on the part of the defendant in shipping the tobacco except that it was unreasonably delayed.

The evidence is also objectionable as hearsay. If the defendant wished to prove that it shipped the tobacco as soon as it reasonably could, after it was injured by the water, and that this was a prudent course to pursue, it ought to have introduced the sellers of tobacco, and not what they had said about it.

The second exception is upon the ground that the court charged the jury that if the tobacco was delivered to the defendant in time to have been shipped on the 2d, then the defendant would be liable.

Upon an examination of the charge we do not find any such instruction.

His Honor did state to the jury, as a contention of the plaintiff, that the tobacco was delivered to the defendant on 2 September, in time for it to have been reasonably shipped on that day.

If the defendant desired other and more specific instructions, it was its duty to present requests for instructions.

We find

No error.

L. P. HARRIS ET AL. v. CAROLINA DISTRIBUTING COMPANY ET ALS.

(Filed 13 September, 1916.)

1. Equity—Judgments—Levy—Cloud on Title.

The sale of lands under an execution upon a judgment will be restrained if the deed to be made by the officer selling the land will not pass title, and will only throw a cloud upon the title of the plaintiff.

2. Estates—Entireties—Husband and Wife—Execution.

Where an estate is held by a husband and wife by entireties, it is not subject to execution for the debts of either of them as long as they both shall live.

3. Same—Trusts—Power of Appointment.

The owner of lands conveyed them to his wife, and thereafter they both conveyed to a trustee to hold the same for their only use and benefit during their natural lives and, upon the death of either, for the sole benefit of the other during his or her life, unless the husband disposed thereof by will; and at the request of both grantors the trustee should convey to another person designated by them. *Held*, the lands in the hands of the trustee were held by entireties, and not subject to levy under a judgment against the husband; and his power of appointment did not enlarge his estate or alter the result.

CIVIL ACTION tried before *Bond, J.*, at April Term, 1916, of BEAUFORT.

This is an action to restrain the sale of certain land under execution, upon the ground that the sale and the deed made pursuant thereto will be a cloud on the title of the plaintiff.

Prior to 7 March, 1912, the plaintiff L. P. Harris was the owner of the land in controversy, and on that day he conveyed the same to his wife, Nellie J. Harris, who is also a plaintiff. Thereafter the said L. P. Harris and his wife conveyed said lands to the plaintiff Wiley C. Rodman, in trust, as follows:

"1. To hold the same for and during the natural life of L. P. Harris and Nellie J. Harris, for their only use and benefit.

"2. Upon the death of the said Nellie J. Harris, for the sole use and benefit of the said L. P. Harris.

"3. Upon the death of the said L. P. Harris, for the sole use and benefit during her natural life of the said Nellie J. Harris, subject to the right of the said L. P. Harris to make such disposition thereof by will as to him may seem proper, in which event and upon its proper probate this said trust shall cease and determine.

"4. That the said Wiley C. Rodman, trustee, his heirs or successors, shall at any time, upon the request of the said L. P. Harris and Nellie J. Harris, convey said land to any person or persons as may be by them therein designated.

"5. That the said parties of the first part shall hold, enjoy, and possess the land during their lifetime, and that upon the death of both, if no disposition shall have been previously made as provided for in this trust, then the said trust shall cease and determine, and the said land shall vest in the heirs of L. P. Harris, either in accordance with the laws of descent or as he may determine by will."

The defendant obtained a judgment against the plaintiff L. P. Harris in 1915 upon a debt contracted after the execution and registration of the deeds to Nellie J. Harris and Wiley C. Rodman, and it is this judgment which the defendant is seeking to enforce by a sale under execution of the interest of L. P. Harris in said lands, the plaintiff contending that the said Harris acquired no interest under the trust deed to Rodman which is the subject of sale.

A temporary restraining order was issued, but upon the hearing it was dissolved, and the plaintiffs excepted and appealed.

W. C. Rodman for plaintiffs.
Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. It has been held in this State that an action cannot be maintained to restrain the sale of land under execution upon the ground that the sale and the deed made pursuant thereto will be a cloud on the title of the plaintiff (*McLean v. Shaw,* 125 N. C., 431), but this has been changed by statute (*Crockett v. Bray,* 151 N. C., 618), and a plaintiff can, under the law as it now exists, restrain a sale under execution if the deed of the officer who sells will not pass title and will only throw a cloud upon the title of the plaintiff.

The determination of the appeal, therefore, depends on the estate acquired by L. P. Harris under the deed to Rodman, trustee, and whether it is such an estate as is subject to the lien of a judgment and a sale under execution issued thereon.

The deed conveys the land to Rodman, trustee, for the benefit of L. P. Harris and his wife, Nellie J. Harris, for and during their natural lives, with a general power of disposition in L. P. Harris.

The estate of L. P. Harris and his wife is an estate by entireties (*Motley v. Whitemore*, 19 N. C., 537; *Bruce v. Nicholson*, 109 N. C., 204), and such an estate is not the subject of sale under execution. *Hood v. Mercer*, 150 N. C., 699.

In the last case cited the Court says, in speaking of estates by entireties, that "While, to some extent, former decisions of this Court in respect to this estate have been modified, we have held, in recent years, that under a conveyance of land in fee to husband and wife they take by entireties, with right of survivorship, and that the interest of neither during their joint lives becomes subject to the lien of a docketed judgment. During the wife's life the husband has no such interest as is subject to levy and sale to satisfy a judgment against him. *Bruce v. Nicholson*, 109 N. C., 202; *West v. R. R.*, 140 N. C., 620."

It is also well settled that a general power of appointment conferred upon a life tenant does not enlarge his estate.

In *Patrick v. Morehead*, *Ashe, J.*, speaking for the Court, says: "It has been settled upon unquestionable authority that if an estate be given by will to a person generally, with a power of disposition or appointment, it carries the fee; but if it be given to one for life only, and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life."

We are therefore of opinion that the plaintiff L. P. Harris has no estate under the deed executed to Rodman, trustee, which is subject to sale under execution, and as the sale and the deed made to carry it into effect would be a cloud upon the title of the plaintiffs, that they are entitled to have the restraining order continued to the hearing.

The defendant is not in a position to avail himself of the contention that the deed from L. P. Harris to his wife and the deed to Rodman, trustee, are fraudulent as to creditors, because its debt was contracted after the execution and registration of those deeds, and it does not appear that there is any debt owing by either of the plaintiffs which was in existence at the time of their execution.

Reversed.

MARSHALL H. ALSWORTH ET AL. v. RICHMOND CEDAR WORKS ET AL.

(Filed 13 September, 1916.)

1. Deeds and Conveyances—Evidence—Adverse Possession—Boundaries.

In an action to recover land and for trespass plaintiffs introduced a grant to show title out of the State, and relied upon adverse possession under color of a deed in their chain of title. The land was known as the "desert or H. tract," and the controversy depended upon the establishment of its eastern boundary. There was evidence in plaintiffs' behalf that the line had been run, and so regarded, in accordance with their contention, and they offered in evidence certain deeds to defendant and its immediate grantor, referring to maps of the land produced at the trial by defendant, upon notice, the descriptions in which tended to corroborate plaintiffs' contentions. *Held*, the deeds and maps were competent as evidence in plaintiffs' behalf; and especially as they had been introduced and relied on by the defendant in its action against anoth r party materially involving the location of the same line.

2. Deeds and Conveyances—Evidence—Boundaries—Admissions Against Interest.

Where the description of the closing calls in a deed leaves the boundary line indefinite or uncertain, the acts or conduct of a party, or an owner of the land, in his chain of title, against his interest, are properly received in evidence, when pertinent to the inquiry.

3. Same—Res Inter Alios Acta.

The introduction of deeds to lands made to the defendant's grantor, which tend to show a boundary line in dispute as claimed by plaintiffs is not objectionable evidence as *res inter alios acta.*

4. Deeds and Conveyances—Color—Adverse Possession—Other Deeds.

Where the plaintiff relies on adverse possession of the lands in controversy under a deed as color of title, the exclusion by the court of other deeds to the same land made by a sheriff is immaterial.

5. Deeds and Conveyances—Color—Adverse Possession—Outstanding Title.

Where the plaintiff claims the land in dispute under color of title, and continuous adverse possession, from his grantor, his having obtained another or superior outstanding paper title will not of itself, and as a matter of law, be held to break the continuity of the possession.

6. Deeds and Conveyances—Declarations Against Interest—Evidence—Pleadings.

Where a boundary line of lands is in controversy it is competent for the plaintiff to introduce a complaint filed by the defendant in an action against a stranger which describes the line in accordance with plaintiffs' contention in the present action, upon the same location of which the defendant's success in his action depended.

7. Deeds and Conveyances—Adverse Possession—Constructive Possession—Entire Tract.

Where the plaintiff claims title to lands by adverse possession under color of title, and thereafter has subdivided the tract into smaller lots

for convenience in selling the same, his possession of a part of the entire tract will be deemed to extend to the outer boundaries of his deed, when the controversy is not between the plaintiff and purchasers of the lots subdivided, but between him and a claimant of the entire tract.

8. Instructions—Trials—Deeds and Conveyances—Boundaries—Burden of Proof.

In this action to recover land and for trespass the court properly charged the jury that the burden of establishing a certain boundary line as contended for by plaintiffs was upon them; and if they failed therein, to find for the defendant, in accordance with its contention that the line was a straight one from the last to the first call in plaintiffs' deed.

CIVIL ACTION for the recovery of land and for damages for trespassing thereon, tried before *Bond, J.*, at February Term, 1916, of PASQUOTANK.

Plaintiffs claimed the land under color of title and adverse possession, the court having ruled that two of the deeds necessary to establish a documentary title from the State by grant and mesne conveyances were invalid and, therefore, the chain of title was broken at that point by the insufficiency of these links to connect their title with that of the State. In order to show that the title was out of the State, plaintiffs introduced in evidence a grant from the State to one John Hamilton, dated 27 December, 1792, and they also offered evidence tending to show that they, and those under whom they claimed, had been in adverse possession of the land for more than twenty-one years under color of title. They further contended, and there was proof to show, that the title had not only passed out of the State, but by reason of their adverse possession, under color, for twenty-one years, or, at least, for seven years, they had themselves acquired the title. They put in evidence a deed from John Hamilton, the State's grantee, to John McKinney, and a deed from the latter to Cathcart and Johnson, and also deeds from Charles Grice, sheriff, to Aaron Albertson, executed 8 September, 1912, under a sale for taxes, which described "all of the Terry land or Great Park estate, including the Heimick and Alsworth land," as shown on the court map, which embraced the John Hamilton tract, and also a deed from John Poole, sheriff, to Joseph B. Skinner, dated 10 September, 1818, executed under a tax sale, and a deed from Joseph B. Skinner to T. L. Skinner, and then showed a connected paper title, consisting of many mesne conveyances, from Joseph B. Skinner to themselves. They also offered proof tending to show the location of the John Hamilton land as acquired from the State, and also proof as to the location of the lands described in the deeds, with further proof that the land described in the complaint was embraced by that described in the grant and deeds, and that defendants had trespassed thereon. The jury rendered the following verdict in answer to the issues submitted by the court:

1. Is all the land claimed by Heimick and Alsworth *et als.*, plaintiffs, described in complaint, inside of the boundaries of the John Hamilton patent, No. 78? Answer: "Yes."

2. Are the plaintiffs Heimick, Alsworth, and others, according to their respective interests, the owners of and in possession of the tract of land described in the complaint? Answer: "Yes."

3. Did the defendants Atlantic Lumber Company, Tilghman Johnson, and Elijah Edge, wrongfully trespass on said lands, as alleged in the complaint? Answer: "Yes."

4. Did the defendant Richmond Cedar Works trespass on said lands, as alleged in the complaint? Answer: "Yes."

5. What damage, if any, are plaintiffs entitled to recover of the defendants because of such trespass? Answer: "None."

Judgment was entered thereon, and the defendant appealed.

Aydlett & Simpson, P. G. Sawyer, and Small, MacLean, Bragaw & Rodman for plaintiffs.

Ward & Thompson, Winston & Biggs, Ehringhaus & Small for defendants.

WALKER, J., after stating the case: While the record and briefs in this case are voluminous, containing nearly three hundred pages, the material questions raised by the exceptions all lie within a narrow compass.

Plaintiffs offered evidence tending to show that the land granted to John Hamilton was, for many years, known as the Desert tract or Great Park estate, the topography of this land and that of the adjoining tracts showing where the eastern boundary of the desert was, and there being marks on the physical dividing line between the two which indicated that it was the boundary. They were unable to trace the closing lines of the Hamilton grant from the head of James Pritchard's millpond, the calls for the same being as follows: "Then bounding on Thomas Redding's and other lines to the first station," or beginning corner, and, therefore, they offered the proof as to the actual location of the eastern lines of the desert with reference to the adjoining lands, and also evidence tending to prove that said line, as represented on the map and as claimed by them, had been well known for many years as the eastern line of the Hamilton grant. For the purpose of further establishing this boundary defendants introduced a deed from Tilghman Johnson and others to the Atlantic Lumber Company, dated 31 August, 1914, and then a deed from the Atlantic Lumber Company to the defendants, the Richmond Cedar Works, and also the maps attached to each of these deeds, they being alike. The deeds, and the maps annexed thereto and

referred to therein, showed the eastern line of the John Hamilton grant to be as contended by the plaintiffs. The deed to the Atlantic Lumber Company and the one from it to the Richmond Cedar Works, with the maps annexed thereto, were produced by the last named defendant upon notice from the plaintiff, and the latter offered them in evidence. Defendant objected to their introduction upon the ground that, while they were in its possession and produced by it at the trial, they were not competent as an admission of the location of the eastern line of the Hamilton land, as defendant Richmond Cedar Works was not a party to the deeds and did not have the maps prepared, and, therefore, they were *res inter alios acta* and incompetent as hearsay.

The fact that the maps attached to the two deeds were called for therein and were in possession of the Richmond Cedar Works, and represented the Heimick and Alsworth tract and the Proctor tract, as plaintiff contended they were located on the ground, was a circumstance for the jury to consider as to the true eastern line of the Hamilton grant, and the maps were clearly competent as evidence, when it is considered that the Richmond Cedar Works used them in its suit against the Foreman-Blades Company to recover damages for a trespass on the Proctor tract. They were not entitled to the damages they recovered, and claimed, if the closing calls of the Hamilton grant should be rejected for uncertainty, and the last line should be run directly from the head of Pritchard's millpond to the head of Pasquotank River. This evidence is competent as an admission by conduct and representation that the eastern line of the Hamilton grant had been correctly located by plaintiff. The eastern line of the Proctor tract, which was a part of the Hamilton land, could not be as represented by the maps annexed to the two deeds, if this were not so. "The general rule is that all a party has said (or done) which is relevant to the questions involved in the trial is admissible in evidence against him. 10 R. C. L., 959." The declarations or confessions of the person making them are evidence against such person and all claiming under him by a subsequent title, and for the plainest reasons. Truth is the object of all trials, and a person interested to declare the contrary is not disposed to make a statement less favorable to himself than the truth will warrant; at least there is no danger of overleaping the bounds of truth as against the party making the declarations. It is therefore evidence against him. *Guy v. Hall,* 7 N. C., 150; *Byrd v. Spruce,* 170 N. C., 429. We said in *Smith v. Moore,* 142 N. C., 277, 287: "The rule as thus established is said to be founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against himself; and the law, in this instance, substitutes for the sanction of a

judicial oath the more powerful motive arising out of the sacrifice of a man's own interests. This natural disposition to speak in favor of rather than against interest is so strong that when one has declared anything to his own prejudice his statement is so stamped with the image and superscription of truth that it is accepted by the law as proof of the correctness and accuracy of what was said, and the fact that it was against interest is taken as a full guaranty of its truthfulness in place, not only of an oath, but of cross-examination as well, they being the usual tests of credibility. A discussion of this rule of evidence, which shows how thoroughly it has been adopted by the courts, whether the declarations are in the form of mere words or written entries, will be found in 1 Greenleaf Ev. (16 Ed.), secs. 147 to 154; 2 Wigmore Ev., secs. 1455 to 1471; McKelvey on Ev., pp. 254 to 261."

It was competent to show that defendant had claimed the eastern boundary of the Hamilton grant to be the same as the lines now claimed by the plaintiff to be such boundary, and to identify the tract on the map known as the Heimick and Alsworth land. The questions specified in exceptions numbers 9, 10, 24, 25, 26, 28 to 41 (inclusive), and 51, were competent and relevant, and the answers to them could in no way have improperly prejudiced the defendants. The exceptions are hardly entitled to serious discussion. If there was any technical error, it was so slight or immaterial as to have done no harm. Besides, the other evidence as to the true location of the eastern boundary of the Hamilton land was so pronounced and conclusive in its nature as to attenuate very greatly those exceptions and deprive them of any practical force. The complaint in the suit of the Richmond Cedar Works v. Foreman-Blades Lumber Company was competent to show the claim made by the Cedar Works Company as to the location of the Proctor tract, it having an important relevancy to the principal question, viz., the location of the eastern boundary of the Hamilton land, the Proctor tract being covered by the Hamilton grant and its eastern boundary being coincident with a part of the eastern boundary of the Hamilton land. It, at least, strongly tended to show the error of the defendants' contention that the last line of the Hamilton grant should be run from the head of Pritchard's millpond to the head of the Pasquotank River. The sheriff's deeds were ruled out by the court, and are immaterial, as plaintiffs claim, not by a paper title from the State, and intermediate owners, but by adverse possession under color. If the tax deeds were void, therefore, as the court ruled, they could not affect the question of possession, for the grantee, and those succeeding him, held it under color. Nor is there anything in the position that the time during which Timothy Ely held the land, from 16 May, 1882, under his deed from William Underwood, to 22 April, 1884, when he took the deed from the commissioners who

sold under the Underwood mortgage to Cannon and Warren, should be excluded from the count as to adverse possession, because Timothy Ely had color of title all the time from 16 May, 1882, in the Underwood deed to him, and held possession under it, and the mere fact that Underwood may not have had the title at the time his deed was made does not affect its character as color of title, which is defined to be a deed or instrument which purports or professes to pass title, but which it fails to do, either from want of title in the grantor or from some defect in the mode of conveyance. *Tate v. Southard,* 10 N. C. (3 Hawks), 119; *Dobson v. Murphy,* 18 N. C. (1 Dev. and Bat.), 586; *McConnell v. McConnell,* 64 N. C., 342; *Lumber Co. v. Richmond Cedar Works,* 165 N. C., 83; *Seals v. Seals, ibid.,* 409; *Burns v. Stewart,* 162 N. C., 360. This Court said in *Seals v. Seals, supra,* at p. 413: "It can make no difference that the deed, claimed to be color, does not in fact pass the title. It is sufficient if, on its face, it professes to do so, and defendant is in possession, claiming *bona fide* under it adversely. Color of title is that which in appearance is title, but which in reality is not title. No excessive importance is to be attached to the ground of the invalidity of a colorable or apparent title, if the entry or claim has been made under it in good faith. A claim to property under a conveyance, however inadequate to carry the true title, and however incompetent the grantor may have been to convey, is one under color of title, which will draw to the possession of the grantee the protection of the statute of limitations." *Wright v. Matteson,* 18 How. (U. S.), 50; *Beaver v. Taylor,* 1 Wall. (U. S.), 637; *Cameron v. U. S.,* 148 U. S., 301, and other cases in our own Reports. "The very act of claiming title by virtue of an adverse possession for the statutory period precludes the idea of a valid paper title. So do the words 'color of title.' It is evident, therefore, that the requirements as to color of title are sufficiently complied with by a possession held under an instrument which, as a conveyance, is in fact either voidable or void." 1 Ruling Case Law, p. 712. 2 C. J., 169, and cases cited. This is the settled doctrine of the courts in regard to color of title, which an adverse possession for the time prescribed by the statute may ripen into a good and sufficient title. It therefore makes no difference that Ely took another title, or even a better title, afterwards from the commissioners, as they did not deprive him of the right to claim under his color. *Chatham v. Lansford,* 149 N. C., 363; 1 R. C. L., sec. 4, p. 725.

Plaintiffs state the applicable principle in their brief: "The fact that Ely took a deed which was void for want of title in the grantor, William Underwood, in 1882, under which he entered, and thereafter took another void deed from the commissioners in 1884, did not affect the character of his possession as adverse to defendants, since 'it is not the instrument

which gives the title, but adverse possession under it for the requisite period with color of title.' It therefore becomes immaterial how many deeds Ely had, or whether there was any privity between them as against the defendants, if he entered into possession under one and remained in possession under the first deed for the requisite period."

The subject is fully discussed in 1 Cyc., 1082. Colorable title, then, in appearance is title, but in fact is not, or may not be, any title at all. It is immaterial whether the conveyance actually passes the title to property, for that is not the inquiry. Does it appear to do so, is the test; and any claim asserted under the provisions of such a conveyance is a claim under color of title, and will draw the protection of the statute of limitations to the possession of the grantee if the other requisites are present. *Dickens v. Barnes,* 79 N. C., 491.

"A deed, though it be defective, will constitute color of title." So the rule is broadly stated in a very large number of decisions that a deed purporting to convey the land in controversy will give color of title to a possession taken under it, even though it be void. And a deed void for matters dehors the instrument will constitute color of title, provided it purports to convey the land in controversy. 1 Cyc., 1085-1087. See, also, for full treatment of the question, *Seals v. Seals,* 165 N. C., 409, as to fraudulent deeds, and 1 Cyc., 1007 and 1092. Nor can we hold, as matter of law, that taking the deed from the commissioners under the mortgage sale broke the continuity of possession by the plaintiff. They could claim under the Ely deed, as color, notwithstanding their purchase from the commissioners; and whether they did so, or abandoned their adverse possession, was a question for the jury. We decided this point in *Roper Lumber Co. v. Richmond Cedar Works,* 168 N. C., 344, as appears by the second and third headnotes: "A party in possession of lands under a deed may buy in an outstanding claim of title to them without acknowledging paramount title in his subsequent grantor or interrupting the continuity of possession under his first deed; and where adverse possession is sufficiently shown under his first deed, for the period of time limited, it will ripen his title under color thereof, unless he has in some way been estopped or precluded from doing so. Where one claiming title to lands has bought in outstanding titles thereto and claims by adverse possession under his first deed, it is competent to show his acts and declarations as evidence of the character of his possession, and it is for the jury to determine upon all the evidence whether his possession continued to be adverse under the first deed, and sufficient to ripen his title into a good and sufficient one for the time fixed by the statute." With the exception of at least one decision, in which it has been broadly ruled that the purchase of an outstanding title or interest by the adverse claimant interrupts the continuity of his possession, it

seems to be very generally conceded that an adverse occupant may purchase an outstanding title without thereby interrupting the continuity of his possession. A party, it is said, may very well deny the validity of an adverse claim of title, and yet choose to buy his peace at a trifling or small price rather than be at great expense and annoyance in litigating it. The reason for this rule is based upon the principle that the adverse occupant has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. 1 Cyc., 1016; *Cannon v. Stockman,* 36 Cal., 535; *Mather v. Walsh,* 107 Mo., 121; *Omaha, etc., L. and T. Co. v. Hansen,* 32 Neb., 449. These cases and others of the same tenor are cited and reviewed in *Roper Lumber Co. v. Richmond Cedar Works, supra.*

The mere subdivision of the tract of land into numerous lots, as shown only on a map of the premises, which was prepared by the parties in contemplation of a sale by lots or small parcels, did not prevent plaintiffs' actual adverse possession of a part of the land from extending by construction of law to the whole thereof. The land was conveyed to plaintiffs, and those under whom they claim, as one entire tract by a single outside or common boundary and by reference to prior deeds, notably the one of Harvey Terry to Thomas H. Robbins, which described the premises as one undivided tract. It was held in *Surghenor v. Ducet,* 139 S. W. Rep., 22, that if there is actual possession of any part of the land described in a deed, it amounts to constructive possession of the whole, where there is a conflicting claim to an entire tract embracing four paper subdivisions, which were made by an administrator for convenience in effecting a sale, and that defendant's actual possession of three of said parts will, under the rule, extend constructively to the fourth, although no inclosure or improvement was upon it. 2 Corpus Juris, 238 and 240, sec. 518, and cases cited in note 76. *Gregg v. Forsyth,* 65 U. S. (24 How.), 179; *Kerr v. Nicholas,* 88 Ala., 346; *Hornblower v. Banton,* 103 Me., 375; *George v. Cole,* 109 La., 816; *B. Imp. Co. v. Needringhaus,* 72 Am. St. Rep., 269; *Bacon v. Chase,* 83 Iowa, 521. In the *Gregg case* the Court, referring to the inquiry whether Ballance occupied adversely the premises described in the patent, said: "The fact is that he did, but he did not reside upon every square yard of the premises, nor upon the particular lot. Nor was this necessary. He resided upon the legal subdivision described in the patent, the evidence of his title, and possessed and occupied it by himself and tenants. We think the laying out of the land into town lots did not deprive him of the benefit of the statute of limitations of 1835 as to all the fractional quarter, except the particular lot upon which his house stood." See, also, 1 Cyc., 1128 and 1129.

It must be noted that the defendant does not claim any one or more of the lots or subdivisions of the land, but is asserting title to the whole

thereof as against the plaintiffs, and it is perfectly evident that plaintiffs have claimed to hold the *entire* tract under their color, and not merely the separate parcels of the subdivisions, each by a distinct and actual possession applicable to it. This is not a controversy between plaintiffs and any of the purchasers of the separate lots, but between them and a party who claims it all.

We have read the charge of the court very carefully, and find nothing in it of which the defendants can well complain. It was a clear and even lucid statement of the law as applicable to the evidence and to the facts as they might find them therefrom. Neither the substance of the charge nor the manner of delivering it to the jury discloses anything contrary to the law which is prejudicial to defendants. The jury were told that the burden was on plaintiffs to locate the eastern boundary of the Hamilton land, and if the jury could not, upon the evidence, locate the various closing lines called for in the grant and deeds, they would run straight from the head of Pitchard's millpond to the head of Pasquotank River. This was according to defendant's own contention. There is nothing in the record to indicate any leaning of the judge towards the plaintiffs or any intimation by him as to how the facts should be found by the jury, but, on the contrary, the charge was fair and impartial.

The court properly refused to charge that there was no evidence of twenty-one or even of seven years continuous adverse possession by plaintiffs and those under whom they claimed, because there was ample evidence of both, and with the exception of the matters of law we have specially considered, the case involved no more than a question of fact for the jury; and as upon the law, which was correctly stated to them, and the evidence, the jury found the facts adversely to the defendants, we must accept that finding as conclusive.

There is no error in the record, and we, therefore, affirm the judgment.

No error.

C. C. LEARY AND WIFE v. BOARD OF DRAINAGE COMMISSIONERS OF CAMDEN RUN DRAINAGE DISTRICT AND S. W. GREGORY ET ALS., COMMISSIONERS.

(Filed 13 September, 1916.)

1. Water and Water-courses—Diverting Waters—Drainage Districts—Damages.

A district created under the drainage statute is not a political agency of the State, and is liable for the wrongful diversion of water to the damage of a lower proprietor of lands lying beyond the boundaries of the district, when those claiming such damage are in no wise claiming

under such proceedings or under any party thereto. *Newby v. Comrs.*, 163 N. C., 26, cited and distinguished.

2. Same—Drainage Commissioners—Negligence—Unauthorized Acts.

The commissioners of a drainage district are without authority to extend its canal beyond the limits of the district in such manner as to divert the flow of the water to the damage of the lands of the proprietor situate beyond its limits; and they are individually liable for such damages as are caused by their unlawful or negligent acts in so doing.

APPEAL by plaintiff from *Bond, J.*, at January Term, 1916, of CURRITUCK.

Aydlett & Simpson and Ehringhaus & Small for plaintiffs.
Ward & Thompson and I. M. Meekins for defendants.

CLARK, C. J. This is an action against the drainage commissioners as a board, and also individually, for the diversion of water whereby the lands of the plaintiffs outside of, and below, the drainage district have been injured.

The ruling of this Court is well settled that the upper proprietor "may accelerate, but cannot divert," water to the injury of the lower proprietor. It is not controverted, and must be taken as true upon this nonsuit, that the water of the drainage district was diverted by this canal and thrown upon the lands of the plaintiffs to their injury. If the defendants had been an individual proprietor there can be no question of his liability. The sole question raised by the nonsuit granted by the court is whether the defendants are exempt from such liability because it is an incorporated body, known as the "Board of Commissioners of the Drainage District," and are also free from liability individually.

We think they are liable in both capacities. It is true that the drainage district is a quasi-public corporation. *Sanderlin v. Lukens*, 152 N. C., 738; *Drainage Comrs. v. Farm Assn.*, 165 N. C., 697. But it is not a governmental agency, and occupies the same relative position as a railroad company or any similar quasi-public corporation created for private benefit, but endowed with the right of eminent domain and other public functions by reason of the public benefit.

In *Drainage Comrs. v. Webb*, 160 N. C., 594, it was held that "Drainage districts are not regarded as municipal corporations," the Court saying: "The drainage districts have conferred upon them the right of eminent domain, just as a railroad company or an electric power plant has, and for the same reason, that they are quasi-public corporations. But they do not come within the definition of 'municipal corporations' in Constitution, Art. V, sec. 5. They have no governmental taxing power for general purposes. It is true, the formation of these districts is en-

couraged by our statutes, because they are expected to aid largely in the development of the State. But so do railroads, electric power plants, and other quasi-public corporations. No one can contend that the property or bonds of those companies can be exempted from taxation, nor can those of a drainage district.".

The above case was cited with approval, *Drainage Comrs. v. Farm Assn.,* 165 N. C., 700, where the Court said: "These drainage districts are not municipal corporations, but are quasi-public corporations." It was also cited with approval in *Southern Assembly v. Palmer,* 166 N. C., 80, where the Court said that the bonds of a drainage district are not exempt from taxation, for that "such district is not endowed with governmental powers for the public benefit, but is more in the nature of a private business enterprise." It is true that the above decisions were as to the exemption of property from taxation; but if the Legislature has no power to expressly exempt such property from taxation because it is not a governmental agency, certainly the drainage district, which is only a quasi-public corporation, cannot be impliedly exempt from all liability for its torts or its contracts. This is not affected by the fact that some of the landowners in the district did not enter the corporation voluntarily.

Drainage districts are favored because of the public benefit, but none the less the prime motive in organizing them is the pecuniary benefit to the corporators. The State confers on them the right of eminent domain, but cannot exempt from taxation or exempt them from liability. They stand on the same footing in these respects with other quasi-public corporations.

The subject is very fully discussed in *Bradbury v. Drainage District* (236 Ill., 36), 19 L. R. A. (N. S.), 991, with many notes, in which it is held: "A drainage district cannot escape liability for injury done by its improvements to lands lying outside of its limits on the theory that it is an involuntary quasi-public corporation, not liable to respond in damages for any of its acts. . . . . The drainage of lands to improve them for agricultural purposes cannot be regarded as an exercise of the police power, so as to exempt the land so drained from liability for injury caused by such district to other land not within the district."

The present case is easily distinguished from *Newby v. Drainage Comrs.,* 163 N. C., 26, because in that case the plaintiff was claiming under a party to the original drainage proceeding and was concluded by the final judgment in that case. His remedy was by motion in that cause. *Banks v. Lane,* 170 N. C., 14; *s. c.,* 171 N. C., 505. In this case the lands of plaintiffs lie outside of the drainage district, and the owners thereof are in no wise claiming under such proceedings, nor under any party belonging to said corporation.

It is not necessary in this case to decide what remedy the plaintiffs would have should they obtain judgment against the drainage district, whether it would be by mandamus to extend the canal past the plaintiffs' land, or to so change it above as not to divert water which otherwise would not naturally come down the canal and flood the plaintiffs' land, or by a mandamus to assess the lands in the district to pay a pecuniary recovery, for the reason that though the nonsuit is set aside, it may be that the plaintiffs will not recover any judgment because of failure of the jury to find that there has been a diversion of the water or any injury sustained by the plaintiffs. In such case any opinion we might now express as to the enforcement of a possible judgment would be *obiter dictum.*

We are also of opinion that though no bad faith or malice on the part of the commissioners individually is indicated in the evidence, they are individually liable because there was no legal authority for them to extend their canal beyond the limits of the district in such a manner as to divert the water upon the lands of the plaintiffs to their detriment. In *Hitch v. Comrs.,* 132 N. C., 573, it was held that even if the commissioners of a county take land for a highway without authority of law, they are liable therefor individually. *A fortiori* the commissioners of a drainage district who construct the canal in such a manner as to illegally divert water upon the lands of plaintiffs outside of the district are individually liable for the injury. This is also true if this injury outside of the limits of the drainage district was caused by the negligence of the commissioners, of which there is allegation and proof. *Tate v. Greensboro,* 114 N. C., 392.

These drainage districts are created for the benefit of the people of the locality, and are favored with certain privileges of eminent domain and otherwise because of the general benefit to the public. But they are not exempt from liability for their torts or contracts. And the commissioners, as their agents, are individually liable if they act illegally or negligently, so as to injure others outside of the district. The judgment of nonsuit is

Reversed.

D. C. HODGES v. W. D. HALL.

(Filed 13 September, 1916.)

1. Damages, Compensatory—Definition.

Compensatory damages, when allowable, are not restricted to the pecuniary loss caused by the defendant's wrong, but may embrace just compensation, in the opinion of the jury, for the injury, including actual loss in time and money, the physical inconvenience, mental suffering, and humiliation endured which could properly be considered as a reasonable and probable result of the wrong.

2. Damages, Punitive—Definition.

Where punitive damages are allowable, they are awarded in addition to compensatory damages for a willful and malicious wrong done to the plaintiff, under circumstances of aggravation, rudeness, or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights.

3. Same—Trials—Questions for Jury.

Where the evidence properly presents the question of punitive damages for a wrongful act done to the plaintiff, the award of such damages, and the amount thereof, under a proper charge, is for the jury, and can never be directed by the court as a matter of law.

4. Same—Instructions—Malice—Assault.

An instruction to the jury which, in effect, tells them to award the plaintiff punitive damages should they find that the defendant assaulted him with malice or in a spirit of revenge, considering evidence of provocation by way of reducing the amount, is reversible error, being an instruction, as a matter of law, to award punitive damages if they found the assault was malicious, and not leaving it to the jury to determine.

CIVIL ACTION to recover damages for assault and battery, tried before *O. H. Allen, J.*, and a jury, at May Term, 1916, of HYDE.

The jury rendered the following verdict:

1. Did the defendant wrongfully and unlawfully beat and assault the plaintiff, as alleged? Answer: "Yes."

2. What damages, if any, is the plaintiff entitled to recover therefor? Answer: "$1,000."

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning for error chiefly the charge of the court on the question of exemplary damages.

Mann & Jones and Ward & Grimes for plaintiff.

Ward & Thompson and Spencer & Spencer for defendant.

HOKE, J. The question of compensatory and punitive damages has been presented in several of the more recent cases before this Court: *Byers v. Express Co.*, 165 N. C., 542; *Carmichael v. Telephone Co.*, 157 N. C., 21; same case, reported in 162 N. C., 333; *Williams v. R. R.*,

144 N. C., 498; *Ammons v. R. R.,* 140 N. C., 196; and from these and other authorities it appears that compensatory damages is not necessarily restricted to the actual pecuniary loss caused by defendant's wrong, but the term may extend to and embrace what the jury may decide to be a fair and just compensation for the injury, including actual loss in time and money, the physical inconvenience, and physical and mental suffering and humiliation endured, and which could be properly considered as a reasonable and probable result of the wrong done. *Carmichael v. Telephone Co., supra.* Speaking further to the subject, the Court said: "Exemplary or punitive damages are not given with a view to compensation, but are under certain circumstances awarded in addition to compensation as a punishment to defendant and as a warning to other wrong-doers. They are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done willfully and maliciously or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights." And on this question it has also been expressly held in this jurisdiction: "That when, on facts in evidence, the question of punitive damages is properly presented, the award of such damages and the amount thereof, under a proper charge, is for the jury, and can never be directed by the court as a matter of law," *Billings v. Charlotte Observer,* 150 N. C., pp. 540-544, a position that is very generally approved by the authoritative cases on the subject. *Topolewski v. Packing Co.,* 143 Wis., 52; *Ferguson v. Moore,* 98 Tenn., 342; *Carson v. Smith,* 133 Mo., 616; *R. R. v. Rector,* 104 Ill., 296; *Carpenter v. Hyman,* 66 S. E., 1078 (W. Va.); *R. R. v. Burke,* 53 Miss., 200.

On careful consideration of his Honor's charge in reference to this last position we are of opinion that reversible error was committed on the question of exemplary or punitive damages. Speaking to this feature of the case, his Honor, among other things, said: "Then, if you find that the assault was of a violent character, such as to indicate malice—by malice I mean a wicked intent to injure the plaintiff, from a spirit of revenge—if that is so, then he would be entitled to punitive damages, that is, damage by way of punishment—that is, in the event that you find that the assault was of a malicious nature." And again: "You may also take into consideration as to whether Hall was provoked—provocation, if you find there was provocation, and the circumstances—and that may be considered by way of mitigating or reducing punitive damages, regardless of what he was worth, if you find he was damaged at all; then, if you find it was of a malicious character, you will add to actual damages punitive damages."

There is nothing in other portions of the charge which sufficiently qualifies these instructions, and, to our minds, the jury could only con-

clude therefrom that if they found the assault to be malicious they were required to increase the amount by an award of punitive damages, as a matter of law.

For the error indicated there will be a new trial of the cause on all the issues.

New trial.

MISSOURI WHITE v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 13 September, 1916.)

Carriers of Passengers—Ejection from Train—Through Trains—Change of Trains—Damages.

The ticket agent of a railroad company should inform the purchaser of a ticket for a through train whether or not this train will stop at the passenger's destination; and where a female passenger on such train, traveling with her child, has been informed by the ticket agent that the train will stop at her destination, and while on the train she was, for the first time, informed by the conductor that she will have to get off at a nearer station and take a local train, in consequence of which she was not met by her husband, as they had prearranged, and suffers inconvenience and annoyance by reason of the enforced change for the local train: *Held*, the ejection from the train was wrongful, making the company liable for the passenger's actual but not punitive damages.

CIVIL ACTION tried at January Term, 1916, of PASQUOTANK, before *Bond, J.*, upon these issues:

1. Did defendant wrongfully put or cause plaintiff to get off its train at Edenton, as alleged? Answer: "Yes."

2. If so, what damage, if any, did the plaintiff sustain thereby? Answer: "$50."

From the judgment rendered, the defendant appealed.

I. M. Meekins for plaintiff.

C. M. Bain and J. Kenyon Wilson for defendant.

BROWN, J. The evidence tends to prove that on 19 November, 1914, the plaintiff, accompanied by her little daughter, purchased from the defendant's agent at Mackeys Ferry a ticket to Chapanoke, upon the assurance of the agent that the ticket was good for continuous passage upon the through train of the defendant, which passed Mackeys Ferry about 1 o'clock. Upon inquiry, the agent assured her that there would be no change of trains at Edenton.

The plaintiff's husband, by arrangement, met this through train at Chapanoke to carry his wife to their home, some distance in the country.

As the plaintiff did not arrive on this train, the husband returned home. When this train of the defendant, which runs from New Bern to Norfolk and passes Mackeys Ferry, arrived at Edenton, the conductor for the first time informed her that this train did not stop at Chapanoke, and told the plaintiff that if she did not get off at Edenton he would carry her on to some other point.

Plaintiff was compelled to get off at Edenton and take the next train, an hour or more later, which was a local train and stopped at Chapanoke. When she arrived at Chapanoke her husband had gone home. It was a rainy, blustery day, and plaintiff was subjected to much inconvenience by reason of having to change trains at Edenton.

The motion to nonsuit was properly overruled.

The plaintiff had the right to rely upon the assurance of the agent that the train which she took at Mackeys Ferry would stop at Chapanoke to put her off. It was the duty of the agent, when he sold a ticket to Chapanoke, to inform the plaintiff that she would have to take a local train at Edenton and would arrive at Chapanoke some time after the other train had passed. Upon the assurance of the defendant's agent, the plaintiff had reason to believe that she would meet her husband there to take her and her little daughter to their home. *Hutchinson v. R. R.*, 140 N. C., 125, and cases cited.

His Honor very properly ruled that there is no evidence upon which the jury would be justified in awarding punitive damage.

No error.

W. S. CHESSON v. RICHMOND CEDAR WORKS.

(Filed 13 September, 1916.)

1. Principal and Agent—Contracts—Unusual Acts.

A general agent has no implied authority to bind his principal by contracts unusual to agencies of like character, or beyond the usual scope of such agencies; and when he attempts to bind his principal by his extraordinary acts, the one dealing with him is put upon notice, and required to ascertain from some authoritative source whether such agent had the power to bind his principal thereby.

2. Same—Logging Boss—Indefinite Contracts—Cutting Timber.

One who has been employed as a field superintendent of logging operations, with authority to have timber cut from time to time as needed for a corporation, his principal, and subject to be discharged at any time, has no implied authority to bind his principal with an indefinite contract for cutting the timber from a large tract of land which might last for years, and involving the expenditure of many thousands of dollars, and

in an action to recover damages for a breach of the contract it is necessary for the plaintiff to show that the agent had express authority or that the principal ratified his act.

3. Principal and Agent—Trials—Evidence—Questions of Law—Nonsuit.

Whether one assuming to act as an agent in making a contract for another made the contract sued on is a question for the jury when the evidence is conflicting; but whether there is more than a scintilla of evidence of such agency is a question of law; and if there is not, a judgment of nonsuit is proper.

APPEAL by defendant from *Allen, J.*, at April Term, 1916, of TYRRELL.

I. M. Meekins and P. W. McMullan for plaintiff.
Ward & Thompson and Winston & Biggs for defendant.

CLARK, C. J. This action is based upon the complaint that the defendant company, through its agent, one L. E. Shucker, made a verbal contract with the plaintiff to cut and top all the merchantable juniper timber of the defendant in that part of the Dismal Swamp owned by the defendant, containing some 5,000 or more acres, at the rate of 6½ cents per tree. The defendant denied that Shucker made such contract or that he had any authority to do so, and averred that the timber cut by the plaintiff was under a contract to cut the same, restricted to the service as performed from time to time, and the plaintiff admits that he was paid up to the time of his discharge.

The evidence shows that the alleged contract was indefinite as to the time of cutting, and that the quantity of timber to be cut, with the force which the plaintiff employed, would require several years. The plaintiff estimates three years and the defendant's estimate is from ten to twenty years.

The plaintiff testifies that he made such verbal contract with Shucker, the wood boss or field manager of the defendant; that it was to cover the cutting of the entire area of the Dismal Swamp owned by the defendant; that this verbal contract was made in a blacksmith's shop, no one being present except the plaintiff and the agent, Shucker. It was further in evidence that the plaintiff had little experience with such work, and had only worked for the defendant one month previously, and that said Shucker had been in the employment of the company himself for only seven months, and was subject to discharge at any time. Shucker denied having made such contract.

The defendant had a general manager, Mr. Warwick, which fact was known to the plaintiff. Shucker was not an officer of the company, nor its general superintendent, and denied that he had any authority to make such contract or any contract for a definite time or that was not subject to the approval of the general manager; and testified that he was

merely a field superintendent of logging operations, with authority to have timber cut from time to time as needed.

The alleged contract is so unusual, extraordinary, and unique that it is not to be assumed that said Shucker had authority to make it. It was no function of his position. If it were, Shucker, a superintendent of logging, holding at will, with authority to have the timber cut as needed, could bind his employers by a verbal contract, not approved by the company or its general manager, which might last for twenty years and involve the expenditure of many thousands of dollars, without any bond or guarantee given by the plaintiff for the faithful performance of his work, and such contract would bind the company, should it sell its timber to another party.

There is no testimony of any express authority given to Shucker to make such contract, or any ratification of such contract by the company.

In Mechem on Agency, sec. 389, it is said: "The person dealing with the agent must also act with ordinary prudence and reasonable diligence. If the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case, but should either refuse to deal with the agent at all or should ascertain from the principal the true condition of affairs."

In *Stephens v. Lumber Co.,* 160 N. C., 107, it is said that a principal is not bound by the act of the general agent, unauthorized by him, so unusual and remarkable as to arouse the inquiry of a man of average business prudence as to whether the authority had actually been conferred; for third persons cannot assume that an agent's acts are authorized unless they are within the scope of the duties ordinarily conferred upon agencies of that character, nor when the transaction is of a nature so unusual that the other party should be put upon inquiry to ascertain the actual authority of the agent of the company to make a contract of that nature. This opinion by *Judge Hoke* discusses the proposition so thoroughly (with the citation of many precedents in point) that it is unnecessary for us to do more than refer to what is there so well said. To the same purport, *Newberry v. R. R.,* 160 N. C., 156; *Furniture Co. v. Russell,* 171 N. C., 474. In *Gooding v. Moore,* 150 N. C., 195, the agent was "a general agent not only in purchasing the plant and timber, but in managing the business." The contract was within the apparent scope of such agency, and it was held that the other party was not bound by restrictions which were not made known to him.

In this case the extent of the contract, which may be twenty years, and the amount of the compensation, which it is claimed by the defend-

ant may aggregate $60,000, and the admission of the plaintiff that the duration and amount are not limited in the terms of the contract, on its face require such unusual authority in the temporary agent of the company that the plaintiff should have ascertained by inquiry of the officials of the company, of those "higher up," whether the alleged agent was possessed of such extraordinary powers. Not having done so, it was incumbent upon him in this trial to show that Shucker in fact possessed such authority. On the contrary, there is absolute denial by Shucker and by the company that he possessed such authority, and the testimony of Shucker that he did not make the contract. There is no evidence tending to show knowledge by the company of such unusual contract, or ratification.

Whether Shucker in fact made such contract was a matter for the jury; but in the absence of any scintilla of evidence that Shucker had authority to make such an unusual contract, which power could not be implied merely from his position as local wood boss, the motion for a nonsuit should have been granted.

Error.

T. H. JENNETT v. PEOPLES TRANSPORTATION COMPANY AND B. A. CREDLE.

(Filed 13 September, 1916.)

1. Corporations—Insolvency—Agreement of Stockholders—Individual Action.

Where the stockholders of a corporation agree among themselves to contribute pro rata to pay off the corporation's debts to enable it to continue in business, they may maintain their suit and enjoin one of them from enforcing the collection of a debt owed him by the corporation, contrary to his agreement to contribute, without making demand upon the corporation to do so.

2. Appeal and Error—Interlocutory Orders—Necessary Determination.

While an appeal from this order restraining the enforcement of a stockholder's judgment against a corporation is interlocutory in its nature, it will not be dismissed, it being necessary to determine the question to adjust the debts of the corporation and before further orders could be taken in the cause.

APPEAL by defendant Credle from *Allen, J.*, at May Term, 1916, of HYDE.

Ward & Grimes and Mann & Jones for plaintiff.
Thomas S. Long and H. C. Carter, Jr., for defendant.

CLARK, C. J. This action was brought against the Peoples Transportation Company, a corporation, by the plaintiff, who was a stockholder

and creditor, for the appointment of a receiver and to wind up its affairs. The stockholders, who had all advanced money to pay bills of the corporation, met to arrange for the adjustment of their debts, to the end that the corporation might resume operations. The amount of the advances made by each stockholder was ascertained and the total ascertained. The plaintiff contends that each stockholder as creditor agreed to contribute an amount representing his pro rata of stock to payment of debts. Two of said stockholders, lacking some $213 of having enough in claims against the corporation to pay their pro rata of indebtedness under such agreement, executed a note secured by a mortgage to plaintiff in pursuance of such agreement.

The defendant B. A. Credle, one of the creditor stockholders, who held a judgment against the company, in violation, as plaintiff contends, of the above agreement, attempted to collect his judgment by execution. Thereupon, on motion of plaintiff, B. A. Credle was made a party defendant, and a restraining order was issued against him to prevent collection of his judgment, alleging the above agreement to put his claim against the company into hotchpotch with the other creditors in order to adjust the debts of the corporation, and also alleging fraud in obtaining the said judgment. On the trial the only issue submitted was whether B. A. Credle had agreed with the other stockholders to pay off the indebtedness of said corporation, and was this judgment a part of his proportion of the indebtedness thus assumed. The jury found the issue in the affirmative.

The defendant Credle contends:

1. That the suit was improperly instituted, because the plaintiff had not made a demand upon the corporation to bring suit against the defendant B. A. Credle, to restrain his alleged judgment.

2. That the defendant never was a party to the alleged adjustment of debts of the corporation, and did not agree to place this judgment in hotchpotch with the other claims of the stockholders, creditors. The jury found the issue of fact on this last proposition against the defendant Credle.

It was not necessary that the plaintiff should make a demand upon the corporation to bring suit against the defendant Credle. The agreement was made, as the jury find, among all the stockholders, who were creditors, in order to substitute such arrangement in lieu of further proceedings to wind up the corporation. The restraining order to prohibit Credle from proceeding further in the collection of the judgment was a very proper and, indeed, a necessary proceeding in the cause.

The other exceptions by the defendant do not require discussion. Though this phase of the proceeding is somewhat interlocutory in its nature, an appeal lay, as a different result would have put an end to

the effort to adjust the debts of the corporation, and it was necessary to determine this issue of fact as to the alleged agreement before further orders could be taken in the cause.

No error.

ALFRED BLOXHAM v. THE STAVE AND TIMBER CORPORATION, M. E. GOETZINGER, ET ALS.

(Filed 20 September, 1916.)

1. Master and Servant—Railroads—Negligence—Evidence—Trials—Questions for Jury—Instruction.

There was evidence tending to show that the plaintiff, the manager of the defendant timber corporation, was on a logging train of defendant, in pursuance of his duties, and was injured by a tree, which had been cut by the defendant's other employees, falling upon the flat car on which he was riding at a speed of 5 miles an hour; that the employees had been instructed by him to be careful in cutting trees along the logging right of way, and that the engineer could have seen the tree falling, had been previously instructed to look for such dangers, and had been warned thereof in time to have stopped the logging engine on this occasion and avoid the injury; and there was evidence *per contra*, and further evidence that the tree would not have fallen on the train except for a current of wind which diverted it from its downward course to the tops of smaller trees, and thence upon the car. *Held*, the question of the defendant's negligence and its proximate cause was properly submitted to the jury. The charge in this case is approved.

2. Same—Prior Admissions.

Where there is evidence that the plaintiff has sustained a serious physical injury proximately caused by the defendant's negligence, and also that soon thereafter, while greatly suffering, he had made a statement exonerating the defendant from blame, it is for the jury to decide, upon the conflicting evidence, as to the defendant's actionable negligence, and not for the court to decide as a matter of law whether there was such negligence.

3. Railroads—Logging Roads—Master and Servant—Assumption of Risks—Statutes—Fellow-servant.

The common-law doctrine that an employee assumes the risk of injury from the negligence of a coemployee in the course of his ordinary employment, etc., has been changed by statute in its application to railroad companies, including logging roads operated by steam and other like power, and extends to an injury received by a manager or superintendent from the negligent acts of a subordinate employee. Revisal, sec. 2646.

4. Negligence—Evidence—Proximate Cause—Vis Major.

The plaintiff, an employee of the defendant, was injured by a tree falling upon him as he was riding on the car of defendant's logging road in the performance of his duties, and there was evidence that a change

of wind had deflected the tree from its expected course, so that it struck the tops of smaller trees and thence fell upon the plaintiff. There was further evidence that the engineer of defendant's logging train should reasonably have seen the danger in time for him to have stopped the train and avoided the injury, after the course of the falling tree had been unexpectedly deflected. *Held*, the proximate cause of the injury depended upon whether the engineer had been negligent in this respect, and, if so, the change of the wind would be the remote cause, and the doctrine of *vis major* is not applicable.

5. Evidence—Negligence—Sudden Peril—Rule of Prudent Man.

Where the negligent act complained of in an action for damages for a personal injury has been done by the plaintiff's coemployee, under circumstances of peril to himself, the law requires of such employee that he exercise only that degree of care which a man of ordinary prudence would have exercised under the same circumstances, making proper allowance for his excitement, terror, or acts done for self-preservation.

6. Appeal and Error—Assignments of Error.

Exceptions taken for the first time in the assignments for error are too late, and will not be considered in the Supreme Court.

7. Evidence—Pleadings—Former Action—Parties—Declarations.

Allegations made in the pleadings filed by a party in a former action are admissible in the present one as evidence of his declarations, though the parties are not the same, when they are material and otherwise competent.

8. Evidence—Letters—Trials—Questions for Jury.

In this case it is held that a material and relevant statement made by the defendant was properly admitted in evidence, subject to contradiction by direct or circumstantial evidence. It was for the jury to determine, in the present state of the evidence, whether there had been any substantial change in the relations of some of the defendants to the property and the business in which the plaintiff was employed at the time of injury which relieved them from liability.

CIVIL ACTION, tried before *Bond, J.*, and a jury, at January Term, 1916, of WASHINGTON.

Plaintiff brought this suit to recover damages for personal injuries to himself which, he alleges, were caused by defendant's negligence in permitting a tree to fall upon him while he was riding on one of the flat-cars of its logging road in the discharge of his duties as its superintendent. We may well adopt, for the sake of deciding the case, the statement of some of the principal facts as contained in the brief of defendant's counsel, with quotations therein of a part of plaintiff's testimony, as follows:

"The defendant Stave and Timber Corporation was operating in a swamp in Washington County, getting logs off by use of a lumber road. The plaintiff was employed at a salary of $3,250 per year to supervise, manage, and control all its logging operations, and contracted to render

to the defendants the 'best of his ability and experience necessary and proper thereto.' He employed all the hands, and their work and operation were directly and exclusively under his control. The work consisted of felling trees in the forest, cutting them into logs, constructing railroads, operating trains of cars on them for hauling the logs out, and shipping by the railroad to Norfolk. On the morning of the accident plaintiff directed his engineer to carry him and Mr. Crane into the woods on the train composed of the engine and one flat-car, he and Crane riding standing on the flat-car next behind the engine. On the return trip the train passed 140 feet from where two woodsmen were felling a tree. The train was moving at the rate of about 5 miles per hour. This tree was being felled nearly parallel with the track, but in its fall was caught and diverted by a gust of wind, lodged on the boughs of standing trees, rolled to the track and fell with its topmost boughs a few feet across the moving engine, and by the motion of the train plaintiff was swept by the limbs of the tree off the car and injured. There was no train crew except the engineer.

"In describing the course of the tree and his own conduct, plaintiff says:

" 'It was a funny falling tree. It made several dives, and that is the reason I did not make preparation to leave the car. . . . Some of the other trees were between the place where this tree stood and the railroad track.'

"Bloxham did not think of moving or getting off the car until the tree had changed its course at least twice, first on account of being caught in a gust of wind; second, by striking the boughs of another tree. He testified in this connection: 'It was hard to tell which way it was going to fall until it got down in such a distance that it was too late for me without jumping off the side of the car.' In speaking of when he began to move, he said: 'I say I saw it 10 or 15 feet above the car, falling towards the car, and I rushed towards the tail end of the car.'

"On cross-examination, Mr. Bloxham testified: 'I said that I realized nothing until I heard some one make a scream or an alarm of some kind which indicated trouble to me. Then I looked up and saw the tree on its way to the ground. I do not know what it was, whether the wind, or what it was, that caught it and turned it towards the track, but the impression seemed to be that it was the wind that did it.'

"Again, on redirect examination, he said: 'The tree looked to me as if it was falling not towards the track anyway. Suddenly it seemed to take a whirl and come diagonally across towards the track. It seemed to strike some trees and bounce back.'

"The engineer was in his cab, covered above and inclosed except by the windows. Plaintiff, standing up, uncovered, and with his view

unobstructed, looking at the forest about him, heard a voice from the front of the locomotive. Looking up, he saw the tree falling in a 'funny' way. It made several dives, and that is the reason he didn't make any preparation to leave the car. It was hard to tell which way it was going to fall until it got down in such a distance, and then it was too late for him to jump without jumping off the side of the car. At this time the tree started to roll, and then struck in the branches of other trees and rolled. There is no allegation of negligence as to the felling of the tree."

This is defendants' statement:

There was evidence on the part of the defendants tending to show that the engineer was not in a position to see the tree from the engine as well as the plaintiff could from the flat-car, and that he could not have stopped the engine and car after he saw or could have seen the danger, in time to have prevented the injury, as he was sitting in the cab of the engine with his view obstructed by the roof and sides of the cab, his only means of observation being the windows; and there was further testimony from him that he had no time to stop the engine after he saw that it was falling, and that as soon as he saw it he did all that could be done to cut off the steam and stop the engine; that he had only a very few seconds to act, and that the engine was stopped as soon as possible by the exercise of care on his part.

The plaintiff, in his own behalf, testified, as stated in the charge with substantial correctness, as follows:

"In February, 1914, I was working on this 4,000-acre tract for the Stave and Timber Corporation, engaged in having logs cut for them; and I was down here every week. The contract between me and Arbuckle Bros. gave me $3,250 a year. I was hurt 4 February, 1914, on the 4,000-acre tract, on defendant's logging road. There was one locomotive and flat-car, and no crew on the engine or car except one engineer. The accident happened on the return trip. I and Mr. Crane were standing on the flat-car; some one began hollering, and I knew that something was wrong. I threw my eyes up and saw a tree falling. I was then 75 feet from it; glanced up ahead and through the trees. The tree was 14 inches big. I saw it 10 or 15 feet above the car, and then rushed towards the tail end; the tree caught me as it fell across the car; train didn't stop; no air-brakes were put on it; don't know if any steam-brake was applied; I had nothing to do with selecting engine or the cars; I used what was furnished; I gave the engineer orders often to look out for falling trees; I told the foreman to be careful about cutting logs; the engineer could have stopped in 20 feet." And again: "I made a request for an engine for a standard-gauge road that had a capacity to haul five to seven cars at one load. I and Folger talked about necessary machinery; I don't remember saying that I didn't name

them. The engineer was acting under my order to carry me down to a particular place when the trip was being made. I don't think the tree, if it fell as it started, would have crossed the track. The impression of the others there was that the wind whirled it. I believe that was the view that they took of it. It hit another tree falling. I guess the tree was cut 40 feet from the track. I did not see that stump. I yelled when I saw the tree coming. The engineer was in as good position as I was to see the tree when I first saw it. I had no time to give anybody orders. He had time to stop the engine, or reverse the engine. It was a minute or two—I would place it at two minutes." The witness then stated that he was estimating the time, and it may not be accurate. Questioned by defendant's counsel as to what he said when he was hurt, and as to whether he did not admit that the injury could not have been avoided and that the engineer was not to blame, he said that he could not remember about it, as he was then suffering from his injuries, which were very severe, and that "he did not think it fair to ask a question of that kind when he was in such a condition at that time, and that he would not swear whether he did or did not make the statement." There had been evidence that just after he was injured the plaintiff had stated that no one was to blame for the accident, and told the engineer that he was not responsible for it.

On redirect examination, plaintiff further testified: "It certainly did seem to whirl. I quickly saw the danger when I saw the tree. My God! I wanted to get off. If the engineer had stopped as soon as he could have seen the tree, there would have been no danger. I thought a gust of wind changed its course, but that is simply a guess. I did all I could. I was 10 or 12 feet from the engineer. I don't know how to handle an engine. I could not have given any order to the men cutting the tree."

There was other evidence tending to corroborate, more or less, the plaintiff and the engineer as witnesses.

The court, at defendant's request, instructed the jury as follows:

"1. If you find from the evidence that the engine and car were not properly equipped, but further find that by reason of the fact that the train was so light, or was moving so slow, that better brakes were not necessary, and that the train, as it was running, could have been stopped as quickly as the conditions required, and as it was necessary under the circumstances, with the brakes and equipment it did have, then the failure to have different brakes did not as a matter of law produce the injury, and if you find no other negligence proximately causing the injury, you should answer the first three issues 'No.'

"2. If you find from the evidence that the plaintiff did not have the selection of the engine and car, but that they were selected and sent out to him by the defendant, yet if you further find that the plaintiff, as

supervisor of the woods and works, went on using them, knowing of their defect of equipment, if any, or having opportunity in the exercise of reasonable care to know of them, even though this defect caused the injury, you should answer the fourth issue 'Yes.'

"3. Plaintiff contends that the defendants were negligent in that the engineman failed to stop the train as quickly as he could and should have done, and that this negligence was the proximate cause, among other things, of the injury. In this connection I charge you that it was the duty of the engineman at all times to keep a diligent lookout in front of his engine, and in the scope and observation of that lookout to see and observe such things as reasonably and naturally came within, or should have come within, his view, and to govern and control his engine in respect to the same; and if you find from the evidence that in the exercise of this duty he did not see and could not, by reasonable care, have seen the tree as it started to fall and was falling, his failure to see it and to stop his engine on account of it was not the proximate cause of the injury, and as to this feature of the case—that is to say, in the absence of other negligence proximate to the injury—you will answer the first three issues 'No.'

"4. The defendants contend that the engineman was keeping a lookout in front of his engine, and in this lookout and view it was not possible for him to have seen the top of the tree at the time it started to fall, or while it was falling, because of the cab on the side and above him, and that he did not see it, and, therefore, did not and could not see the impending danger; and I charge you if you find this to be the fact, you will answer the first three issues 'No.'

"5. The defendants contend further that even if the engineman had seen the tree when it started to fall, and while it was falling, it was impossible for him to have stopped his train, whatever appliances he might have had on it, before the tree fell on the train; that it was all done so quickly that it was impossible to escape the tree, and that if he had stopped the train suddenly at the time he saw, or by reasonable diligence could have seen, the tree falling, it would still have fallen on the train. In this connection I charge you that if the engineman saw the tree falling at such a time, in such a condition, and under such circumstances as caused him to believe, as a reasonable man, that if he brought the engine to a sudden stop it would fall on the cab and injure him, it was not his duty to stop the train and receive the injury himself under such circumstances; and the accident was what the law calls an unavoidable accident, from which no liability flows; and if you find these to be the facts, you will answer the first three issues 'No.'

"6. It was the duty of the engineman to exercise such care as a reasonably careful and prudent man would have exercised under the same circumstances, and no more; and if he saw the tree falling so near to

the engine and so fast that as a reasonably prudent man it appeared to him that if he stopped the engine suddenly he would receive an injury himself, and in the exercise of proper care could not have seen it sooner; and if the engineman knew, at the time, that the plaintiff was behind on an open car, and had as good and sufficient view of the tree and opportunity to see and appreciate the danger as he had, and by reason of the slow movement of the train could jump off and protect himself, it was not his duty to bring the train to a sudden stop under circumstances that led him to believe he would receive the injury himself and was more likely to receive it than the plaintiff; and if you find this state of facts to have existed, and no other cause proximately produced the injury, you will answer the first three issues 'No.'

"7. If the engineman was exercising reasonable care in looking out for danger in front of him, and did not see the tree until he had good reason to believe, and did believe, that the tree would fall on his cab and injure him if he came to a sudden stop, he had the right, in the exercise of his own right of self-preservation, to refuse to stop the engine, and it was not his duty to do so; and if this state of facts proximately caused the injury, you will answer the first three issues 'No.'"

The jury under the evidence and charge of the court returned the following verdict:

1. Was the plaintiff Bloxham injured by the negligence of defendant The Stave and Timber Corporation, as alleged in complaint? Answer: "Yes."

2. Was the plaintiff Bloxham injured by the negligence of the defendant M. E. Goetzinger, as alleged in complaint? Answer: "Yes."

3. Was the plaintiff Bloxham injured by the negligence of the defendants Arbuckle Brothers, and the individuals composing said firm, as alleged in complaint? Answer: "Yes."

4. Did the plaintiff Alfred Bloxham by his own negligence contribute to and cause the injuries he received, if any? Answer: "No."

5. Were the acts, if any, which produced injury to plaintiff Bloxham caused by risks which Bloxham under his employment agreed to assume? Answer: "No."

6. What amount, if any, is the plaintiff Bloxham entitled to recover of defendants by whose negligence he was injured as alleged? Answer: "$8,000."

Judgment was entered thereon, and defendant appealed.

Winston & Biggs, E. R. Baird, Jr., W. M. Bond, Jr., and Earl M. White for plaintiff.

Ward & Grimes, Starke, Venable & Starke for defendants.

WALKER, J., after stating the case: Some of the assignments of error are directed to the absence of evidence to show any negligence on the

part of defendant, arising from the failure of the engineer to see the falling tree in time to have stopped his engine and prevented the injury, and to the fact that plaintiff was in full charge and control of the defendants' business and logging operations, including the running of the engine and cars, and therefore assumed all risks of injury therefrom; and, further, that there is no evidence to support the finding of the jury that plaintiff was injured by defendants' negligence. A careful review of the record will show that these contentions should not be sustained, as there was evidence which tended to show that the defendants were not legally in fault, and, therefore, not responsible for this deplorable occurrence, which has shattered the plaintiff's health and subjected him to great and constant suffering; and there was also evidence which tended to show the contrary, and that the injury was directly traceable to the defendants' negligence. In this state of the proof the case was one for the jury, and we are of the opinion that the charge of the court was not only fair and impartial, but that it contained a full explanation of the law applicable to the facts as they might be found by the jury, and in many respects it was exceedingly favorable to the defendants.

It is true that the statements made by the plaintiff just after he was injured, if they were true, exonerated the defendants from any blame; but they were made, as the plaintiff testified, when he was suffering greatly, both in mind and body, from his injuries. He described his condition as follows: "I went to Norfolk and had Dr. Seelinger there. It is impossible for me to describe how I felt. I was a total wreck, is all I can say. My left arm was broken in two places, and there were two dislocations. The bones of the hand were driven back into the wrist of both hands. I had a bruise on my forehead over the left eye, and I had a bruise on the back of my head. I feel both of those physical injuries now. In regard to the arm, I always have a pain there. Sometimes it is so bad I can't sleep with it, and sometimes it does not discommode me, as I get used to it. [Witness illustrates what use he has of the arm by moving it.] I can raise it higher than that by the shoulder. I was confined to my home by this accident about a month, I think, the first time. I can't tell you to the day. Then I tried to go out and do something, but it was just misery."

It is not to be expected that a man under such distressing circumstances can describe an occurrence as well and with as clear and retentive a memory as when his faculties and senses are either restored or in a more normal condition. But, however this may be, the whole matter, including the conflict and discrepancies in the evidence, was for the jury. How can we say, as matter of law, that he told the truth the first time, and not the second, or even that what is attributed to him really agrees with the facts? The case of *Dail v. Taylor,* 151 N. C., 284,

accurately states the law in respect to such a conflict of evidence. *Justice Hoke* there says: "While we hold this to be a correct position as to mere proof of the occurrence, we are of opinion that there was error in sustaining defendant's motion for nonsuit, for the reason that there was additional testimony tending to show a want of proper care on the part of the defendant. C. S. Weslett testified: 'That all along for the last two years witness had seen these coca-cola bottles from defendant's works explode in the store.' True, the witness seems subsequently to have given evidence qualifying this statement; but we are not at liberty to select the more favorable portion of a witness's statement and act on it for defendant's benefit. In a motion of this kind we have repeatedly held that the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable for him; and, applying this rule, we think the additional testimony as indicated, with the evidence describing the occurrence, presents a case which requires that the issues raised should be submitted to the jury, and that the order directing a nonsuit was erroneous."

The charge of the court was singularly responsive to the requests of the defendants in respect to the question of negligence, and it substantially submitted to the jury for their consideration every phase of the law embraced by them, and almost in their very language. There was no change of expression, as will be seen, which affected the substance of them. This brought the case to the simple question as to which version of the facts the jury would accept. It must not be forgotten that there was testimony that the plaintiff halloed to the engineer, as did also another person, and also that the engineer had been instructed to look out for falling trees, and he testified that he looked immediately after the alarm was given.

It is urged by the defendants that they are not responsible to plaintiff, as their vice principal, for the negligence of the engineer, one of his subordinates, because, as held in *McGrory v. Co.*, 23 L. R. A. (N. S.), 301, such act of negligence on the part of defendants' servant is one of the ordinary risks assumed by the plaintiff when he entered their service. But this leaves out of consideration the fact that this common-law rule no longer is in force with us, as the Legislature has abrogated it, and enacted that assumption of risks shall not be a defense for a railroad company in an action by one of its employees for damages on account of injuries sustained by reason of the negligence of another employee. Revisal, sec. 2646; *Fitzgerald v. R. R.*, 141 N. C., 530; *Coley v. R. R.*, 128 N. C., 534, and 129 N. C., 407. It was held in the *Fitzgerald case* that "The statute known as the Fellow-servant Act, published as chapter 56, Private Laws 1897, where the same applies, has the effect of making all coemployees of railroad companies agents and vice principals of the company so far as fixing the company with

responsibility for their negligence is concerned. While commonly spoken of as the 'Fellow-servant Act,' it is entitled 'An Act to Prescribe the Liability of Railroads in Certain Cases,' and it operates on all employees of the company, whether in superior, equal or subordinate positions." The statute also applies to logging roads. *Hemphill v. Lumber Co.,* 141 N. C., 487; *Hairston v. Leather Co.,* 143 N. C., 512; *Bird v. Leather Co., ibid.,* 283; *Roberson v. Lumber Co.,* 154 N. C., 328. The defense of assumption of risks is not, therefore, available to the defendants. The jury have properly found that plaintiff was not guilty of contributory negligence, so that these two defenses have both been disposed of, one by the law and the other by the jury upon the evidence and correct instructions of the court.

The plaintiff testified that the engineer could have taken in the exact situation as well as he could, and that with proper attention and care the engine could have been brought to a full stop by the engineer in time for plaintiff to have escaped the injury.

The shifting of the winds was not the proximate cause of the injury. Although the act of God, for which they are not responsible, as contended by defendants, it is considered to be the remote cause if, after the winds changed in direction, and the tree had started in its course toward the car, the engineer had a fair opportunity to stop the engine, after becoming aware of the danger. If these are the facts, the injury to plaintiff was not the result of an accident, but of direct causation.

In determining whether the engineer was guilty of negligence, the situation and his surroundings were proper subjects for the jury to consider. If he was suddenly confronted by a serious emergency or peril, the law required of him only the care which a man of ordinary prudence would have exercised in the same circumstances, and makes proper allowance for excitement, terror, or the instinct of self-preservation. But this was all fully explained to the jury, and if on any phase of the case the defendants desired more specific instructions, they should have asked for them. *Simmons v. Davenport,* 140 N. C., 407.

There are numerous positions taken by the defendants, in their brief, some of them relating to matters presented for the first time in the assignments for error, which is too late (*Harrison v. Dill,* 169 N. C., 542), and others which are really subsidiary to those we have already discussed, and are controlled by the general principles we have stated. The charge of the court covered the entire case, and notwithstanding the attack made upon it, which we think is groundless, it was eminently fair and just to both parties and characterized by the closest attention even to the details of the evidence. There was nothing in it of which defendants can justly complain as being an intimation of opinion upon the facts, but, on the contrary, it has the merit of being an unusually clear, strong, and comprehensive review of the case, and such as no

jury could misunderstand. It is exceptionally free from anything of a foreign nature, and is a remarkably plain, direct, and forceful statement of the facts and the law of the case, such as is calculated to bring the jury to a fair and just understanding of the issues.

As to the liability of the defendants other than the corporation, it is sufficient to say that there was evidence for the jury to consider, and which was properly left to them. The pleading in the other suit mentioned was competent as a declaration of the party who is a defendant in this action, and it makes no difference that the other suit was not between the parties in this one. We find the rule thus stated in 1 Enc. of Evidence, p. 425: "It is not necessary to the competency of a pleading, as an admission against the party, that it be one filed in an action between the same parties. A pleading filed in any action is competent against the party if he signed it or otherwise acquiesced in the statements contained in it, if such statements are material and otherwise competent as evidence in the cause on trial, not by way of estoppel, but as evidence, open to rebuttal, that he admitted such facts." The same principle was applied, at this term, in *Ilsworth v. Cedar Works, ante,* 17. See, also, *Cummings v. Hoffman,* 113 N. C., 267. It is not so much the time, place, or manner of making a declaration or admission, as the fact of the admission, its substance, and its relevancy to the questions in dispute. These matters were all fully and sufficiently explained to the jury. The statement in the letter was not conclusive, but open to contradiction by direct or circumstantial evidence, and it was for the jury to say whether there had been any substantial change in the relations of the individual defendants to the property, and the business in which the plaintiff was employed at the time of his injury.

We have considered this case with great pains and some elaboration, because of the length of the record and the many and important questions involved; but upon a careful review of it we conclude that it has been correctly tried.

No error.

N. T. AYDLETT, TRADING AS C. C. AYDLETT & SON, v. NORFOLK SOUTHERN RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

(Filed 20 September, 1916.)

1. Carriers of Goods—Delivery to Carrier—Title—Damages—Party Aggrieved.

Ordinarily the title to a shipment of goods by common carrier passes to the consignee upon their acceptance by the carrier, and he may sue for damages thereto in transit; but when it is shown that the consignee refused to accept the damaged goods, and that the sale has been canceled by consent, the consignor may maintain his action against the carrier for damages.

2. Carriers of Goods—Interstate Commerce—Connecting Lines—Intermediate Carrier—Damages—Parties—Carmack Amendment.

Where a second carrier in a connecting line of carriers of a shipment of a car-load of goods has caused damages thereto by loading them improperly, an action may be maintained against it to recover the damages thus caused, and it may not avoid liability under the Carmack Amendment to the Interstate Commerce Act on the ground it was not the initial carrier.

3. Carriers of Goods—Connecting Lines—Contractual Notice—Intermediate Carrier—Principal and Agent.

Where the second carrier in the connected line of shipment of a car-load of goods causes damage to the shipment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applied to the facts of this case.

WALKER, J., dissenting.

CIVIL ACTION tried before *Allen, J.*, at March Term, 1916, of CURRITUCK.

The following issues were submitted to the jury:

1. Has the plaintiff been damaged by the negligence of the defendant Norfolk Southern Railroad, by reason of transporting said sweet potatoes in an unsuitable and unfit car, as alleged? Answer: "Yes."

2. What damage, if any, is the plaintiff entitled to recover of the defendant Norfolk Southern Railroad? Answer: "$256.55, with interest from 23 December, 1913."

Similar issues were submitted as to the other two defendants and were answered in like manner. From the judgment rendered, the defendants appealed.

Ehringhaus & Small for plaintiff.

C. M. Bain, J. Kenyon Wilson for defendant Norfolk Southern Railroad Company.

Guthrie & Guthrie, Ward & Thompson for defendant Norfolk and Western Railway Company.

Tye, Peeples & Tye for defendant Louisville and Nashville Railroad Company.

BROWN, J. This action is brought to recover damages to a car-load of sweet potatoes, delivered by the plaintiff to a steamboat company at Brinsons Landing in North Carolina, consigned to Schafer Bros. at Louisville, Ky. The evidence is to the effect that they were delivered to and receipted for by the Norfolk Southern Railroad Company in apparent good order on 16 December, 1913, and were loaded by the said

company in a car furnished by it which had just previously been used in transportation of a load of flour, and for that purpose had been lined with paper, which was not removed when the potatoes were loaded in the same car.

In consequence of this the testimony shows that the ventilation of the car was cut off and it was practically air-tight. This caused the potatoes to rot in the car. The shipment was routed by the Norfolk Southern via Norfolk and Western and Louisville and Nashville to Louisville, Ky. On account of the bad condition of the potatoes on arrival, the consignees refused to receive them, and notified the consignor, the plaintiff, at once. It was agreed that the contract of sale should be rescinded and the potatoes sold on account of the plaintiff.

1. The defendants contend that the plaintiff cannot recover, because the plaintiff is not the real party in interest, and that the suit, if maintainable at all, should be brought by the consignee, Schafer Bros.

As a general rule, it is true, where goods are shipped upon an open bill of lading, the title passes to the consignee at the time they are delivered to the carrier, and any ensuing damage must be recovered by the consignee. *Stone v. R. R.,* 144 N. C., 228.

Notwithstanding this general rule, it is open to the consignor to show that the goods were shipped on consignment or that owing to peculiar circumstances, by agreement between himself and the consignee, the title had revested in the consignor while the goods were *in transitu,* and that the consignor has a pecuniary interest in the proper performance of the contract of shipment.

The identical case is presented in *R. R. v. Guano Co.,* 103 Ga., 590, where it is held that where a consignee of freight refuses to receive goods on account of damage done to them in the hands of the common carrier, and the goods are subsequently thrown back on the hands of the consignor, the latter has a right to bring an action for such damages against the carrier. This case is cited with approval by this Court in *Buggy Co. v. R. R.,* 152 N. C., 122.

2. The defendants contend that they are not initial carriers, and that by virtue of the Carmack Amendment to the Interstate Commerce Act they are exempt from suit by the plaintiff. If this contention is correct, then the said amendment, admittedly passed in the interest of the shipper, would be entirely nugatory and utterly fail to accomplish the purpose for which it was enacted.

It was not intended to exempt any carrier legally liable from suit. In this case the potatoes were delivered to the steamboat company and by that carrier delivered at Elizabeth City directly to the Norfolk Southern Railroad. It was this defendant that furnished the car in which the potatoes were loaded, and, if the evidence is to be believed,

negligently failed to prepare the car for such shipment. It was practically air-tight, thereby causing the potatoes to rot before they reached the point of destination. *Mewborn v. R. R.*, 170 N. C., 205; *Brinson v. Kramer*, 169 N. C., 425; *R. R. v. Sperber Co.*, 117 Md., 595.

3. It is next contended that the plaintiff cannot recover because the claim was not filed with the initial carrier, to wit, the steamboat company, within four months. The evidence shows that a written claim was filed with the defendant the Norfolk Southern Railroad Company within the time required by law, and if it is not sufficiently definite, as is now contended, it does not appear that the said defendant ever made any objection to it or demanded a more particular statement. A written claim was also filed with the other two defendants.

Practically all of the evidence shows that the injury was occasioned by the negligence of the defendant the Norfolk Southern Railroad Company, and that that defendant received full notice of the claim in writing. Nothing further than that can reasonably be required of the plaintiff.

We have held that the stipulation on the bill of lading requiring such notice is a reasonable and valid requirement, and we decided in *Grocery Co. v. R. R.*, 170 N. C., 241, that the notice of claim must be filed where the shipment originated. In that case the defendant was the initial carrier, to whom no notice was given, nor was the claim "filed by the consignor at the point of origin, even if he had any right to file it at all, and certainly he did not have this right as consignor" (page 243). That action was brought to recover a penalty given by a penal statute, which must be strictly construed. It was not brought to recover damages from a carrier that had caused the loss and with whom claim had been duly filed.

The defense in this case is based, not on a statute, but on the contract of shipment, that declares that "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

The initial carrier and the last carrier are thus made the agents of all the other carriers for the purpose of filing claims for damage. In our judgment that provision was not intended nor can it have the effect to preclude the claimant from filing his claim with and from suing the carrier that actually caused the injury. In this case it is undisputed that the potatoes were delivered to the defendant the Norfolk Southern, in good condition, and that carrier caused the injury by furnishing an unventilated car.

It is true, the initial carrier was the steamboat company and that no claim was filed with that company, but as it was filed with the Norfolk Southern, the carrier that received the potatoes from the steamboat company and caused the damage, we think the stipulation in the bill of lading was substantially complied with. Surely, notice to the agent may be dispensed with when notice to the principal is given. To hold otherwise would be "sticking in the bark." *Cassante ratione legis cessat et ipsa lex.*

If the injury had not been caused by the negligence of the Norfolk Southern, then the contention of defendant that notice of claim must have been filed with the steamboat company, in order to bind the Norfolk Southern as well as other carriers, would be more reasonable.

Upon a review of the whole record, we find

No error.

WALKER, J., dissenting: The provision in regard to the claim for damages requires that it "must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery, . . . and unless claims are so made the carrier shall not be liable." This stipulation has been held by the highest Federal court to be reasonable and binding, and unless there is a compliance with it there can be no recovery for loss of or damage to the goods shipped. *M. H. and T. Railway Co. v. Harriman,* 227 U. S., 657. This being an interstate shipment, the Federal law applies. *N. P. Railway Co. v. Walls,* 36 S. C. Report. (U. S.), 493. The reasonableness of the provision is not disputed, and being a matter arising out of contract, it is to be enforced according to the *terms* of the contract, as parties have the right to contract as they please if there is no fraud, nor violation of any rule of law. If the contract is plainly expressed, there is no room for construction, and we enforce it as it is written. It is not for us to say whether it was wise or expedient for the parties or either of them. The reason for making it is left with the parties by the law, and we cannot unmake or even amend it because we may think it is not according to our idea of reason. The rule in this regard is well stated by a learned text-writer: "It is not the province of a court, however, to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one. Nor will the dictates of equity be followed if by doing so the terms of a contract are ignored; for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must be enforced if such is the clear meaning of the language used, and the intention of the parties using that language." 9 Cyc., 587. Where meaning is doubtful, such matters may be considered.

The meaning here is clear that the claim shall be made to the receiving or delivering carrier. There can be no doubt about it. The parties, as we have seen, had the right so to contract, whether with or without a good or sufficient reason. The maxim, *"Cessante ratione legis cessat et ipsa lex,"* has no application whatsoever to a case of this kind. It is a most excellent one when properly applied, but is "out of place" here. Nor do defendant's counsel "stick in the bark" when they merely insist, according to the usual rule, that a contract must be enforced as the parties have made it, and not as we think it should have been made. But if the maxim, *Cessant ratione,* etc., applied in a case of contract where the words of the parties must control, the reason has not ceased because there is a valid and substantial one for the requirement as to filing claims at either end of the line. Goods are often, and in the case of shipments on through bills of lading, transported in sealed cars, and the seals are not broken until the transit has ended. The carrier upon whom may rest the ultimate liability for any damage to the goods by reason of his negligence might not know of it while the goods are in his possession, nor until they are unloaded at their destination. He may designate his agent, and in this case either the initial or final carrier, instead of himself, as the one to receive notice of the claim. It is expedient that he do so, as, knowing nothing about it himself, he would at last have to communicate with him in order to get proper information, and it would save time and be more convenient that the agent should first be notified, as he, having knowledge of the facts, could notify his principal of them without delay. But more to the point is this reason, that the provision was not inserted merely that the carrier may ascertain if there has been negligence, but that he may inform himself as to the *extent of the damage* or loss, and prevent, not so much the assertion of false claims as to negligence, as false and exorbitant claims in the amount demanded. Therefore, the agent, who knows the facts, is selected as the one with whom the claim must be filed.

It would seem sufficient, though, to say that the highest court having jurisdiction of this question has held that the stipulation is reasonable and valid, and must be observed by the parties to the shipment according to its terms as expressed by the parties. It may well be added that the Interstate Commerce Commission has given its approval to this requirement in bills of lading, as one that must be complied with. It should not be overlooked that one term of this stipulation is that if the claim is not filed as therein provided, the delinquent carrier shall not be liable. The Court has written into this contract something that is not there, and made for the parties a contract which they had not made for themselves. If parties to a contract do not offend against any principle of the law in making their contract, "they are a law unto themselves," and are not required to make a reasonable one, but may contract without any

special reason, and even against their own interests, as we have seen. It is only when the language is ambiguous that we may resort to construction and consider what is just or expedient. If parties make a contract which turns out to be unfavorable to them, it is their own fault, and the law affords no remedy.

BREVARD MANUFACTURING COMPANY v. W. BENJAMIN & SONS.

(Filed 20 September, 1916.)

1. Lotteries—Gift Enterprises—Statutes.

A trade enlargement or expansion scheme which selects "contestants" to boost business for merchants, giving them prizes to engage in the movement, and tickets or books, in accordance with purchases by customers they may influence, with intermediate votes for prizes or gifts, and at the termination of the movement certain votes for an ultimate prize or gift, is a gift enterprise coming within the intent of the statute. Revisal, sec. 3726.

2. Same—Police Powers—Constitutional Law.

The regulation of lotteries or gift enterprises is within the police powers of the State, and Revisal, sec. 3726, is constitutional and valid.

3. Bills and Notes—Illegal Consideration—Lotteries—Gift Enterprises—Statutes—Actions.

Notes given in pursuance of a contract prohibited by Revisal, sec. 3726, are for an illegal consideration, and collection thereof is not enforcible in our courts.

CLARK, C. J., dissenting.

CIVIL ACTION tried before *Whedbee, J.,* at July Special Term, 1916, of EDGECOMBE, upon appeal by the plaintiff of two causes from justice's court, which, by agreement, were consolidated and a single answer filed thereto. A jury was waived and trial by the court substituted. The court rendered judgment upon the admitted facts and evidence for defendants. The plaintiff appealed.

A. W. MacNair for plaintiff.
James M. Norfleet for defendant.

BROWN, J. This action is brought to recover on certain notes executed by defendants to plaintiff. The defendants plead illegality of consideration in that said notes were given for the sole purpose of carrying out a certain agreement entered into between plaintiff and defendants, which is called the plaintiff's "Trade Expansion Campaign."

The defendants aver that the said scheme is in fact a lottery or gift enterprise in violation of section 3726, Revisal, as follows: "If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style, or title the same may be denominated or known; or if any person, by such way and means, expose or set to sale any house or houses, real estate, or any goods or chattels, cash, or written evidence of debt, or certificates of claims, or anything of value whatsoever, every person so offending shall be guilty of a misdemeanor, and be fined not exceeding $2,000, or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, money or evidences of debt, or in any manner distributes gifts or prizes upon tickets or certificates sold for that purpose, shall be held liable to prosecution under this section."

The facts appear to be undisputed, and are substantially these: The plaintiffs reside in Iowa and are engaged in a business claimed by them to be a copyrighted advertising scheme, and called a "Trade Extension Campaign." The defendants are merchants engaged in business in Tarboro, N. C. The defendants' business was estimated at $30,000 per annum, and plaintiffs by their plan agreed to increase this business 20 per cent upon the defendants executing the contract set out in record and making their negotiable notes in the aggregate of $340, and in case of partial failure in securing said increase there was to be proportionate rebate on amount of notes.

The defendants were to furnish plaintiffs with the names of one hundred and fifty women, who were to be known thereafter as contestants for the prizes offered and later described. The plaintiffs were to notify contestants of their appointment, and the first sixty accepting were to be rewarded with the gift of a "Queen Esther Spoon." Each of the one hundred and fifty were to be given a white coupon free to the value of $10 ordinary coupons. Each of the one hundred and fifty in return was expected to drum up trade among their friends and acquaintances to purchase from defendants, and such purchaser either for cash or payment on account would be given certain tickets, which varied with amount of cash paid. These tickets were delivered to favored contestant or deposited to her credit by purchaser. There were also red tickets for special sales which had an extra value. There were coupon books each of value of $5 which could be bought for cash, and amount paid for said books was placed to credit of purchaser, to be traded then or later at his convenience, but the coupons in said book could be voted at any contest by the woman contestant to whom same was delivered. Also there was a card of value of $2.50 to be punched on margin, which, in addition, was worth $1 to holder for the purchase of any article enumerated on back of same by paying the difference between such value and

list price, which ran from 3 cents to $1.55. A book of instructions was also sent by plaintiffs, which contained the rules of contest.

This "Trade Extension Campaign" was to extend over a period of six months. On Wednesday of each week a piece of silver was given the contestant having the largest number of coupons deposited, and such tickets could be voted in no further weekly contest, and as to them were worthless. Once a month a watch was delivered to the contestant having the largest number of coupons deposited, and all tickets so deposited were worthless at any subsequent monthly drawing. At the end of six months the contestant having the largest number of coupons deposited for the entire campaign received the grand prize of the Grafanola; then the campaign was closed, and all coupons were worthless in the hands of all except the fortunate winners at the weekly, monthly, and final contests. This is a concise statement of the scheme as disclosed by the evidence.

The defendants made the notes and executed the contract and received the various articles to be offered as prizes described in contract.

Awaiting the coming of plaintiff's representative, who was to open the campaign, the prizes were displayed in defendants' show windows, when they were advised by the county solicitor if they went forward with this plan they would be indicted for conducting a lottery. Defendants at once advised plaintiff of the situation, and offered to return prizes and cancel contract, which offer they have kept good to date, but plaintiff refused to accept offer, and demanded that contract be carried out.

His Honor held upon all the evidence that the scheme came within the purview of section 3726 of the Revisal as a gift enterprise, that the consideration for the notes was illegal, and that plaintiff cannot recover.

It is immaterial whether this scheme to enlarge defendants' business is a lottery or a gift enterprise, as both are prohibited by the law. We concur with the judge that the scheme falls under the denunciation of the statute, and, therefore, the consideration for the notes is illegal, and plaintiff cannot recover.

Schemes of this character are so numerous that it would tax the ingenuity of man to define with accuracy and to draw the line clearly between those which are devised to evade the laws made for the protection of an unwary public and those which are *bona fide* and harmless methods of advertising a legitimate business.

That legislation of this character is well within the police power of the State is too well settled to need discussion. *Rast v. VanDemon,* 240 U. S., 342; *Tanner v. Little,* 240 U. S., 369.

The plaintiff has sought for the protection of its scheme the sanctuary to which most such enterprises flee when their legality is assailed, viz.,

that it is an innocent and harmless method of advertising legitimate business. We think it is much more. The language of the Supreme Court of the United States aptly draws the distinction and is peculiarly applicable to this case.

Mr. Justice McKenna in the *Rast case, supra,* says: "Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in its purpose and motive, and its consequences are well defined, there being nothing ulterior. It is the practice of old and familiar transactions, and has sufficed for their success. The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article, and apparently not represented in its price, and hence it may be thought thus, by an appeal to cupidity, to lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction of evil of such."

The statute since its adoption, Code, sec. 1047, has been enlarged in its scope by the addition of the last paragraph, evidently intended to prohibit gift enterprises of any character. We think the plaintiff's so-called "Trade Expansion" plan comes within its terms. The courts in construing remedial statutes affecting lotteries, gift enterprises, or other schemes, by whatever name called, for disposing of goods and merchandise by unusual methods, will construe them with reference to the mischief intended to be redressed.

The facts of this case bring it within the scope of the opinion in *S. v. Lipkin,* 169 N. C., 265, where this subject is fully discussed by *Justice Walker.*

It appears to us to be one of those schemes "by which persons are induced to buy what they do not want in the hope or expectation or upon the hazard of getting something else as a gratuity which it might turn out they did want, but the exact character of which they do not at the time know." *Commonwealth v. Emerson,* 165 Mass., 146; *Winston v. Beeson,* 135 N. C., 281.

This last case seems to be relied upon by plaintiffs to support their contention, but we fail to see the relevancy. The only question presented in that case was the power of the city of Winston to tax dealers in trading stamps, and it was held that they did not come within the provision of an ordinance taxing gift enterprises.

Under the trading stamp scheme there was no lot or chance. Each stamp had a value, and could be traded off for articles of many kinds. Here there are weekly, monthly, and final drawings, and only a limited number could win, and however strenuous the labors of the losers, they

received nothing and their tickets were worthless. Hardly any scheme could be devised to stir up more strife and ill-feeling in a small community.

The judgment of the Superior Court is

Affirmed.

CLARK, C. J., dissenting: The scheme presented by this appeal is almost identical with the well known method heretofore adopted by many newspapers of the State in order to increase their circulation, and without objection up to this time from any source. It would seem that the plan is neither a lottery nor a gift enterprise. The mere fact that merchandise is to be given away, or disposed of upon certain conditions, does not make it either a lottery or a gift enterprise within the purview of the statute. The courts have laid down the rule that to make a lottery there must be an element of chance, in winning a greater prize or of winning nothing and losing the purchase price of the chance. Also, that there must be a consideration paid for the chance to participate in the distribution of the prizes. *S. v. Lumsden,* 89 N. C., 572; *Winston v. Beeson,* 135 N. C., 271.

Here there is no element of chance, nor is there any fee charged for participating in the contest. The prizes are awarded according to the number of votes cast. There is no drawing, no throwing of lots, nor any distribution of prizes, "which human reason, foresight, sagacity, or design cannot enable any one to know or determine until same has been accomplished." *People v. Elliott,* 2 L. R. A., 403. The awards are to be made solely by the number of votes cast for the several contestants. The one who works hardest and sends the largest volume of business to the defendant's store will certainly win the prize. It is merely a question of the hardest work, the exercise of the greatest influence, and the possession of the largest degree of skill.

When the contest is determined by skill, energy, and judgment there is no lottery, even though an entrance fee is charged the contestants. 25 Cyc., 1635; 19 A. and E., 589. This distribution is dependent entirely on effort and judgment. Chance is completely eliminated and no consideration is charged either directly or indirectly to any one. The manner of distributing the prizes to the more popular contestants is like a public election, and no more a lottery than such elections, whose results, often uncertain, are not lotteries in the legal sense of that word. If this is a lottery, then every election is a lottery wherever there are two or more candidates.

In *S. v. Lipkin,* 169 N. C., 265, the proposition was entirely different from this. In that case there was an element of chance, the award being thereby determined and a consideration had to be paid.

It is also urged that this is a gift enterprise denounced by the statute. A gift enterprise is defined by the decisions as a scheme for the division of certain articles of property determined by chance among those who take shares in the scheme. *Winston v. Beeson, supra.* There is nothing in this scheme that savors of a gift enterprise. The fact that coupons, pamphlets, and the like are used for the purpose of the campaign does not conclusively establish that this is a lottery or a gift enterprise. It is a proposition for the extension of the business of the plaintiff by the methods proposed which do not constitute either a gift enterprise or a lottery, for the reason already stated, that there is no element of chance and that no consideration is paid for the opportunity to participate in the distribution of the prizes. The result is obtained simply by an election, the party getting the most votes receiving the prizes according to the schedule set out. The consideration to the plaintiff, as in the almost identical method used in the familiar newspaper contests, is the enlargement of its business by the advertisement obtained and the interest aroused by the election contest. It is simply the application of election methods to business. There is no chance, and no gift enterprise, unless the ordinary election contest for office can come under one of those heads.

M. C. COBB v. THE ATLANTIC COAST LINE RAILROAD COMPANY AND TOISNOT TOWNSHIP ROAD COMMITTEE.

(Filed 20 September, 1916.)

1. Municipal Corporations—Public Roads—Relocation—Discretionary Powers—Private Use—Courts—Jurisdiction.

Where in an action against a railroad company and a township road committee there are allegations and affidavits that the defendant committee are about to change the location of a public road running in front of plaintiff's lands to the rear thereof, taking about an acre of plaintiff's land, not for the public good, but for the sole advantage of the railroad company in again commencing to use a rock quarry which it had theretofore used, a judicial question is raised, cognizable by our courts, whether the power sought to be exercised is for the public benefit or solely to advance private interests.

2. Same—Injunction.

Where the relocation of a public road by a township road committee is made for the public benefit in the honest exercise of their discretionary powers, they will not be interfered with by the courts solely because there are some incidental advantages to be gained by an adjoining property owner.

3. Same—Serious Questions—Issues.

Where an injunction is sought against a township road committee and a railroad company, and the pleadings and affidavits raise the question as to whether the relocation of a public road running in front of plaintiff's lands was for the sole benefit of the railroad company, and not the public, serious issues are raised, and a restraining order, theretofore granted, should be continued to the hearing of the case upon its merits. The principle that the courts will not enjoin the operation of industrial and other enterprises which aid in the development of the country has no application to the facts of this case.

4. Constitutional Law—Condemnation—Public Use—Compensation.

Under our State Constitution private property can only be taken by condemnation for a public use, and upon just compensation.

5. Injunction—Blasting—Insolvency—Allegations—Statutes.

Continued blasting of stone in a rock quarry which unlawfully invades the property rights of an adjoining owner is a continuous trespass, and may be enjoined without allegation of insolvency. Revisal, sec. 807.

6. Injunction—Blasting—Continuous Trespass.

Where there is allegation that the defendant had theretofore operated a rock quarry near plaintiff's dwelling to the invasion of his property rights by continually blasting rock which was thrown in all directions onto plaintiff's lands, dwelling, and outhouses, endangering the life of his family and impairing the value of his property, and that the defendant was about to resume such operations; and the defendant admits it is about to resume operations, but denies that it will injure the plaintiff: *Held*, a restraining order should be continued to the hearing of the case upon its merits.

APPLICATION for injunction, heard at chambers, 21 April, 1916, by *Devin, J.* From WILSON.

This is an action to restrain the defendants, the Atlantic Coast Line Railroad Company and the Toisnot Township Road Committee, from entering upon the land of the plaintiff and changing a public road, and from committing other trespasses thereon.

The plaintiff alleges, in substance, that he owns a tract of land in Toisnot Township, Wilson County, lying on a public road from Elm City to Sharpsburg, and adjoining a quarry of the defendant the Atlantic Coast Line Railroad Company and others; that the two defendants, unlawfully and without the consent of plaintiff, are about to change said road, which runs in front of plaintiff's residence, and locate the same in the rear of same, and in doing so take about an acre of plaintiff's lands; that there is absolutely no public necessity for a change in said roadway, and no public demand therefor; that it will not shorten travel; that no one lives upon said roadway; and the sole purpose of changing the said roadway is a scheme on the part of the Atlantic Coast Line Railroad Company, by and with the consent of the Toisnot

Township Road Committee, to unlawfully take possession of the plaintiff's lands, to destroy the old roadway without the authority of law, and to close the same up; that the defendant the Atlantic Coast Line Railroad Company owns a quarry immediately adjoining plaintiff; that some few years ago it was engaged in blasting rock in the quarry, and while so doing continually trespassed upon plaintiff by throwing rock, stone, and débris upon his premises, endangering plaintiff's life and the lives of his family, employees, tenants, and stock; that the Atlantic Coast Line is about to reëngage in blasting in this quarry, and that it will do so in the same manner as previously, and will again invade plaintiff's home and premises, and continually and continuously throw and hurl rock, stone, and débris upon the same, as it previously did, if not restrained by the courts.

The defendants filed answers in which all the material allegations of the complaint are denied.

A temporary restraining order was issued, and on the return day the plaintiff offered evidence tending to prove all the allegations of his complaint, and the defendants offered evidence to the contrary.

The temporary restraining order was continued to the final hearing, and the defendants excepted and appealed.

H. G. Connor, Jr., for plaintiff.
F. S. Spruill for defendants.

ALLEN, J. We concur in the positions taken by the learned counsel for the defendants, that the courts will not ordinarily interfere by injunction with the operation of industrial and other enterprises which aid in the development of the country, nor will they attempt to restrain the free exercise of discretion vested in public officers, when used for the benefit of the public. But these questions are not now before us.

The allegations of the plaintiff are that the members of the road committee are not using the powers vested in them for the public good, and that, on the contrary, they and their codefendant have entered into an arrangement to destroy the public road running in front of the plaintiff's house and to open a new road in the rear of the house and over the land of the plaintiff solely for the benefit of the defendant railroad, and to enable it to run an enterprise of its own more successfully; and if these allegations are true, the road committee is exceeding its powers and the taking of the plaintiff's land would be for a private, not a public, use, and illegal.

There is no power under the Constitution to take private property except for a public use, and then only upon just compensation (*Dargan v. R. R.*, 113 N. C., 598), and whether the power is being exercised for the public benefit or solely to advance private interests is a judicial

question of which the courts may take cognizance. 4 McQuillin Munic. Corp., p. 3092; 10 R. C. L., 30; *Stratford v. Greensboro,* 124 N. C., 133; *Edwards v. Comrs.,* 170 N. C., 451.

The author says in Ruling Case Law: "The question whether the constitutional provisions against taking private property for private use have been violated is, like all constitutional questions, ultimately for the courts; and if a court can clearly see that a particular undertaking, which it is proposed to clothe with the power of eminent domain, has no real and substantial relation to the public use, it is the duty of the court to intervene." And the Court, in *Stratford v. Greensboro,* said: "But whether the use of the property which the delegated legislative authority has declared to be a public use be such a use, or would sustain the authorities in taking, against the will of the owner, his property, is a judicial question."

The *Stratford case* is clearly recognized as authority in *Edwards v. Comrs., supra,* as applied to a case where it appears that the measure complained of is "in promotion of a personal and private scheme, and not in furtherance of the public interests."

We have, then, on this branch of the case, a judicial question raised by the pleadings, and supported by evidence at the hearing, and the material facts alleged, upon which it rests, are denied in the answers of the defendants.

This raises serious issues of fact, supported by evidence; and in such case, and when the main purpose of the action is to obtain a permanent injunction, the rule is to continue the restraining order to the final hearing. *Tise v. Whitaker,* 144 N. C., 510; *Stancill v. Joyner,* 159 N. C., 189; *Little v. Efird,* 170 N. C., 189.

If, however, it should hereafter be made to appear that the use is for the benefit of the public, the courts would not interfere on account of incidental advantage to the railroad, nor because the course followed by the commissioners in the honest exercise of their judgment and discretion might be less convenient or might not be the best.

As was said in *Edwards v. Comrs., supra,* these officers "are not to be controlled by a vote of the localities affected, either informal or otherwise, and, whenever it is shown that they have officially dealt with questions lawfully submitted to their judgment, their action may not be controlled nor interfered with by the courts, unless it is established that there has been a gross and manifest abuse of their discretion or it is clearly made to appear that they have acted, not for the public interest, but in promotion of personal or private ends. *Supervisors v. Comrs.,* 169 N. C., 548; 86 S. E., 520; *Comrs. v. Comrs.,* 165 N. C., 632; *Newton v. School Committee,* 156 N. C., 116; *Brodnax v. Groom,* 64 N. C., 244."

The plaintiff also asks for injunctive relief against the defendant railroad, not to restrain it from operating its quarry, but to prevent

it from so using the quarry that it will throw rocks on the land of the plaintiff.

He alleges that the defendant has heretofore used the quarry, and while doing so it continually trespassed on the premises of the plaintiff; that in its use rock were thrown in all directions, and that almost daily large quantities of rock were thrown on the land of the plaintiff, striking the plaintiff's residence and outhouses, and endangering the life of members of his family, and impairing the value of his property, and that the defendant intends to renew the operations as heretofore.

The defendant railroad denies that it has or will do any injury to the plaintiff, but admits that it is about to renew the operation of the quarry.

This raises an issue for a jury, and as a continuous trespass may be restrained, and without an allegation of insolvency (Rev., sec. 807), his Honor properly continued the order, restraining the defendant from causing rock, etc., to be thrown on the land of the plaintiff, until the hearing.

If the defendant is doing no injury to the plaintiff, as it claims, the order is no restraint upon its rights; and if it will continuously throw rock on the land of the plaintiff, it ought to be restrained.

In our opinion, the restraining order was properly continued to the final hearing.

Affirmed.

LEWIS T. PERRY, EXECUTOR, v. ROSE E. PERRY ET AL.

(Filed 20 September, 1916.)

1. Removal of Causes—Transfer of Causes—Executors and Administrators—Settlement of Estate—Executor's Petition.

An executor having qualified in the county where his testator died domiciled, properly filed his petition therein to have the facts found and the law applied relative to a bequest given him by the testator, and which is contested by some of the heirs at law, to the end that his executorship may be terminated and that he may be discharged from its duties: *Held*, the court may not order the action removed to another county as a matter of law.

2. Removal of Causes—Transfer of Causes—Convenience—Discretionary Powers—Appeal and Error—Statutes.

The discretionary power conferred on the trial judge to remove a cause to another county, "for the convenience of witnesses and to promote justice," is not reviewable on appeal in the Supreme Court. Revisal, sec. 525 (2).

APPEAL by defendants from *Cooke, J.*, at July Term, 1916, of WARREN.

J. H. Kerr and Winston & Matthews for plaintiff.

Gillam & Davenport, Pruden & Pruden, and Murray Allen for defendants.

CLARK, C. J. This is an appeal from a refusal to remove the cause to another county. Mark V. Perry died domiciled in Warren, and the plaintiff qualified as executor in that county and administered the estate. He has filed his petition as provided, Revisal, 150, in the Superior Court of Warren, against the legatees, devisees, heirs and next of kin, asking for an account and settlement of the estate committed to his charge. He alleges as a reason for doing so that, at the instance of the deceased and promises to recompense him, he abandoned his home in Bertie County and went to live with the deceased, who was his uncle, in Warren County; that in recognition of said obligation the deceased made a will in which he devised and bequeathed to the plaintiff a storehouse and lot and certain personal property in Raleigh; that subsequently his testator sold said property, receiving therefor $33,000 in North Carolina State bonds, which he put in a box in the bank, giving the key to the plaintiff, telling him to take the said bonds in lieu of the legacy which had been thus adeemed; that since the death of the testator a large number of devisees and legatees named in the will have agreed that the plaintiff should retain the sum of $16,500 in lieu of said bonds; that the plaintiff is anxious to close up his final account and be discharged, but owing to the opposition to this settlement by a few of the legatees and devisees named in the will, he is unable to make a final account and settlement and procure his final discharge till this matter is adjusted; that he has now in hand $29,000 of said bonds, which he is ready to convert into cash; that he has been notified by some of the legatees that they demand that the entire balance in his hands be distributed without reserving any part for himself either under the action of his testator in delivering the bonds to him as above set out, or in accordance with the agreement of all the other legatees and devisees agreeing to his retention of $16,500. The plaintiff asks that the above matter be adjudicated, the facts found, and the law applied, to the end that he may have his final account approved, and be discharged.

This action might have been brought by a legatee, devisee, heir at law or next of kin, under Revisal, 129 or 144, or by any creditor under 104. In all these cases the action can be brought either in term or before the clerk, but in the county where the administration is taken out; which is true, also, as to this action.

The action has been brought in the proper county, and in the proper manner, and the judge did not err in refusing to remove it as a matter of law. The motion to remove "for the convenience of witnesses and to promote the ends of justice," Revisal, 425 (2), rested in the discre-

tion of the judge, and is not reviewable. *Eames v. Armstrong,* 136 N. C., 392. Indeed, as the final settlement of the estate must depend largely upon the account and the vouchers filed in the Superior Court of Warren, that is not only the legal forum in which the cause should be tried, but the most convenient.

Affirmed.

GEORGE M. FLOYD AND G. K. GRANTHAM, TRUSTEE IN BANKRUPTCY, v. J. G. LAYTON AND G. M. FLOYD COMPANY.

(Filed 20 September, 1916.)

1. Corporations—Bankruptcy—Embezzlement of Officer—Joinder—Parties—Causes of Action.

Where a stockholder of a corporation has brought action against the president thereof to recover the value of his stock for his alleged embezzlement of the corporate assets, and joins the corporation therein for the purpose of appointing a receiver therefor, and the corporation thereafter has been adjudged a bankrupt under the Federal law, and a receiver appointed, the corporation has become only a nominal party, and it is not a misjoinder either of parties or causes of action, or objectionable, for the court, in its discretion, to permit the receiver to make himself a party plaintiff under the same allegation of embezzlement, to seek to recover the assets alleged to have been embezzled by the president to the extent of the capital stock of the corporation and for the benefit of all of its shareholders.

2. Bankruptcy—Corporations—Officers—Embezzlement—Duty of Trustee.

It is the duty of a trustee in bankruptcy to collect all of the assets of the bankrupt corporation, whether due by contract or withheld by embezzlement of one of its officers.

3. Same—Funds Apportioned.

Upon a recovery by the trustee of a bankrupt corporation of moneys embezzled by its officer, the bankruptcy court will, by proper decree, apportion the net proceeds among the creditors and stockholders.

4. Bankruptcy—Corporations—Embezzlement—Judgments—Demurrer.

The trustee in bankruptcy of a corporation represents the stockholders in an action against its officer to recover funds embezzled by him, and objection by defendant that a judgment in favor of the stockholders would not be released by a discharge in bankruptcy is not a good ground for demurrer.

APPEAL from *Lyon, J.,* at February Term, 1916, of HARNETT.

Clifford & Townsend for plaintiff.
E. F. Young and R. L. Godwin for defendant.

CLARK, C. J. This action was begun 13 September, 1913, by the plaintiff Floyd against the defendant Layton, president of the defendant Floyd Company, and said Floyd Company, alleging that said Layton had converted to his own use the entire assets of the company, which is consequently insolvent, asking for a receiver for said company to wind up its affairs and possession of its assets by said receiver, and for judgment against the defendant Layton for $1,000 loss sustained by the plaintiff in the destruction of his share in the capital stock. The George M. Floyd Company was thereafter adjudged bankrupt and George K. Grantham was appointed trustee in bankruptcy, who has qualified as such, and on his own motion has been made a party plaintiff in this action. In his complaint he reiterates the allegations of the complaint, already filed by his coplaintiff, that Layton has converted to his own use the assets of the company, and asks judgment for $6,000 to recover the full capital stock of the company.

The defendant Layton demurs to the complaint of Grantham, trustee, on the ground that the court had no authority to permit said trustee to become a party to this action; that this action was begun by George M. Floyd, not as a creditor, but as a stockholder of the defendant company, and that the original plaintiff, George M. Floyd, is not a creditor of the defendant company and is seeking to recover, not against the bankrupt company, but against the defendant Layton individually, and that it is a misjoinder both of parties and of causes of action to join the receiver of the company, who is suing to recover the whole amount of the capital stock, $6,000, and the original plaintiff, Floyd, who is suing to recover only the value of his stock against the defendant Layton.

The defendant company, which has been adjudged a bankrupt, is only a nominal defendant, against whom neither plaintiff asks judgment. In the original action in the complaint filed by Floyd he asked no judgment against the corporation, but merely to have a receiver appointed, which has become unnecessary by reason of the subsequent adjudication in bankruptcy. The complaint filed by George M. Floyd alleges the embezzlement of all the assets by Layton, the president of the company, and asks judgment against him for the value of his stock, $1,000, which has been made worthless. The complaint of the trustee in bankruptcy, Grantham, who has been made party plaintiff by leave of the court, makes the same allegation that Layton has embezzled all the funds of the corporation, and asks for a judgment of $6,000 to recover all the capital of the company which has been thus destroyed by Layton. It is, therefore, the case of an action by one stockholder, which by leave of the court has been broadened into an action by him and all the other stockholders as well (who could have been made additional parties, but who are now represented by the trustee in bankruptcy), for the same pur-

pose, of holding Layton liable for converting to his own use all the assets of the corporation. This was within the discretion of the court, and there was no reason that another summons should be issued, and that two actions should be maintained for the same cause, *i. e.*, the alleged embezzlement of the capital stock by the defendant Layton.

The trustee, under the Bankrupt act, secs. 70 (4) and 70 (6), is charged with the duty of collecting all the assets of the bankrupt, whether due by contract or withheld by the embezzlement thereof by one of its officers or others.

There is no misjoinder of parties. If the corporation was a going concern, it might have brought this action; but, being under the control of the defendant Layton, it would not do so, and was made a nominal party defendant. The plaintiff Grantham having been appointed trustee in bankruptcy, represents the creditors and stockholders, and is therefore a proper party plaintiff to recover wasted assets. It was his duty to bring this action, which is an action of the same nature, and upon the identical allegation of the embezzlement by Layton of all the funds set out in the complaint in the pending action. It was very proper, to avoid multiplicity of actions, that said Grantham, trustee, should be joined in the action already pending. If recovery is had by the trustee, the bankrupt court will by proper decree apportion the net proceeds brought into that court by the trustee as a result of this action to the creditors and stockholders. The original plaintiff could not proceed to recover the assets for his sole benefit after the decree in bankruptcy and the appointment of a trustee therein.

The other stockholders could have been made additional parties plaintiff, and, of course, so could the trustee in bankruptcy, who represents the stockholders as well as creditors. The objection that the judgment in favor of the stockholders against Layton for embezzlement would not be released by a discharge in bankruptcy is not a ground of demurrer for Layton. Indeed, if the trustee recovers such judgment, it is no more released by such discharge than if recovered by the stockholders themselves.

Affirmed.

H. H. POE v. W. F. SMITH & CO., R. R. LENNON, ET ALS.

(Filed 20 September, 1916.)

1. Mortgages—Release of Lien—Deeds and Conveyances—Fraud—Evidence.

A release by deed or otherwise by the mortgagee of his lien upon lands sold by his mortgagor to another does not furnish any evidence *per se* that he participated in the fraudulent representations of his mortgagor in procuring the sale, or in such representations made by his own attorney acting independently of him.

2. Appeal and Error—Instructions—Record.

Where the charge of the lower court is not set out in the record, it is considered on appeal as having been a correct exposition of the law.

3. Deeds and Conveyances — Fraud — False Representations — Evidence—Values.

Where a deed is sought to be impeached on the ground that it had been procured by false and fraudulent representations made to the purchaser of the land, that it had been sold to another party at a profit, and that the purchaser would immediately make a profit from the transaction, evidence that an unaccepted bid had theretofore been made at a much less sum at a foreclosure sale under a mortgage is not material, and its exclusion by the trial court is not erroneous.

4. Deeds and Conveyances—Fraud—Burden of Proof—Correction.

Where a deed is sought to be set aside for fraud in its procurement, the burden of proof is not on the plaintiff to show the fraud by clear, strong, and convincing proof, as where a deed is sought to be corrected or reformed, but only by the preponderance of the evidence.

5. Deeds and Conveyances—Contracts—Pleadings—Statute of Frauds.

Where the plaintiff alleges that the defendant induced him to purchase a tract of land for $5,500 by false and fraudulent representations that he had sold it to another for $7,000, and would repay him $6,100 in this deal, and that he is able, ready, and willing to comply with his contract to convey the land upon receiving the purchase price of $6,100 agreed upon, and demands a recovery thereof: *Held*, the action is upon the contract to convey the land, and not for the profits thereof, and the contract is governed by the statute of frauds, requiring that the contract be in writing, etc. *Brown v. Hobbs*, 147 N. C., 73, cited and distinguished.

CIVIL ACTION tried before *Devin, J.*, and a jury, at November Term, 1915, of HARNETT.

The plaintiff declared on two causes of action, in the first of which he alleged that he was induced to buy certain land in Columbus County by the false and fraudulent representations of the defendants R. B. Lennon, W. F. Smith Company, and Hiram Baggett, for the price of $5,500, on which he paid $1,500, and for the balance of $4,000 gave his two notes, each for $2,000, secured by mortgages; and, in the second, he alleged that Hiram Baggett, for himself and his codefendants, had agreed to buy the land from plaintiff, or take it off his hands, at $6,100,

which would yield to plaintiff a profit of $600, as he, Hiram Baggett, had contracted to sell it to another at $7,000.

The following portions of the testimony and record will sufficiently show the nature of the contentions and matters in controversy.

Plaintiff testified in his own behalf: "In the latter part of the year 1912 I had sold my farm and moved to Lillington. I was interested in buying some farm land. I saw an advertisement in the newspapers of some land in Columbus County for sale by Mr. R. B. Lennon, who was then merchandising in the town of Lillington. I called to see him with reference to this land, and as a result of the conversation we made an appointment and went to Columbus County together and looked over the property. He priced the property to me at $6,500. We spent two nights and one day at Evergreen investigating the property. Mr. Lennon was so closely associated with me that I did not make much inquiry from other people as to the property. I declined to buy the property at his price, but on our way back, while stopping over at Elrod, he agreed to reduce the price to $5,500, provided the W. F. Smith Company, of Fayetteville, who he said held a mortgage on this property and some other for $6,500, would consent to the sale and join with him in the deed. I agreed to buy an option on the land at the price of $5,500 for twelve months. We arrived in Fayetteville after night, and early next morning Mr. Lennon called Mr. Smith, of the W. F. Smith Company, and asked him to come down to the station to meet us before the departure of our train for Lillington. Mr. Smith agreed that the sale at $5,500 would be satisfactory to the W. F. Smith Company, provided the payments were made to them, and that he would stand by whatever trade Lennon made. Upon our return to Lillington, I drew an option on the property for twelve months and Mr. Lennon signed it. I paid him $11 for it. Later I wrote Mr. Lennon a note that I did not think I would take the property, and he might consider himself released from his option. Soon thereafter the defendant Hiram Baggett came to me and asked if I expected to take the Lennon property. I told him that I had not investigated the property sufficiently to buy it, and I would not buy it without further investigation. A few days afterwards I saw Mr. Baggett again, and he asked me at what price I had gotten an option on the Lennon property, and I told him at $5,500. He expressed great surprise, and said that he had taken an option from Lennon, also, but that his option was for $6,450. He asked if my option was recorded, and said that he had sent his for registration, but showed me a copy of it. Mr. Baggett said he was buying the land for another man, and had it sold for $7,000; that his man did not have the money to get."

Q. "What proposition did Mr. Baggett make you with reference to buying the land and any disposition of the land thereafter?"

Defendant objects. Overruled. Exception.

A. "He told me that he would take the land, and there was an agreement drawn up, but never signed. I drew up the agreement and came downtown to sign up, and did not find him. I got up with him finally two or three times, but the agreement was never signed, and when we came to the day of trade with Lennon, Mr. Baggett said I might rely upon his word, and I did not think but what he was ready to take it at once. I was to get $600 profit between my option and his price to me. I asked him if he was thoroughly satisfied with the value and with the title, and he said he was; that the land was worth more than $7,000, and he was selling it for that price. I was not to pay any cash. The first payment of $1,500 was to be deferred one month to give time for the deal to be closed. About a month thereafter, to wit, on or about 26 May, 1913, I met with R. B. Lennon, and Mr. W. F. Smith of the W. F. Smith Company, and a Mr. Pond of said company, at the office of Messrs. Baggett & Baggett, of which firm Hiram Baggett was a member, but who was not present at that time, and a deed was prepared and executed by R. B. Lennon and wife and the W. F. Smith Company, conveying to me the land in question, and I thereupon executed and delivered my note for $1,500 due 1 July, 1913, payable to the W. F. Smith Company, which was secured by a mortgage on a house and lot in Lillington, and two bonds in the sum of $2,000 each, payable to W. F. Smith Company, one due 1 January, 1914, and the other due 1 January, 1915, they being secured by a mortgage on the land in controversy. On that day Hiram Baggett told me that he would go to Columbus immediately and close up his deal, conveying the land to his purchaser at $7,000. On the 27th of May I received a letter from said Baggett, dated Evergreen, 27 May, 1913, as follows:

"'I tried to see you before I left home yesterday in regard to the property here. I think my party is going to fall down on taking it. He says he don't think he will purchase at the price. I will let you know certainly when I get home. 'Respectfully,

'H. BAGGETT.'

"Thereafter I received from said Baggett a letter, dated Hot Springs, Ark., on 6 June, 1913, as follows:

"'MR. H. H. POE,
Lillington, N. C.

"'DEAR SIR:—My parties have refused to take the Lennon land. I did not receive this notice until I got here yesterday. I thought it my duty to inform you, so you could dispose of it to the other parties. I hope you can do as you said—get more out of it than my option was for. My option was good until the 15th, but I release any claim on the land by reason of the option. 'Respectfully,

'H. BAGGETT.'

"The reference in said letter to a conversation of mine in which it was suggested that I had said that I could get more out of it than this option was a conversation that I had with him immediately after we had closed our contract, in which I told him that R. B. Lennon told me not to sell at the price at which Baggett had agreed to take it off my hands, for I could get more from another party. This conversation I had related to Baggett, and told him that he might investigate.

"After Mr. Baggett's return from Hot Springs I approached him about the matter, and asked him what was the trouble, and he said that his man had fallen down on getting the money. I asked him to give me the man's address, and he said he would turn over his correspondence. He said that he could not find it right then, but would look it up. I asked him to give me the man's name and address, and he replied that he would get up the correspondence, and put me off that way.

"Prior to the sale R. B. Lennon told me the two houses in Evergreen would rent for $8 or $10 per month; but upon investigation after the purchase, I found they were renting for $3 or $4 per month. I do not consider the land was worth exceeding $2,500 at the date of my purchase.

"I paid to the W. F. Smith Company, through their attorneys, Baggett & Baggett, my note for $1,500 in installments as follows: $400 on 23 July, 1913; $170 on 13 August, 1913; $956.79 on 11 September, 1913."

There was other evidence on the part of the plaintiff tending to show the value of the lands in question as from $3,360 to $3,798 at the time of the conveyance to the plaintiff.

The option of R. B. Lennon to Hiram Baggett was introduced in evidence, showing that it was registered 26 May, 1913, and that it expired on 15 June, 1913.

At the conclusion of the plaintiff's evidence there was motion on the part of W. F. Smith Company for judgment of nonsuit. Motion allowed, and plaintiff excepted.

The defendants Lennon and Baggett offered testimony tending to contradict the material testimony of the plaintiff and to show that the land was worth from $5,500 to $7,000 at the time of the sale, and the defendant Baggett testified, in explanation of his option not being registered at the time he told Poe that it had been sent on for registration, that he had sent the same down for registration, but that it was held in the office for payment of fees until the 26th of May, when, the fees having been paid, it was actually registered.

Defendant Baggett denied that he had agreed to buy the land for $6,100 or at any other price, or that he had sold the land at $7,000, saying that he did tell Poe that he had a prospective purchaser for the land, and that he thought he could sell it to him at $7,000. Mr. Baggett further testified that he asked Mr. Poe, in the event he purchased the

land, if he would be willing to extend the time of the option which Lennon had given to Baggett. Poe declined to do this, but said he would give Baggett one-half of all he could sell the land for above $6,500.

The plaintiff offered to prove that the land had been sold at public auction by the W. F. Smith Company, under its mortgage from Poe, in February, 1914, and that the highest bid was $1,800. This was after the suit involving the title to the property had been commenced, and the offer was made on the cross-examination of defendant's witnesses, after the motion of W. F. Smith Company for a nonsuit had been sustained. This evidence was excluded by the court, and plaintiff excepted.

At the conclusion of the plaintiff's evidence defendant Hiram Baggett moved for a nonsuit as to himself, upon the plaintiff's second cause of action, as set forth in his supplementary complaint. His Honor stated at the time that he would reserve his ruling upon this motion, and, at the conclusion of all the evidence, the motion was renewed and the court sustained it, on the ground that the alleged contract on the part of the defendant Hiram Baggett, to take the land off the plaintiff's hands at $6,100, or at a profit of $600 to the plaintiff, was not in writing, and could not, therefore, be enforced, to which ruling of his Honor plaintiff excepted.

The jury returned a verdict as follows upon the issues submitted by the court:

1. Did the defendant Hiram Baggett, by means of false and fraudulent representations, procure the plaintiff to purchase the lands as described in the complaint? Answer: "No."

2. Did the defendant R. B. Lennon, by means of false and fraudulent representations, procure the plaintiff to purchase the lands as described in the complaint? Answer: "No."

3. If so, what damages, if any, has plaintiff sustained by reason thereof? (Not answered.)

E. F. Young, Clifford & Townsend, and B. C. Beckwith for plaintiff.
Sinclair & Dye and Ray for defendant Lennon.
E. G. Davis for Smith Company.
Charles Ross for Baggett.

WALKER, J., after stating the case: The nonsuit as to the W. F. Smith Company was properly allowed. It held a mortgage on the land, and in order that plaintiff might acquire a good and unencumbered title to the land from Lennon it was necessary that the Smith Company should either release its security, or lien upon it, or join in the conveyance; but we can see nothing in the record which tends to connect it with any fraudulent transaction in connection with the matter. The

Smith Company merely agreed to the sale and conveyance to plaintiff subject to their prior lien, and received the first payment of $1,500, in reduction thereof; but there is no evidence to show that they knew of any representations by Lennon or Baggett, false or otherwise, and the jury have found that there were none. If Lennon and Baggett committed no fraud, how can it be said that the Smith Company did? If Baggett was the attorney of the Smith Company (as contended by plaintiff), and anything he said or did to the injury of the plaintiff is to be imputed to that company, as his principal, the jury having acquitted him of all wrong, it follows, of course, that there is nothing to impute to the company. The jury have simply found the facts upon disputed testimony in favor of the defendants. But we find no evidence in the record upon which the Smith Company can be made liable to the plaintiff for any false or fraudulent representations if such had been made by Lennon or Baggett.

As to the defendants Baggett and Lennon, the verdict is, upon conflicting evidence, that the allegations of the plaintiff as to false and fraudulent representations are not true, and, as to this feature of the case, the plaintiffs have utterly failed. The charge of the court is not in the record, and there is no exception taken to it. It stands, therefore, unchallenged by the plaintiff and as a correct exposition of the law applicable to the evidence. This, of course, reduces the case, thus far, to a pure issue of fact, which has been settled against the plaintiff.

We do not see how the exclusion of the evidence as to the bid at the sale under the mortgage held by the Smith Company was prejudicial to the plaintiff, if it was competent and offered by him in due time. If admitted, it would not have turned the scales in favor of the plaintiff upon the issues as to whether false and fraudulent representations had been made by Lennon and Baggett. In the aspect of the case then presented, it would not have aided the jury in deciding the vital question as to the alleged representations. If Lennon and Baggett had dishonestly and intentionally misled and deceived the plaintiff by false statements, which induced him to enter into the contract, he would be entitled to the relief demanded by him without regard to the value of the land, for the alleged fraud did not depend upon value so much as it did upon the fact whether the representations had been made and were false, so as to lead the plaintiff to do what otherwise he would not have done. Value is sometimes competent to be considered, and may be a very important element in certain cases of fraud, but not here, in the light of this evidence. The Smith Company had been dismissed from the case when this evidence was offered.

It is not a correct proposition, though, as contended by the defendants, that plaintiff must establish his allegation of fraud, in a case of this kind, by clear, strong, and convincing proof, but only by a pre-

ponderance of the evidence. *Ray v. Patterson,* 170 N. C., 226; *Harding v. Long,* 103 N. C., 1; *Avery v. Stewart,* 136 N. C., 426; *Glenn v. Glenn, ibid.,* 729; *Lamb v. Perry,* 169 N. C., 436.

This is an action brought for the purpose of setting aside a deed for fraud, and not to correct or reform a written instrument or to establish a parol trust. The distinction between the two classes of cases is based upon the difference in the presumption of the law arising in each. A fraud is not presumed, except where there is some confidential or peculiar relation between the parties, not necessary to mention, as it does not exist here. The law, therefore, requires that he who alleges fraud must prove it; but it does presume that the writing of the parties truly expresses their agreement; and for that reason, when an attempt is made to vary it, or to reform it, the party who seeks to do so must take the laboring oar and satisfy the jury of the mistake in the writing by stronger proof than is ordinarily required in civil cases; in other words, by proof clear, strong, and convincing. *Lehew v. Hewett,* 138 N. C., 6; *Lamb v. Perry, supra; Perry v. Ins. Co.,* 137 N. C., 402; *Ray v. Patterson, supra.*

The only serious question in the case grows out of the second cause of action set up in the supplemental complaint, where it is alleged that Hiram Baggett agreed "to take the land off of plaintiff's hands at the price of $6,100, or a profit to the plaintiff of $600." Plaintiff's intention to charge by this language that Baggett had agreed to buy the land from him for $6,100 is fully evidenced by subsequent allegations of the complaint, especially the fifth paragraph of his complaint, and the prayer for judgment, which are as follows:

"That the plaintiff stands ready and willing to comply with and carry out the contract with the said Hiram Baggett, and to convey the land to the said Hiram Baggett or to him and his codefendants upon payment to plaintiff by him or them of the purchase price agreed upon, to wit, $6,100, and interest on the same from 16 May, 1913.

"Wherefore, plaintiff demands judgment that he recover of the defendants the sum of $6,100, with interest from 16 May, 1913."

The words, "and to convey to the said Hiram Baggett or to him and his codefendants, upon payment to plaintiff by him or them of the purchase price agreed upon," manifestly show that plaintiff was suing upon a contract to convey land, and not upon one merely for the division of the profits of a sale of the land to another, and the prayer for judgment extends to the entire amount of the price of $6,100, and is not restricted to the amount of the profit of $600. This being so, the case is governed by the principle that the statute of frauds requires the contract to be in writing and to be signed by the party to be charged or by his duly authorized agent. Revisal, sec. 976. As it is sought to charge the defendant Baggett upon this contract, he is protected by the statute. *Mizell*

v. Burnett, 49 N. C., 249; *Green v. R. R.,* 77 N. C., 95; *Miller v. Monazite Co.,* 152 N. C., 608; *Brown v. Hobbs,* 154 N. C., 544.

This was not an executed sale, where the deed, under the contract to convey, had been made to Baggett, with a promise that upon a sale of the land to another he would divide the profits with the plaintiff, as in *Brown v. Hobbs,* 147 N. C., 73. The plaintiff, therefore, has failed to show a case within the principle decided in *Brown v. Hobbs, supra,* or *Michael v. Foil,* 100 N. C., 78; *Little v. McCarter,* 89 N. C., 233, and the cases cited in *Brown v. Hobbs,* 147 N. C., 73, and 154 N. C., 544. The promise here is not collateral to an executed contract of sale, but the agreement to sell and the reciprocal promise to buy are still executory in form and substance. As said by *Savage, C. J.,* in *Hess v. Fox,* 10 Wendell (N. Y.), 436, "No question can arise on the validity of the agreement to sell. That was performed, and the remaining part was to pay over money, supported by the consideration of land conveyed to the promisor."

The rulings of the court are approved by us.

No error.

J. B. COLLIER ET ALS. v. HALIFAX PAPER CORPORATION ET ALS.

(Filed 20 September, 1916.)

1. Tenants in Common—Partition of Lands—Oral Partition—Acquiescence—Estoppel.

An oral partition of lands among tenants in common is not void, but voidable, and evidence is admissible to show ratification of the partition or conduct from which the parties seeking to disregard it should be held estopped from so doing.

2. Same—Lapse of Time.

Where parties seeking to avoid an oral partition of lands have lived on the portions allotted to them and peaceably and continuously accepted it for twenty years or more, they are estopped to deny its validity.

3. Same—Executors and Administrators—Donees of Power—Married Women.

Where the testator has conferred upon his executors the power to partition his lands among certain of his beneficiaries, they act, in making the partition, *sui juris,* as donees of such power, and where they have made an oral partition, the statute of limitations begins to run from its date, notwithstanding the fact that one of the parties was a married woman.

4. Same—Estates—Tenants for Life—Remaindermen.

A testator devised his lands to two of his daughters for life, and at their death to their children, upon certain contingencies, the lands to

be divided among the life tenants by the executors, who accordingly exercised the power, without writing, except that maps of the division were made by surveyors employed for the purpose. Each of the life tenants entered into and remained in possession of the lands allotted to her, respectively, for twenty years or more. *Held*, the life tenants, by their conduct, are estopped to deny the validity of the partition, which is binding upon their children and those claiming under them.

APPEAL by plaintiffs from *Stacey, J.*, at April Term, 1916, of NORTHAMPTON.

W. L. Knight and Peebles & Harris for plaintiffs.

G. E. Midyette, George C. Green; Mason, Worrell & Long, and W. E. Daniel for defendants.

CLARK, C. J. Henry Garner devised a certain tract of land to his daughter Sarah, wife of W. W. Lee, and his daughter Elizabeth, wife of W. H. Collier, "to be equally divided between them, to their use during their natural life, and at their death to their children. If either of my said daughters should die leaving no children, then the share of the one so dying to be divided equally between the children of the other, if any. If my said daughters, Sarah J. Lee and Elizabeth R. B. Collier, should die leaving no children, then the property loaned to them to go to their next of kin," and appointed them his executors.

The will was probated 31 July, 1876, and on 5 August, 1876, said executors divided said tract between them, employing the county surveyor to make a survey of the division, which appears in the record. There was no writing, unless the adoption of this plat could be so considered, and no order of court. This partition proving unsatisfactory to the parties, the executors made another division 10 March, 1877, employing a surveyor, who made a new plat, which is in the record, showing a change in the dividing line by adding to the part allotted to Mrs. Lee 40 or 45 acres. Mrs. Lee remained in possession thereof up to her death, 17 June, 1904, leaving surviving her heirs at law, under whom the defendants claim by mesne conveyances. The defendants and those from whom they purchased are and were in sole and exclusive possession claiming under said deeds and partition since 1877.

Mrs. Collier died 4 February, 1909, leaving surviving her three children, who are the plaintiffs in this action. It is true that at the time of both surveys Mrs. Collier was a married woman, but the partition aforesaid was made by the executors under the power conferred by the will, and they acted *sui juris* as donees of such power. Mrs. Collier and those claiming under her have been in continuous and exclusive possession since aforesaid partitions now nearly forty years. A parol partition is not void, but merely voidable.

It is not necessary to pass on the point whether the plat made by the

surveyors at the instance of the executors when they executed the power, conferred by the will, to make partition, and which plat was adopted by them, takes this out of the class of parol partitions. The partition is valid, since it has been acquiesced in for more than twenty years.

Treating this as an oral partition, "Any evidence is admissible which tends to show either ratification of the partition or conduct from which the parties seeking to disregard it are held to be estopped from so doing." 30 Cyc., 164.

These executors did not exercise the power hastily, but deliberately. Having made one partition in August, 1876, and one of the parties at least being dissatisfied with the partition, they made another in March, 1877, on both occasions employing a surveyor and adopting the plat drawn by them. Such partition gave them during their lives the use of the land, and it would be binding upon their children, for they were executing a power conferred by the will under which the allotment to each was to descend to their children, in the event that they had children, as they did. "A power must be executed in strict accordance with its terms; but where no mode is prescribed, or where the manner of execution is left to the discretion of the donee, he may execute it in any manner which will legally effectuate the intention of the donor." 31 Cyc., 1115.

There is no allegation of mutual mistake or fraud in the complaint, and if there was inequality in value of the lands allotted to the respective life tenants by the partition, they alone could complain of it. "Where a power is personal to the donee, it cannot be exercised by the heirs." 31 Cyc., 1111.

The plaintiffs and defendants have been in undisputed possession of the tracts as allotted by the executors, in execution of the power, in 1877. In *Rhea v. Craig,* 141 N. C., 602, it is said: "Where, after a parol partition between the tenants in common, who severally took possession, each of his part, and have continued in the sole and exclusive possession for twenty years without making any claim or demand for rents, issues, or profits by any of them upon the others, but recognizing each other's possession to be of right and hostile, the law will presume an actual ouster and a supervening adverse possession, as much so as where the possession was of the whole instead of a part only."

In *Love v. Love,* 38 N. C., 104, the Court held that while a distributive share in an estate consisting of slaves should be assigned by writing in the same manner the slaves should be, yet after the delivery of the slaves to the donees to divide them and subsequent possession by each of the parties for nearly thirty years, this possession would be an estoppel.

It must be noted here that the executors were donees of a power to divide this realty "between themselves," and "the share" of each to go

to her children. The respective shares would pass to the children, not by the allotment to them, but the division was made between the life tenants—the children succeeding to the shares so allotted. The life tenants having held more than twenty years, either would have been estopped to claim against the other, and their children hold the respective shares in the same plight. The statute began to run from the date of the execution of the power in 1877.

There is less cause of complaint in this case, for the reason that the plaintiffs, including the life tenant, through whom they claim, on 10 January, 1896, conveyed by deed pine timber on land which is a part of the tract allotted to their mother, thereby receiving the consideration from the sale of an interest in said realty. This was a ratification by them, if there was any necessity for such ratification. Also, the other life tenant, on 31 July, 1897, conveyed certain timber on the land allotted to her, her living children and the representative of her grandchildren joining in the deed. Thus there has been a ratification by both parties and a mutual estoppel. However, the lapse of twenty years was a sufficient estoppel on both parties, even if this is deemed a parol partition, notwithstanding the adoption by the executors of the plat made for them by the surveyors in making the partition above set out.

Affirmed.

GEORGE M. HOLLEY v. W. P. WHITE ET ALS.

(Filed 27 September, 1916.)

Partition of Lands—Sales—Lienors—Parties—Appeal and Error.

In proceedings to sell lands for partition among tenants in common, judgment creditors of the individual tenants, and their mortgagees, having liens on the lands to the extent of their interests, are proper parties to the proceedings; and where such lienors have been made parties thereto, and the trial judge has dismissed the action as to them, it is reversible error. The distinction between proper and necessary parties pointed out by BROWN, J.

PETITION for sale for partition, heard by *Stacey, J.*, at February Term, 1916, of BERTIE.

The court being of opinion that certain judgment creditors and mortgagees, who held liens upon the undivided land, were improperly made defendants, dismissed the action as to them. To this ruling the plaintiff excepted and appealed. The court then decreed a sale of the land for partition among the tenants in common, all of whom are parties.

John W. Davenport for plaintiff.

J. B. Martin, Winborne & Winborne for defendants.

BROWN, J. The plaintiff owns two-ninths of the land and the other tenants in common one-ninth each. Certain of these latter have executed mortgages on their undivided interests, and judgments have been docketed against others constituting liens on their respective shares. The decree for the sale of the land is acquiesced in by all the tenants in common, and the only matter for review is the propriety of dismissing the action as to the mortgagees and judgment lienors.

It is true, we decided in *Jordan v. Faulkner,* 168 N. C., 466, that judgment creditors of a tenant in common are not necessary parties to a partition proceeding, but we have nowhere held that they are not proper parties. There is a recognized distinction.

If they are not parties, the purchaser buys subject to such liens. The fact that a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. *Kelly v. McLeod,* 165 N. C., 385. His share of the proceeds of the sale will be reserved and his homestead right therein protected by a proper decree.

The point presented here was not decided in *Jordan v. Faulkner, supra.* In that case some of the tenants in common filed the petition for partition, making the other tenants in common defendants. One of these defendants had judgment creditors, but they were not made parties defendant by the petitioner. A sale was ordered, and the judgment creditors became the purchasers, and then interpleaded, asking that they be allowed to retain such part of the purchase money from the share of this tenant in common as would satisfy the judgment, or protect their rights therein. The Court simply holds in the opinion that they cannot interplead after judgment; that they purchased the lands with knowledge of the docketed judgments, buying the rights, title, and interest of said defendant, and cannot then come in and interplead and protect themselves. The judgment creditors not being parties to proceeding, only such interest as belonged to the parties has passed at the sale.

That case is, therefore, no authority for the position that mortgagees and other lienors may not be made parties. It may be very advisable to do so in the inception of the proceeding, so the purchaser may acquire an unencumbered title. Such course undoubtedly tends to enhance the price of the land. Intending purchasers will likely bid more for property when they know they are getting a perfect title freed from all encumbrances, the amount of which they probably do not know. The better practice undoubtedly is to make all mortgagees and lienors parties in foreclosure and other proceedings wherein land is to be exposed to a judicial sale.

The reasons are well stated by *Justice Walker* in *McKeel v. Holloman,* 163 N. C., 134: "The Code provides that any person may be made a party who has or claims an interest in the controversy adverse to the

plaintiff, or whose presence is necessary to a complete determination or settlement of the questions involved therein, and any person claiming title or right of possession to real estate may be made a party, as the case may require, to any such action. Revisal, sec. 410. It would be strange if it were not so under our wise and liberal system of procedure, which seeks to settle all controverted matters in one action and without circumlocution; and, further, it is better for all parties concerned that it should be so, in an action of this kind, in order that a good title to the land may be sold, as it secures a better price."

While it is not necessary to make such lienors defendants in this proceeding, the plaintiff had a right to do so, and the court erred in dismissing the proceeding as to them.

Error.

W. H. BURWELL v. COOPERS CO-OPERATIVE COMPANY.

(Filed 27 September, 1916.)

Landlord and Tenant—Contracts—Option of Purchase—Liens—Statutes.

Where the owner has entered into a written contract to rent his land at a stated price per annum, the relation of landlord and tenant is not changed to that of vendor and purchaser or disturbed by the fact that, under the further terms of the contract, the other party had an option to purchase the lands upon making a certain additional payment, time being of the essence of the contract entered into, which he has not exercised; and as landlord, the owner may enforce his statutory lien for a part of the rent remaining due him.

APPEAL from a justice of the peace, heard by *Stacey, J.*, at May Term, 1916, of VANCE.

At the conclusion of the evidence, the motion to nonsuit was sustained. The plaintiff appealed.

Tasker Polk and T. T. Hicks for plaintiff.
B. H. Perry and A. C. & J. P. Zollicoffer for defendant.

BROWN, J. This action is brought to recover $175 which the plaintiff alleges is due him by one P. C. Arrington, his tenant, for rent for the year 1915 for a certain farm. The evidence tends to prove that the said Arrington occupied the farm during the said year, cultivated a crop of tobacco and sold the same to the defendant; that he failed to pay the plaintiff the alleged rent, and plaintiff seeks to recover it of the defendant under the lien given to landlords.

The defendant denies that Arrington was the tenant of the plaintiff, averring that the relation of vendor and vendee existed between them. The question is to be determined by the written contract between the

plaintiff and the said Arrington, dated 1 December, 1914. This contract provides that the plaintiff, "In consideration of the execution of the rent note in the sum of $250 by the party of the second part to W. H. Burwell, one of the parties of the first part, being for the rent of the place hereinafter described for the year 1915," etc., gives to Arrington an option on the place until 1 December, 1915, to purchase it at a stipulated price mentioned in the agreement.

In several places in the agreement the $250 note is described as the rent which Arrington is to pay for the place for the year 1915. In case the said Arrington paid the said note in full, and made additional payments set out in the contract, then the parties of the first part agreed to make him a deed for the property. There is no evidence that any payments were made by Arrington, except about $75 on the rent note. A similar contract was entered into between the parties in preceding year for the year 1914.

His Honor thought that this agreement created a relation of vendor and vendee, and that the plaintiff could not enforce his lien as landlord against the tobacco in the hands of the defendant. In this we think there is error. It has been expressly held that where land is sold on credit, and a mortgage is executed by the vendee to the vendor to secure payment of the purchase money, the vendor, as mortgagee, has the right of possession, and that it is competent for the parties to contract that the possession shall be held by the purchaser until payment is made, and that in consideration thereof the relation of the parties shall be that of landlord and tenant. In such case the landlord's lien for rent takes priority of a mortgage for advancements. *Crinkley v. Edgerton,* 113 N. C., 445.

Although that decision was not by a unanimous Court, it has been subsequently affirmed and acted upon in a number of cases, cited in the annotated edition: *Jones v. Jones,* 117 N. C., 254; *Ford v. Green,* 121 N. C., 70; *Ewbanks v. Becton,* 158 N. C., 238; *Hawser v. Morrison,* 146 N. C., 252; *Hicks v. King,* 150 N. C., 371.

The case at bar is much stronger than any of those which we have cited. The agreement in this case does not create the relation of vendor and vendee, as contract of sale does not appear upon the face of the paper to have been perfected. The effect of the instrument appears upon its face to give to Arrington an option on the place, and a definite time is fixed within which he has to exercise his right. It is expressly provided that time shall be of the essence of the contract. Under such conditions we see no reason why it was not competent for the parties to occupy the relation of landlord and tenant towards each other pending such period.

New trial.

J. A. STEWART v. W. A. STEPHENSON.

(Filed 27 September, 1916.)

1. Limitation of Actions—Adverse Possession—Pleadings—Deeds and Conveyances.

Where the question of title to lands depends upon the true divisional line between the parties to the action, adjoining owners, and each has introduced a grant from the State to their lands respectively, which, taken together, cover the *locus in quo;* and the plaintiff has introduced evidence tending to show that he has had open and continuous adverse possession of the lands under known and visible metes and bounds for more than twenty years, it is sufficient to sustain a charge of the court to the jury as to his title by adverse possession, Revisal, secs. 383, 384; and where the plaintiff has sufficiently alleged general ownership of the *locus in quo*, he is not confined to the location of such line under his grant, for he may avail himself of any source of title that he may be able to establish by his testimony.

2. Deeds and Conveyances—Evidence—Surveyor's Notes.

Where the plaintiff, in his action to recover lands, relied upon a grant from the State as sufficient paper as well as color of title, the notes of a surveyor, since deceased, made by him while on the land surveying it for the purpose of taking out the grant, are competent evidence when relevant to the question of the correct location of a boundary line in dispute between the parties to the action. *Ray v. Castle*, where the surveyor's notes were not shown to have been "original and contemporaneous," cited and distinguished.

CIVIL ACTION to recover damages for an alleged trespass on real estate, involving also an issue as to title, tried before *Devin, J.*, and a jury, at September Term, 1915, of HARNETT.

Plaintiff claimed and offered evidence tending to show that he owned a tract of land lying in said county, and that the true dividing line between himself and defendant was a "zigzag" line of various courses and distances "along the southwest side of Black River Swamp" and designated on the surveyor's plat from 1 to 14; that defendant had wrongfully entered and cut timber on said land, and that the damage done to plaintiff's land was from $200 to $300. In support of his claim, plaintiff, among other things, offered in evidence a grant from the State to plaintiff, bearing date in March, 1881, the call of said grant along the line in dispute being: "To a small gum, the old Atkins corner, thence, as the old Atkins line, down the various courses of the southwest side of the river swamp, about 116 chains, etc., to a stake where formerly stood a red oak, the beginning corner of the Atkins survey," etc. He further offered evidence tending to show that the line of said grant was run by Captain Greene (now dead) just prior to taking out the grant, and with the view of doing so, and that said survey was run along

the southwest edge of the swamp, and as plaintiff now contends the true line to be.

Plaintiff offered in evidence several deeds under which defendant claimed the lands lying west of plaintiff's tract, beginning as early as 1847 and all calling for the southwest corner of Black River Swamp as the eastern or northeastern boundary of defendant's tract, and further evidence that plaintiff had been in the actual occupation of the land under the line as claimed by him, asserting title and exercising acts of ownership thereof, from the date of his grant in 1881 to the time of the alleged trespass in 1912, shortly before suit entered.

Defendant, claiming the John Atkins land, offered in evidence a grant to John Atkins, bearing date in 1789, for 640 acres of land, described as follows: "On the southwest side of Black River, beginning at a red oak on Black River; thence S. 46 chains to a stake; thence W. 80 chains to a stake; thence N. 114 chains to a stake in Black River Swamp; thence down Black River to the beginning corner," agreed by both parties to be the beginning corner of the Atkins line, and contended that the correct location of his land extended to Black River, and did not stop at the southwest edge of Black River Swamp, and offered evidence tending to show continuous possession of the land in dispute between the line 1 to 14 and the river for fifty years next before the alleged trespass by defendant and those under whom he claimed.

The jury rendered the following verdict:

1. Is the plaintiff the owner of the land shown on the map as included within the lines from No. 1 to No. 14? Answer: "Yes."

2. Has the defendant trespassed upon any part of said lands? Answer: "Yes."

3. What damage, if any, is the plaintiff entitled to recover of the defendant therefor? Answer: "$35."

Judgment on verdict for plaintiff, and defendant excepted and appealed.

Charles Ross and D. H. McLean & Son for plaintiff.
Clifford & Townsend and C. L. Guy for defendant.

HOKE, J. Plaintiff alleged his ownership of a tract of land on waters of Black River, and described the same by metes and bounds, in which the southwest call, and the one significant in this controversy, is as follows: "To a small gum, the old Atkins corner; thence as the old Atkins line down the various courses of the southwest side of the Black River Swamp, about 115.40 chains to a stake, etc., represented on the court plat by the line from 1 to 14."

The defendant alleged ownership of the tract adjoining on the southwest, and alleged and offered evidence tending to show that the line was not the true line of plaintiff's property, but that the same was the

main runlet of the river, and termed in the deeds Black River, the *locus in quo* being between these suggested lines.

As appears from the verdict, the jury have established the line as contended for by plaintiff, and, on judgment pursuant to the verdict, defendant resists the validity of the plaintiff's recovery:

"1. Because his Honor charged the jury, in effect, that though the grant of 1881 might not include the land, the plaintiff could recover if the jury were satisfied by the greater weight of the evidence that plaintiff had entered and occupied the land exclusively and continuously for twenty years under known and visible lines and boundaries, asserting title, etc., next before action brought, the objection noted being that the plaintiff was thus allowed to recover land not embraced in his complaint," etc.

The fault of defendant's exception here is that, in his complaint, plaintiff makes no reference to his grant as the source of his title. His allegation of ownership is general; that he owned the land bounded on the southwest by the southwest border of the Black River Swamp, and, this being true, it was open to plaintiff to avail himself of any source of title that he might be able to establish by the testimony. *Taylor v. Meadows,* 169 N. C., 124, and the authorities cited.

There was testimony in support of the position, and both sides claiming and the testimony all showing that title was out of the State, either under one or other of the grants offered in evidence, twenty years occupation was the proper and determinative period. Revisal, secs. 383 and 384.

Defendant excepted, further, that his Honor admitted the field notes of the surveyor, Greene; but this objection, also, must be overruled. The location of the grant to plaintiff around the southwest side of the Black River Swamp was a relevant circumstance on the issue, plaintiff claiming under said grant both as to title and color of title. It was proved that the surveyor was dead, and that these field notes were made by him when he was on the land making the survey for the very purpose of taking out the grant, and the testimony was properly received under our decisions admitting hearsay evidence in questions of private boundary, *Sullivan v. Blount,* 165 N. C., 7; *Lamb v. Copeland,* 158 N. C., 138; *Hemphill v. Hemphill,* 138 N. C., 504; *Yow v. Hamilton,* 136 N. C., 357; and, also, as declarations identified and established as made by the surveyor in the course of his business, *Ray v. Castle,* 79 N. C., 580; Lockhart's Evidence, sec. 143. True, in this last case, the field notes were rejected, but that was on the ground that they were not shown to have been "original and cotemporaneous," both of which circumstances are present here.

There is no error, and the judgment of the court below is affirmed.

No error.

J. J. PRICE, AND OLLIE PRICE BY HIS NEXT FRIEND, D. H. BLAND, v. BOARD OF TRUSTEES OF GOLDSBORO TOWNSHIP.

(Filed 27 September, 1916.)

Municipal Corporations—Road Trustees—Government Agencies—Torts.

A township board of trustees incorporated by the Legislature to maintain and construct the public roads of the township are clothed with duties governmental in their nature and for the public benefit; and while strictly acting in pursuance thereof they are not liable for a pure tort of their employees or agents in inflicting a personal injury upon others, as in this case, by their negligence in leaving explosives exposed, resulting in their being found by young children and set off by them in their play. The distinction between instances in which the injury amounts to the taking of private property and where the primary purpose of a corporation is for private gain is pointed out and distinguished.

CIVIL ACTION to recover damages for alleged negligent injury, heard on demurrer to complaint before *Lyon, J.,* at May Term, 1916, of WAYNE.

There was judgment sustaining demurrer, and plaintiffs, having duly excepted, appealed.

Dortch & Barham for plaintiff.
W. T. Dickinson for defendant.

HOKE, J. The complaint, in effect, alleges that in September, 1915, defendant, incorporated by act of General Assembly, Public-Local Laws 1913, ch. 327, and charged with duty of constructing and maintaining the public roads of Goldsboro Township, Wayne County, were, through their employees and agents, in performance of their corporate duties, engaged in blasting out certain portions of a public road in said township and using for the purpose dynamite cartridges, etc.; that said employees, while so engaged, by reason of a rainstorm suddenly arising, were forced to seek shelter in a barn of one Howard, situate near the roadway, and, on departing from said barn, wrongfully, carelessly, and negligently left therein a box of dynamite cartridges, and later a child of the owner, aged 9, found said box, which had been left "on a sill in said barn in easy reach and plain view," and the contents were distributed among his playmates, who were present with him at the time; that one of these, Ollie Price, aged 10, was endeavoring to open the cartridge given to him, with a pin, when it exploded, causing him serious and permanent injury, etc.

To this complaint, defendant corporation entered formal demurrer for cause, chiefly, that it appeared on face of the complaint that defendant corporation, in so far as connected with the transaction, is a municipal

corporation, a branch of the county government, and engaged at the time in building and grading the public roads, a work purely public and governmental in its nature, and in such case the corporation is not liable for the torts of its employees, agents, etc.

His Honor, being of opinion with defendant, entered judgment, as stated, sustaining the demurrer, and the plaintiffs appealed.

It is the general rule in this jurisdiction that a municipal corporation, when engaged in the exercise of powers and in the performance of duties conferred and enjoined upon them for the public benefit, may not be held liable for torts and wrongs of their employees and agents, unless made so by statute. *Snider v. High Point,* 168 N. C., 608; *Harrington v. Greenville,* 159 N. C., 632; *McIlhenny v. Wilmington,* 127 N. C., 146; *Moffit v. Asheville,* 103 N. C., 237; *White v. Comrs.,* 90 N. C., 437.

A limitation upon the general rule is recognized and established in several of the more recent decisions on the subject when the injury complained of amounts to a taking of private property of the citizen, within the meaning of the term "taking" as understood and defined in administering the rights of eminent domain. See *Donnell v. Greensboro,* 164 N. C., 330; *Hines v. Rocky Mount,* 162 N. C., 409; *Little v. Lenoir,* 151 N. C., 415.

Again, it is held that the general rule, as first stated, does not obtain where the corporation, though partaking to some extent of the nature of a municipal agency and exercising some such powers, is, in its primary and controlling purpose, a private enterprise, undertaken and organized for purpose of private gain. *Leary v. Comrs., ante,* 25; *Southern Assembly v. Palmer,* 166 N. C., 75; *Comrs. v. Webb,* 160 N. C., 594.

There is doubt if the limitation first suggested has been always sufficiently adverted to and observed in some of our cases; but however that may be, there can be no question that, on the facts of this record, the general rule should prevail, it appearing that the wrong complained of was in no sense an invasion of the proprietary rights of plaintiffs or any of them, but a tort pure and simple, perpetrated by defendant's agents and employees, if at all, while engaged in the performance of duties, governmental in their nature and imposed upon and undertaken by defendant corporation entirely for the public benefit.

There is no error, and the judgment of his Honor, sustaining the demurrer, must be

Affirmed.

J. A. PHILLIPS AND C. H. TEAGUE, TRADING AS PHILLIPS & TEAGUE, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 27 September, 1916.)

1. Carriers of Goods—Bills of Lading—Written Demand—Limiting Liability—Reasonableness—Burden of Proof—Trials.

A stipulation in a bill of lading denying the carrier's liability for damages unless written notice of such claim be filed within a specified period is in derogation of the common law, and while it will be upheld if reasonable, the burden of proof is on the carrier to show that it is.

2. Carriers of Goods—Bills of Lading—Stipulations—Interstate Commerce—Federal Courts—Reasonableness.

Where the stipulation in a bill of lading for an interstate shipment of goods, as to the liability of the carrier for damages if written demand has not been made on it for such damages within a specified time, is the subject of the controversy, the question is one governed by the Federal law, and under this, as well as under our State decisions, it is required that to be valid such stipulations must be reasonable.

3. Same—Ten Days—Perishable Goods.

A stipulation in an interstate car-load shipment of perishable goods, such as dewberries, exempting the carrier from liability to the shipper caused by its negligence, unless written claim for damages shall have been filed with its agent at the delivering point within ten days after its delivery, is unreasonable and unenforcible, according to our decisions, and will be so held in the absence of an authoritative ruling of the highest Federal court to the contrary. The effect of the adoption by the carrier of the bill of lading recommended by the Interstate Commerce Commission, containing the four months stipulation, discussed by WALKER, J.

4. Carriers of Goods—Bills of Lading—Written Claim—Requisites.

Where a stipulation in a bill of lading requiring written notice to be given the carrier's agent within a stated time, to enforce a demand for damages to the shipment, is reasonable, it is only necessary that the written claim shall be a plain and intelligible statement of the demand, and not that it be expressed in any particular form.

5. Carriers of Goods—Consignment—Party Aggrieved.

A shipper of goods on consignment may, as the party thereby aggrieved, maintain an action against the carrier for damages caused thereto by its negligence.

CIVIL ACTION tried before *Lyon, J.*, and a jury, at May Term, 1916, of CHATHAM.

Plaintiffs sued for damage to two car-loads of dewberries shipped by them over the defendant's and connecting lines of railways from Cameron, N. C., to Buffalo, N. Y., in June, 1912. They alleged that by reason of negligent delay on the part of defendant and its associate

carriers the berries became mouldy and they could not, on that account, be sold in the Buffalo market for the ruling price at the time of delivery. There was proof of the delay in transportation beyond the usual time and of depreciation of the berries. The bill of lading contained this clause: "Claims for loss or damage shall be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than ten days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event." One of the cars arrived at Buffalo, N. Y., 20 June, 1912, and the other 24 June, 1912, where they were delivered to J. H. Gail, the consignee, the berries having been shipped by plaintiffs on consignment. No claim for damages was filed within ten days after delivery of the goods at Buffalo, but a written claim was filed with the defendant on 6 September, 1912. Plaintiffs notified the defendant's agent at Cameron, N. C., orally, within the ten days after delivery of the berries to the consignee, that they would make a claim for damages.

At the close of all the evidence the court, on motion by defendant, entered a judgment of nonsuit, and plaintiffs appealed.

H. A. London & Son for plaintiffs.
Murray Allen for defendant.

WALKER, J., after stating the case: There was evidence of negligence for the consideration of a jury, and the only question left open is the one as to the validity of the clause in the bill of lading as to filing a claim for damages. The plaintiffs did not comply with this requirement, nor do we think compliance with it was waived by the defendant. The same question practically was presented in *Lytle v. Tel. Co.,* 165 N. C., 504, and it was said there: "A mere casual remark to the agent at Alta Pass that the message had been delayed, and some one would have to pay for it, was in no sense a claim or demand such as is contemplated by the contract. It was not in writing, as required by the stipulation, nor did it give any fair or adequate idea of her claim, being entirely too indefinite. The authorities we have cited, and they seem to be uniform, are clearly opposed to the contention that it is a sufficient compliance with the contract. The cases relied on by plaintiff are not applicable. The facts were not the same as those we have here." Similar stipulations in bills of lading and other contracts have been upheld provided they were reasonable. *Capehart v. R. R.,* 81 N. C., 438; *Mfg. Co. v. R. R.,* 128 N. C., 280. The burden of showing the reasonableness of stipulations in bills of lading limiting the liability of the carrier (where this can be done), or in derogation of the common law, is upon him. *Hinkle v. R. R.,* 126 N. C., 932. It is true that this was an interstate shipment, and is governed by the Federal law; but the highest court in

the Federal jurisdiction has held that while limitations of this sort are permitted, they must be reasonable. That Court said in *Mo. K. and T. Railway Co. v. Harriman,* 227 U. S., 657, 672, in respect to a provision in a bill of lading as to presenting claims: "The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of 29 June, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question, to be determined under the general common law, and as such is withdrawn from the field of State law or legislation. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short," citing authorities. In that case the claim was required to be made within ninety days from the happening of any loss or damage, and was declared to be valid. And it was so held in *Express Co. v. Caldwell,* 21 Wall., 264, where the time limit was the same. In *Railway Co. v. Blish Milling Co.,* 36 S. C., 541, the time fixed for filing claims for damages was four months. The Court held in all those cases that the stipulation was a reasonable one, the Court saying in the last cited case: "The transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily, the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it, even with respect to its own operations." See, also, *Grocery Co. v. R. R.,* 170 N. C., 241.

But we are not aware of any case, decided by the Supreme Court of the United States in which a provision for presenting claims like the one under consideration has been held to be valid, and in the absence of any such declaration by it, controlling the matter, we must decide according to our notion as to the law, especially where the point has

been well settled by precedents in this Court. We simply follow what has before been decided upon the same question. *Mfg. Co. v. R. R.*, 128 N. C., 280, is a very strong condemnation of the stipulation in the bills of lading given to the plaintiff in this case. There the time fixed for filing claims was thirty days after arrival and delivery. If that requirement was void, *a fortiori* those in the bills of lading issued to plaintiff are invalid, as the time limit in the latter is much shorter. The Court said in that case: "The defendant contends that the plaintiff is barred of any recovery on account of the following clause in the bill of lading, to wit: 'Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.' It is now well settled that all such contracts of limitation, being in derogation of common law, are strictly construed, and never enforced unless shown to be reasonable. *Mitchell v. R. R.*, 124 N. C., 236; *Hinkle v. R. R.*, 126 N. C., 932, and cases therein cited. This Court has said in *Wood v. R. R.*, 118 N. C., 1056, that 'such stipulations, contained in a contract, are a part of the contract, but they do not contain any part of the obligation of the contract. They are conditions, in the nature of estoppels, and, when enforced, operate to prevent the enforcement of the obligations of the contracts. Such restrictions, when reasonable, will be sustained. But, as they are restrictions of common-law rights and common-law obligations of common carriers, they are not favored by the law.' We do not think the stipulation under consideration is reasonable, and therefore it cannot be enforced. We deem it proper to state that we are inclined to think that, in analogy to the ruling as to telegraph and express companies, a stipulation requiring a demand to be made within sixty days after notice of loss or damage would be reasonable," citing cases. This Court, in *Deans v. R. R.*, 152 N. C., 171, approved the decision in *Mfg. Co. v. R. R., supra,* the limit of time allowed in each case being the same. See, also, *Cigar Co. v. Express Co.*, 120 N. C., 348; *Watch Co. v. Express Co., ibid.*, 351; *Capehart v. R. R., supra.*

Our attention was called, on the argument, to the fact that the Interstate Commerce Commission had strongly recommended the adoption by the defendant and other carriers of a uniform or standard bill of lading (which was approved by the Commission), containing among others the following clause: "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier

shall not be liable." The first day of September, 1908, was indicated as the day for the new bill of lading to take effect, and be substituted for those in former use, and "the intervening period (27 June, 1908, to 1 September, 1908) is allowed for printing new bills and using those on hand." Reasons for suggesting the standard form are well stated by Hon. Martin A. Knapp, chairman of the Commission, in an opinion reported in 14 Interstate Commerce Reports, at p. 346, the standard bill of lading being set forth at p. 351 *et seq.* The defendant and other carriers, it appears, complied with the suggestion of the Commission and filed with it bills of lading conforming thereto. It would seem, therefore, that the bills of lading issued to plaintiffs by defendant were two of the old type, which were used by inadvertence or mistake. If the defendant, at the time of these shipments, had adopted the uniform bill of lading, it would supersede the obsolete ones, and, under such a bill, the plaintiff would have complied with its terms, as they filed their written claim within the time fixed by it. As the case must be tried again because of the error already pointed out, we need not pass upon this question, nor determine whether we can take judicial notice of the substitution of the new bill for the old one by filing the former with the Interstate Commerce Commission, under the principle stated in *S. v. R. R.,* 141 N. C., 846, and *Staton v. R. R.,* 144 N. C., 136.

We do not think the case of *Mitchell v. R. R.,* 84 S. E. (Ga.), 227, is a *decision* upon the validity of a clause in a bill of lading continuing the ten days limit for presenting claims. The reasonableness of the time was there admitted by the parties, and there was no point made about it, and the Court states that, "for this reason, the question need not be considered." The only matter involved was whether the stipulation was required to be supported by a consideration.

We do not see why, in respect of notice as to a claim for damages, there should be any real distinction between perishable products and other goods. If vegetables, for example, are damaged or partially spoiled when delivered, they will deteriorate rapidly, and a notice on the tenth day after arrival or delivery will be no more beneficial to the carrier than one at a much later time. The vegetables may, even at the expiration of so short a time, have been disposed of or entirely perished, and knowledge then acquired for the first time would be of no avail.

When these provisions as to the time for filing claims are valid, the written claim need not be expressed in any special way, so that it is a plain and intelligible statement of the demand. In respect to this matter, *Justice Hughes* said in *Railway Co. v. Blish Milling Co., supra:* "Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency, and it is to be construed in a practical way. The stipulation required

that the claim should be made in writing, but a telegram which in itself or taken with other telegrams contained an adequate statement must be deemed to satisfy this requirement." We so held in *Lytle v. Tel. Co., supra.*

The plaintiff having shipped the goods on consignment, can maintain this action, as the party interested or the one aggrieved by defendant's negligence; and there was evidence of sufficient delay to carry the case to the jury. *Rollins v. R. R.,* 146 N. C., 153.

There was error in ordering the nonsuit, which reverses the judgment and requires another trial.

New trial.

L. NORRIS ET AL. v. A. B. HUDSON ET ALS.

(Filed 27 September, 1916.)

Mortgages—Sales—Fraud—Issues—Appeal and Error.

Where the sale of lands under the execution of a power in a mortgage is sought to be set aside upon allegation that it was fraudulent for the lack of a consideration for the mortgage, and in answer to responsive issues the jury has found that there was a valid consideration for the mortgage, it is not error that the court refused to submit an issue tendered by the plaintiff drawing a conclusion of fraud based entirely upon an affirmative finding of the issues submitted.

CIVIL ACTION tried before *Lyon, J.,* at April Term, 1916, of JOHNSTON.

This is an action to set aside a sale purporting to have been made under the power contained in a mortgage executed by the plaintiffs, Lucian Norris and his wife, Ava Ann Norris, to the defendant J. B. Hudson on 20 January, 1912, and the deed made pursuant thereto, and for an accounting.

On 13 April, 1911, the said plaintiffs executed a mortgage to the defendant Hudson, conveying several lots to secure $733, and on 20 January, 1912, another mortgage conveying the same land and another lot in which the plaintiff Ava Ann Norris had a life estate, to secure $707.

The plaintiffs allege, in substance, that the lot in which Ava Ann Norris had a life estate was included in the mortgage of 20 January, 1912, by fraud; that this mortgage was executed to procure a loan; that they received no money or other thing of value as a consideration for the execution of this mortgage; that nothing was due thereon, and that therefore the sale under it was fraudulent and void.

These allegations are denied by the defendants.

The plaintiffs tendered the following issue, which his Honor refused to submit, and the plaintiffs excepted:

"Was the mortgage deed of 20 January, 1912, retained through fraud and foreclosed by defendant A. B. Hudson, with intent to cheat and defraud the plaintiffs and in violation of the rights of plaintiffs?"

The jury rendered the following verdict:

1. In what amount was the plaintiff Lucian Norris indebted to A. B. Hudson 20 January, 1912? Answer: "$557."

2. Was the one-fourth interest of Mrs. Ava Ann Norris in lot No. 1-J included in the mortgage dated 20 January, 1912, by the fraud of A. B. Hudson or the attorney, Ryals? Answer: "No."

3. Did defendant Parrish purchase said property with notice of such fraud? Answer: "No."

4. What was the value of the three lots owned by Lucian Norris and included in said mortgage on 28 August, 1912? Answer: "$1,750."

5. What was the value of the one-fourth interest of Mrs. Norris in lot No. 1 on 28 August, 1912? Answer: "$250."

6. Was said mortgage on 20 January, 1912, given to secure the indebtedness of Lucian Norris to Hudson on the prior mortgage, and $150 for goods purchased? Answer: "No."

Judgment was entered upon the verdict, and the plaintiffs appealed, assigning as error the refusal to submit the issue above set out.

E. F. Young and R. L. Godwin for plaintiffs.
W. S. O'B. Robinson for defendants.

ALLEN, J. The only specific allegations of fraud in the complaint are that the lot of the *feme* plaintiff was included in the mortgage by fraud, and that the mortgage was executed to secure a loan which was not made, and that it was therefore fraudulent to retain the mortgage and to attempt to execute the power of sale.

The allegations of fact are denied by the defendants, and the jury has found according to the contention of the defendants, and it would seem that the conclusion drawn by the plaintiffs as to the fraudulency of the sale would fall with the facts upon which it depends.

The plaintiff Lucian Norris testified that the mortgage of 20 January, 1912, was executed to pay up and settle the mortgage of 1911, and the jury has found that the lot of Mrs. Norris was not included in the mortgage of 1912 by fraud, and that the plaintiff Lucian Norris was then indebted to the defendant Hudson in the sum of $557.

This establishes a debt due by the plaintiffs to the defendant Hudson at the time of the sale under the mortgage, and there is neither allegation nor evidence of irregularity or fraud in making the sale.

If the complaint is read as a whole, it clearly appears that the fraud alleged as to the sale is a conclusion based entirely upon the other allegations, which have been negatived by the jury.

It follows, therefore, that there was no error in refusing to submit the issue to the jury.

No error.

G. T. TAYLOR AND T. W. MOORE v. J. W. BOONE ET AL.

(Filed 27 September, 1916.)

1. Injunction—Service—Affidavit—Statutes.

Our statute requires that "a copy of the affidavit be served with the injunction," which must be done unless the judge allows such service to be made thereafter (Revisal, sec. 810), or the injunction will be dissolved.

2. Same—Agreement to Continue—Waiver.

The requirements of the statute, Revisal, sec. 810, are not waived by an agreement made between the parties out of court, on the return day of a temporary restraining order, that the hearing may be had at a later day; and when such have not been observed by the plaintiff, the defendant may enter a special appearance and successfully move to dissolve the restraining order on the ground that it has not been served according to law.

APPEAL by plaintiff from order of *Stacy, J.*, dissolving a restraining order, 24 April, 1916, from HERTFORD.

This is an action to recover damages for trespass on land, and during the pendency of the action the plaintiff applied for and obtained a temporary order restraining the defendants from further trespassing upon the said lands.

No copy of the affidavit or complaint was served with the restraining order.

On the return day of the order, and after the time set for the hearing, counsel for plaintiff and defendant agreed that the hearing might be had at a later day, and at the time agreed on both parties were represented and counsel for the defendants entered a special appearance and moved to dissolve the restraining order upon the ground that it had not been served according to law.

The motion was granted, and the plaintiffs excepted and appealed.

Roswell C. Bridger for plaintiffs.
John E. Vann and Cowper & Boone for defendant.

ALLEN, J. The statute (Rev., sec. 810) requires that "a copy of the affidavit must be served with the injunction," and this must be done unless the judge allows service of the affidavit to be made thereafter.

Plaintiffs, however, contend that this requirement of the statute has been waived by the agreement between counsel, made out of court, that the hearing should be had at another time. This position is met and decided against the plaintiffs in *Woodard v. Milling Co.,* 142 N. C., 100. In that case the defendant moved to dismiss the action for irregularities in the proceeding, and the plaintiff replied that irregularities had been waived by an agreement between the attorneys of the plaintiff and defendant, that "the matters should be continued from 23 April, 1914, and come up for hearing on 13 May, 1914," and the Superior Court found that this agreement was made. This Court said: "This agreement was made, doubtless, for mutual convenience, and we see nothing in it to indicate that counsel for defendant intended to enter a general appearance or to waive any right which could have been exercised had he appeared on 23 April," and held that there was no waiver.

We must, therefore, affirm the ruling of his Honor.

Affirmed.

J. E. WILDER v. A. W. GREENE, AND A. W. GREENE v. J. E. WILDER.

(Filed 27 September, 1916.)

Actions—Consolidation—Courts—Appeal and Error.

Two causes of action, alike in their facts and the issues involved, may be consolidated by the trial judge, where it can be done without serious prejudice to the parties, the effect being to save time and unnecessary expense and prevent confusion and conflict in the verdicts; and in this case, it appearing that each member of a partnership has, in separate actions, brought suit for a dissolution thereof and asking for the appointment of a receiver, upon a disagreement among themselves, it is held that the order of the court consolidating the causes was proper. As to whether the exercise by the court of this power was discretionary and unreviewable, *quære.*

CIVIL ACTIONS, from HERTFORD, for the dissolution and settlement of a copartnership, heard before *Winston, J.,* on 1 August, 1916, at Winton, N. C., on motions for an injunction and receiver.

The parties formed a partnership on 1 January, 1916, which was conducted until 20 July, 1916, when, disagreeing among themselves as to its management, the plaintiff J. E. Wilder commenced an action against A. W. Greene on that day for the purpose of having it dissolved and a receiver appointed, and on 22 July, 1916, the defendant in that

action, A. W. Greene, commenced his action against J. E. Wilder for a similar purpose. Complaints were filed in both actions and verified, and in the latter action, *Greene v. Wilder,* the court appointed a temporary receiver and restrained Wilder from interfering with the business or assets of the partnership until 1 August, 1916, when a motion for a permanent receiver would be heard. J. E. Wilder, on 20 July, 1916, had caused to be served upon A. W. Greene a notice that on 1 August, 1916, he would apply to the same judge for the appointment of a permanent receiver for the same purpose. When the matter came on to be heard, the court consolidated the two actions, dissolved the partnership at the request of the parties, and then appointed permanent receivers of the partnership property, when J. E. Wilder excepted and appealed.

R. C. Bridger for appellant.
J. H. Matthews for appellee.

WALKER, J., after stating the case: The real question presented by this appeal is whether the court had the power to consolidate the actions. It is one that is often required in order that different suits, alike in their facts and the issues involved, may be brought together in one trial, where it can be done without serious prejudice to the parties, as it will save time and unnecessary expense, and may prevent confusion and conflict in verdicts, if the actions were tried separately. *Sumner v. Staton,* 151 N. C., 203. The power has frequently been exercised with the strong approval of the courts. *Glenn v. Bank,* 70 N. C., 192; *Morrison v. Baker,* 81 N. C., 76, and *Hartman v. Spiers,* 87 N. C., 28, where *Smith, C. J.,* states the cases in which, under the general practice, consolidation may be ordered, though the enumeration by him does not embrace all such cases. It has been intimated that the exercise of the power is discretionary, *Glenn v. Bank, supra; Sumner v. Staton, supra;* 4 Enc. of Pl. and Pr., 688; but we do not decide how this is. It is said in 4 Enc. of Pl. and Pr. at p. 689: "A court of equity has power to consolidate actions, with or without the consent of the complainant. It is a power over the conduct of suitors, resting upon the clearest principles and absolutely essential to prevent scandalous abuses and to protect defendants against gross oppression." See, also, *Castle v. Castle,* 69 W. Va., 400; *Cooper v. Bowen,* 140 Ga., 45. Whether the exercise of the power be discretionary and unreviewable, or, though it clearly exists, is subject to revision by appeal, there was no abuse of it here, and the result will, therefore, be the same in either case. The judge acted wisely in consolidating the two actions, as they are substantially alike and the plaintiffs in them seek the same relief.

There is nothing in the other question raised, as there are no facts to be found in the record which support the contention of appellant.

The signature to the complaint of appellee was evidently an inadvertence, and it was stated on the argument before us and not denied that dissolution of the law firm had taken place before any motion in the cause had been made. But apart from all this, nothing has been done that violates the rights of either party, and the order was a matter of course, as it granted the relief which both parties were demanding.

No error.

JOHN B. OAKLEY v. CHARLES L. LASATER.

(Filed 27 September, 1916.)

1. Appeal and Error—Record—Issues—Presumptions—Arrest and Bail—Negligence.

Where the evidence has not been set out in the record of the case on appeal, it will be deemed that it justifies the issues; and where the jury have found, by their answer to an issue not objected to, that the defendant has negligently injured the plaintiff's mule, it will not be inferred that such was "wrongfully, recklessly and wantonly done, after being forbidden by the plaintiff's agent," so as to sustain an order of arrest against the person of the defendant.

2. Same—Statutes.

A judgment that execution issue against the person of the defendant cannot be sustained upon the mere finding that the defendant negligently injured the plaintiff's property, for to justify such execution under our statutes, Revisal, secs. 727 (1), 625, the injury must have been intentionally or maliciously inflicted, *i. e.*, with some element of violence, fraud, or criminality.

3. Same—Homestead—Exemptions.

Where arrest and bail is authorized, Revisal, sec. 727 (1), execution against the person of the judgment debtor may be issued, Revisal, sec. 625, and after judgment he cannot be discharged except by payment, or giving notice and surrender of all property in excess of $50, Revisal, secs. 1920, 1918a, and the effect of the execution against the person is to deprive him of his homestead and his personal property exemption over and above $50; which does not contemplate an execution against the person when injury to personal property of the plaintiff has been caused solely by the negligent act of the defendant, or by accident.

APPEAL by defendant from *Lyon, J.*, at March Term, 1916, of CHATHAM.

H. A. London & Son and Fred W. Bynum for plaintiff.

R. H. Hayes for defendant.

CLARK, C. J. The verdict finds that the defendant "negligently" injured the mule of the plaintiff. The allegation in the complaint is that

the injury was done "wrongfully, recklessly, and wantonly and after being forbidden by the plaintiff's agent." This allegation of the complaint was denied in the answer, and the issue submitted without exception is, "Did the defendant negligently injure the mule of the plaintiff?" There is no evidence sent up in the record. We must take it, therefore, that the evidence justified the issue. The judgment that an order of arrest should "issue against the person of the defendant" should not have been granted and should be reformed by striking out such order.

Revisal, 727 (1), authorizes an arrest and holding to bail, among other cases, "where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property, real and personal."

Revisal, 625, authorizes an execution against the judgment debtor "if the action be one in which the defendant might have been arrested." In such case the person arrested cannot be discharged after judgment, except "by payment or giving notice and surrender of all property in excess of $50." The Code, sec. 2972 (now Rev., 1920, 1918a); *Fertilizer Co. v. Grubbs,* 114 N. C., 470; *S. v. Williams,* 97 N. C., 415. The effect of an execution against the person, therefore, is to deprive the defendant in the execution entirely of his homestead exemption and of any personal property exemption over and above $50.

In *Dellinger v. Tweed,* 66 N. C., 266, often affirmed since, *Gill v. Edwards,* 87 N. C., 76, and other cases in Anno. Ed., it is held that the homestead and personal property exemption can be asserted against a judgment in an action of tort. We think, therefore, that an execution against the person which would deprive the defendant of his homestead and personal property exemption cannot issue where the judgment is for an injury sustained by negligence or accident, but only when the injury has been inflicted intentionally, or maliciously; that is, there must be some element of violence, fraud, or criminality. This is the true dividing line between those cases which affirm *Dellinger v. Tweed* and those which seem to depart from it. For instance, in *Moore v. Green,* 73 N. C., 394, the defendant was held in an action for libel. In *Long v. McLean,* 88 N. C., 3, the action was for wrongfully taking and converting personal property. In *Kinney v. Laughenour,* 97 N. C., 325, the action was for seduction. In *Burgwyn v. Hall,* 108 N. C., 489, the action was for false arrest. All these and similar cases come under the express provisions of Revisal, 727, and embrace some element of violence, fraud, or criminality. It is otherwise when the "injury to property" is committed negligently or accidentally.

The language of Revisal, 727 (1), authorizing arrest and bail "for injury to property," and consequently an execution against the person, Revisal, 625, applies only where the injury was intentional, not where

it was merely negligent or accidental. We find no case in which a person has been committed to jail by order of the court and held until he is released upon surrender of his homestead and personal property exemption (Rev., 1918a), where the injury was merely accidental or negligent. The context of Revisal, 727 (1), indicates that the injury must have been intentional. If the issue submitted had conformed to the complaint and had been sustained by the verdict, the judgment should have directed execution to issue against the person.

On the issues submitted and found, the court should have signed the judgment tendered by the defendant, which omitted the order for an execution to issue against the person if the judgment was not paid. The judgment rendered should be modified by striking out that provision. The plaintiff will pay the costs of this appeal, as there is error in the particular excepted to by the appeal.

Judgment modified.

ARCHIE P. ASHBY v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 27 September, 1916.)

1. Railroads—Push Cars—Children—Dangerous Places—Trials—Evidence—Negligence—Questions for Jury.

Evidence tending to show that employees of defendant railroad company were operating a push-car loaded with cross-ties on defendant's track, and asked plaintiff, a boy 8 years of age and some other children to help push the car to a switch to clear the track for an expected train; that to pass a trestle the lad jumped upon the car, and to avoid a cattle-guard 700 yards beyond, and being warned thereof by the employees, the plaintiff again attempted to jump upon the car, but fell, to his injury; that the foreman of the gang saw the boy thus engaged and did not object: *Held*, upon a motion to nonsuit, sufficient evidence of defendant's actionable negligence to take the case to the jury.

2. Contributory Negligence—Children—Trials—Evidence—Questions of Law.

A lad 8 years of age, injured while assisting, at their reqquest, the defendant's employees in pushing a car loaded with cross-ties, and injured while endeavoring to jump on the car to ride across a cattle-guard, was too young to be guilty of contributory negligence under the facts of this case.

3. Railroads—Children—Dangerous Places—Push Cars—Negligence.

Where the defendant railroad company's employees operating a push-car loaded with cross-ties invited or permitted a lad 8 years of age to help them, in consequence of which he was injured, and this conduct of the boy had been seen by the foreman of the gang without objection:

Held, the company was liable, though it had theretofore forbidden its employees to permit children to thus help them.

4. Same—Duty of Company.

The plaintiff, a lad of 8 years, was injured while assisting employees of defendant railroad company to push a car loaded with cross-ties along the track, at their request, with the knowledge of the foreman. *Held*, it was not only the duty of the defendant to order the child away from the track, but it should have seen that he went away.

APPEAL by plaintiff from *Whedbee, J.*, at February Term, 1916, of CRAVEN.

C. A. York, A. D. Ward, and William F. Ward for plaintiff.
Moore & Dunn for defendant.

CLARK, C. J. This is an action for personal injury to a minor, at the time of the injury 8 years of age, who brings this action by his next friend. The employees of the defendant were operating a push-car loaded with cross-ties under the supervision of the section master. There was evidence that one of the employees asked the plaintiff and two or three other small boys to help push the car to the switch before the arrival of an approaching train, and that when the car approached the trestle one of the boys, with the knowledge and without objection of the employees or the foreman, jumped on the car and rode across; that they continued to push the car for several hundred yards till they approached a cattle-guard across the track in which there were sharp iron pointers which the plaintiff was unable to walk upon with his bare feet, and being cautioned by the foreman to "look out" for the cattle-guard, the plaintiff in attempting to climb upon the car to ride across slipped and fell, the wheel of the car passing over his foot. There was evidence that the child was not invited by the employees and that the section master in charge had no knowledge of his participating in pushing the car. But there was evidence for the plaintiff that one of the employees asked the boys to help push the car, and also that the foreman saw the boys pushing the car and made no objection. Upon a nonsuit this evidence must be taken as true, and, if true, it was negligence for the defendant through its foreman to permit a child of the age of the plaintiff to participate in such dangerous work with its great liability of injury to those who are not presumed to have judgment to avoid the dangers incident to such work.

If the railroad employees invited or permitted the plaintiff to take part in pushing the car the company was liable, though the company had forbidden the employees to permit this to be done. 33 Cyc., 819. It was not only the duty of the defendant to order the child away from its tracks and from moving cars, but it should see that he does go away.

33 Cyc., 769, and cases there cited. If the boy was there for that length of time, it was negligence if the foreman did not discover the child and make him leave.

In *Greer v. Lumber Co.,* 161 N. C., 146, the Court held that there being evidence that the foreman permitted the children to ride on the engine, it was actionable negligence not to require them to leave.

Contributory negligence cannot be attributed to a child of the age of the plaintiff at the time of this injury.

The judgment of nonsuit is

Reversed.

MIDDLE CANAL COMPANY v. W. H. WHITLEY.

(Filed 4 October, 1916.)

1. Drainage Districts — Constitutional Law — Assessments—Irregularities—Collateral Attack.

An assessment made under the provisions of our drainage laws is constitutional and valid, and when it does not appear to be void on its face, it may not be collaterally attacked by a defendant owner of lands embraced in the district, in an action to enforce its payment.

2. Drainage Districts—Appointment of Assessors—Report—Confirmation.

It is immaterial whether the owner of lands in a drainage district formed under our statutes had notice of a meeting at which a committee had been appointed to assess the lands in the district and determine the amount of each assessment, when the assessment has been accordingly made, and duly ratified and confirmed at a subsequent meeting regularly called and held in accordance with the statute, of which he had notice.

3. Drainage Districts—Assessments—Proceedings—Irregularities—Presumptions—Procedure.

Objection to an irregularity in making an assessment against the owners of land in a statutory drainage district, which does not avoid the assessment on its face, should be made to the properly constituted authorities of the corporation, and its collection will not be enjoined or set aside on account of defects or omissions of statutory requirements which do not affect the substantial justice of the assessment itself or render it void *ab initio*, the presumption being in favor of the regularity of the proceedings.

4. Drainage Districts—Assessments—Liens—Courts—Jurisdiction.

An assessment made upon owners of lands within a statutory drainage district constitutes a lien upon the lands therein and is enforcible by proceedings *in rem* in a court having equitable jurisdiction, in the absence of other provision of the statute; and personal judgment against the defendant may not be had, as in actions arising *ex contractu;* therefore, a justice of the peace has no jurisdiction over actions to enforce the payment of such assessments, and they will be dismissed upon motion to nonsuit when brought in that court.

5. Drainage Districts—Assessments—Levy—Homestead.

An owner of lands in a statutory drainage district may not claim his homestead exemption therein against an assessment levied thereon in accordance with the provisions of the statute.

6. Drainage Districts — Assessments — Docketing — Enforcement — Levy — Courts—Supervision.

Assessments upon lands within a drainage district made in accordance with the statute become liens on the lands when properly certified by the officers of the corporation and docketed in the office of the Superior Court of the proper county; and executions may issue directing that such lands be sold to pay the assessments and the costs. Laws 1909, sec. 21; Pell's Revisal, secs. 3996, 4003. *Semble*, the courts will review by writ of *certiorari* the action of the drainage corporation in making illegal assessments and enjoin such assessments that are absolutely void upon their face.

CIVIL ACTION tried at February Term, 1916, of BEAUFORT; *Shaw, J.*

The action was commenced before a justice of the peace to recover $45 and interest on account of an assessment under the drainage laws of this State made by plaintiff upon defendant's land.

Upon the trial in the Superior Court a motion to nonsuit was sustained, and plaintiff appealed.

Small, MacLean, Bragaw & Rodman for plaintiff.
Daniel & Warren for defendant.

BROWN, J. 1. The contention of the defendant that the assessment is void upon the face of the record cannot be sustained. The constitutionality of the drainage laws of this State has been sustained in several cases and cannot now be successfully attacked. *Leary v. Drainage Co., ante*, 25. Drainage districts are regarded as quasi-public corporations created for private benefit, but endowed with the power of eminent domain and other governmental functions for the public benefit. *Sanderlin v. Luken*, 152 N. C., 738; *Drainage Comrs. v. Farm Assn.*, 165 N. C., 697.

This assessment does not appear to be void upon the face of the record, and therefore cannot be attacked collaterally. It was ordered on 28 February, 1910, and a committee appointed to inspect the lands to determine the amount of each assessment. This was done and an assessment of 9 cents per acre was made against defendant's 500-acre tract.

This assessment was duly ratified and confirmed at a subsequent meeting of the plaintiff regularly called and held in accordance with the statute. It is, therefore, immaterial whether defendant had notice of the meeting of 28 February, 1910. If there is any irregularity which

does not avoid the assessment upon its face, it is the duty of defendant to apply to plaintiff to correct it and to set aside the assessment.

An assessment is like a tax, and will not be enjoined or set aside on account of defects and omissions of statutory requirements which are not of such a nature as to affect the substantial justice of the tax itself or render it void *ab initio*. 37 Cyc., 1262, and cases cited in note.

The presumption is in favor of the regularity of the assessment proceedings. *Omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium.*

2. We are of opinion, however, that this action will not lie and that the justice of the peace has no jurisdiction to entertain it. It is not a debt and does not arise *ex contractu*. It is not a personal liability of the landowner to be collected by execution, as against which he would be entitled to a homestead. It is a statutory charge upon the land and must be collected by proceedings *in rem* in a court having equitable jurisdiction, unless some other method is provided by the statute. If the land benefited is insufficient in value to pay the assessment in full, the remainder cannot be collected out of the other estate of the landowner.

Upon the subject it is said in Elliott on Roads and Streets, 400: "It is not easy to perceive how the assessment can extend beyond the property against which it is directed, since the sole foundation of the right to direct and enforce the assessment rests upon the theory that the land receives a benefit equal to the assessment. If the land, with the superadded value given to it by the improvement, will not pay the assessment, there is no constitutional warrant for the right to seek payment of the assessment elsewhere; for the land is all that the improvement can by any possibility benefit, and land (or other property) that is not benefited cannot be seized without violating the principle which forbids the taking of property without compensation, nor without breaking down the only theory upon which it is possible to sustain local assessments; and yet if there is a personal liability, the assessment may be enforced although the land, even as enhanced in value by the improvement, may not be worth a tithe of the extent of making the improvement. The decisions which declare statutes imposing a personal liability upon the landowner unconstitutional are in our judgment so strongly entrenched in principle that they cannot be shaken."

This question is discussed in a learned opinion by *Mr. Justice Shepherd* in the leading case of *Raleigh v. Peace,* 110 N. C., 33, where it is held: "The powers to enforce the collection of such assessments are limited to the specific property presumed to be benefited, and do not authorize a personal judgment against the owner of the property, and, therefore, so much of the act, in this case, as provides that a judgment

rendered for the amount alleged to be due might be docketed and enforced as other judgments is invalid."

It is usual for drainage laws to provide a summary and inexpensive method for collecting assessments, as they are generally small in amount, and the expense of a suit in the Superior Court to collect each assessment would be too much of a burden. The act of 1909, sec. 31, provides a very expeditious as well as effective method of enforcing the collection of assessments, which doubtless is universally followed since that law was enacted. The drainage law in force at the time of the incorporation of the plaintiff and the levy of the assessment in this case is contained in Pell's Revisal of 1908, sec. 3996, etc. We think this act, when properly construed, furnishes a summary method of collecting these assessments without resorting to the Superior Court.

Section 4003 provides that "Every corporator shall be bound to obey the lawful by-laws of the company and pay all dues lawfully assessed on him: *Provided,* he shall in no case pay more than his proportion of the expenses as fixed by this chapter; and such dues may be collected in the corporate name in any court having jurisdiction; and every assessment duly docketed in the county where the land to be affected lies shall be a lien on the lands of the debtor which are connected with the corporation from the date of such docketing."

There is a broad distinction between dues which are imposed upon each member for the support of the corporation and the assessments which are levied upon the lands for the purpose of paying the expense of the drainage canals or ditches. The dues may be collected in the courts of justices of the peace where they are under $200, and out of any property owned by the defendant, although assessments cannot. Therefore, the act provides that these assessments may be duly docketed in the county where the land to be affected lies.

We construe this to mean that these assessments, which are made by the corporation in accordance with the statute and its by-laws, and recorded in its proceedings, may be docketed in the Superior Court in order that they may become liens upon the land against which they have been assessed.

Executions may be issued directing the sale of the land to pay the assessment and the costs. Such executions must necessarily be confined to the land against which the assessments have been levied. They cannot be collected out of any other property, real or personal, of the landowner. In order to docket the assessments, of course, they must be properly certified by the officers of the corporation. We think this is the true meaning and purport of the drainage laws prior to 1909.

It may be asked what remedy the landowner would have against illegal assessments. That question is not before us, but doubtless the

Superior Court could review the action of the drainage corporation in levying these assessments by a writ of *certiorari,* or, if the assessment is absolutely null and void upon its face, the collection of it could be enjoined.

Affirmed.

GEORGE J. HALES v. ATLANTIC COAST LINE RAILROAD COMPANY AND D. J. ROSE AND R. H. HICKS.

(Filed 4 October, 1916.)

1. Easements—Appurtenant—Railroads—Deeds and Conveyances—Contracts—Interpretation.

Where the owner of lands grants to other private and adjoining owners the privilege to cross his lands with one railroad siding at a certain location, "not to be used by or for them or their tenants or any other owner of said lot, after thirteen years from date"; that the privilege was given to reach the grantee's lot with a side-track, and they were not to place cars on the grantor's lot; *Held,* an easement in gross did not pass by the conveyance, but a right of way appurtenant to the business lot of the grantees and the tenants and occupants under them, and thereunder a railroad company cannot acquire from the private grantees a right of use of the easement for the general public, or extend the roadway to points beyond to handle the business of its other patrons or customers.

2. Same—Injunction.

Where the owner of lands has granted the privilege of a spur-track across his lands appurtenant to the lands of adjoining private owners, and the railroad company has attempted to acquire this privilege and extend it to other of its customers in the town: *Held,* the right to the extended easement may be acquired by the excessive user, and the trespass being a continuing one, may be enjoined, on the ground that damages at law are inadequate, and to prevent a multiplicity of suits and vexatious litigation. *Jones v. Lassiter,* 169 N. C., 250, cited and distinguished.

3. Same—Damages.

Where a railroad company is attempting an excessive use of a spur-track permitted over the lands of the owner appurtenant to the private owners of adjoining lands, under their contract alone, and had not entered upon the lands under its statutory right of condemnation, the principle that the owner granting the privilege has only his right of action for damages arising from the excessive user has no application.

4. Same—Statutes.

Section 1097 of the Revisal, subsec. 5, authorizing railroad companies, under certain conditions, to establish side-tracks for the accommodation of private industries, has no application where it is shown

that the railroad company has acquired, from a private owner, the right to a spur-track over the lands of an adjoining owner, and appurtenant to his own land, and is using it in connection with its other patrons, not contemplated by the grant under which it claims the right.

5. Railroads—Spur-tracks—Condemnation — Corporation Commission — Statutes.

A railroad company, of its own initiative or by virtue of a contract with private persons, can acquire no right to construct and use its side-tracks to private industries off its right of way and over the lands of intervening owners against their will; and where it has permanently located its line, it is, as a rule, restricted to that and the right of way incident to it; nor is this principle affected by Revisal, sec. 1097, subsec. 5, which authorizes the Corporation Commission to permit the building of industrial spur-tracks after investigation.

6. Railroads—Spur-Tracks—Easements—Appurtenant—Equal Facilities.

Where the grantees of the use of a spur-track over the lands to be used only with reference to the grantees' private business enterprises located on their own lands have granted the right of this use to a railroad company which seeks to extend it to its other patrons, the railroad company can only act as the agent of the grantees of the right, with only such powers as they may have had, and the rule that such corporations are required to furnish equal facilities to all its shippers has no application.

CIVIL ACTION from EDGECOMBE, heard on return to preliminary restraining order and on motion to make the same permanent, before *Connor, J.,* at Wilson, N. C., on 7 July, 1916.

There was judgment dissolving the restraining order, and plaintiffs, having duly excepted, appealed.

G. M. T. Fountain & Son for plaintiff.
L. V. Bassett and F. S. Spruill for defendant.

HOKE, J. On the hearing it was properly made to appear that on 8 June, 1915, defendants Rose and Ricks bought and plaintiff sold and conveyed to said defendants a certain right of way over a lot of plaintiff's in the city of Rocky Mount, the agreement between them being embodied in a written contract, signed by all the parties, in terms as follows:

"This contract, made this 8th day of June, 1915, by and between D. J. Rose and R. H. Ricks of the one part and G. J. Hales of the other part:

"Witnesseth, That for and in consideration of the sum of five hundred dollars ($500) paid by said Rose and Ricks to said Hales, the said Hales grants to them for the period of thirteen (13) years from date the privilege of crossing with one railroad siding his lot on Washington

and Marigold streets as situated on the blue-prints laid out by the railroad engineer from said Hales' present siding south along the western end of the machine works lot or said Rose and Ricks lot; said privilege not to be used by or for them or their tenants or any other owner of said lot after said thirteen (13) years period without new contract being made.

"It is further agreed between said Rose and Ricks of the one part and Hales of the other part, that this privilege is given to reach said Rose and Ricks lot with a side-track, and that said Rose and Ricks are not to control, use, or have cars placed on said part of track lying on said Hales lot."

That, acting under and by virtue of said contract, the railroad extended its track and has been operating its cars over said right of way, delivering freight to said defendants doing business on said lot until some time in 1916, when defendant railroad, acting under an arrangement or agreement with its codefendants, Rose and Ricks, both claiming the right to do so under the above contract of plaintiff, have extended said track 40 feet beyond the lot of Rose and Ricks and have been and are delivering freight to others and to persons who are not occupants of the Rose and Ricks lot described and referred to in the contract of plaintiff, among others, to the Builders' Supply Company, a corporation doing business on another piece of property. It appears further that defendant railroad company, under an arrangement or agreement with its codefendants, and claiming the right to do so under said contract of plaintiff, has been for some time making use of said track and right of way across plaintiff's lot in order to make deliveries of freight to the wholesale merchants doing business in lower Rocky Mount, and defendant company, in its answer and affidavits, avers its purpose and claims the right to do so in performance of its duties as common carrier which require it to afford equal facilities to all persons properly applying to ship over its lines.

From a perusal of the contract between plaintiff and Rose and Ricks, and under which defendants claim the right to act, it appears that the grantees bought and intended to buy, and grantor sold and conveyed and intended to sell and convey, a right of way over plaintiff's lot for the purpose of enabling said grantees to ship freight to them and others doing business on the lot specified in the instrument. The right granted is "to cross with one railroad siding his lot on Washington Street, etc., from said Hales' present siding south along the western end of said Rose and Ricks lot. Said privilege not to be used by or for them or *their tenants* or any other owner of said lot after thirteen years from date." It is further agreed between Rose and Ricks of the one part and Hales of the other part that this privilege is given to reach the Rose and Ricks lot with a side-track, and said Rose and Ricks are not

to have or place cars on the Hales lot," etc. And it is clear from the language of the contract and the attendant circumstances that the right obtained was not an easement in gross, but a right of way appurtenant to the business lot of the grantees and the tenants and occupants under them, and it was no part of their purpose to pay out their money to procure a right of use by and for the general public. *Simmons v. Groom,* 167 N. C., 271.

This being, in our opinion, the correct construction of the contract, the grantees acquired no right to extend this privilege to other persons doing business on other lots, and could not confer upon the railroad the right to use this track for the purpose of general delivery of freight in South Rocky Mount or otherwise. *Wood v. Woodley,* 160 N. C., 17; *Winslow v. City of Vallejo,* 14 Cal., 723; *Shaver v. Egdell,* 48 W. Va., 502; *Greene v. Canny,* 137 Mass., 64; *Davenport v. Lawson,* 38 Mass., 72; *Dudgeon v. Bronson,* 159 Ind., 562; *Schuroele v. Betz,* 212 Pa. St., 32; 14 Cyc., pp. 1206, 1208, 1209. In *Schuroele's case, supra,* it was held: "That an easement of right of way over another's property is appurtenant to the particular piece of ground of the dominant owner with which it is granted, and is not personal to the owner, authorizing him to use it in connection with other real estate he may own abutting on the right of way."

In 14 Cyc., 1209, it is said: "An easement can be used only in connection with an estate to which it is appurtenant, and cannot be extended to any other property which he may then own or afterwards acquire." And these and other authorities are to the effect that the unwarranted user of the way by the dominant owner in excess of the right granted will amount to a civil trespass, and, when the same is repeated and continuous, and especially when in the assertion of ownership, that injunction is the proper remedy. *Wood v. Woodley, supra; Cobb v. Clegg,* 137 N. C., 153; *Greene v. Canny,* 137 Mass., *supra; West v. R. R.,* 137 Ala., 568; *Society v. Morris Canal and Banking Co.,* 1 N. J. Eq., 157; *U. S. Freehold, etc., Co. v. Galligos,* 89 Fed., 769; 22 Cyc., p. 836; 2 Joyce on Injunctions, sec. 1129; Jones on Easements, sec. 879. It is well understood that a prescriptive right to an extended easement may be acquired by excessive user, Washburn on Easements, 3 Ed., p. 141; and in 22 Cyc., *supra,* it is said: "When acts of trespass are continuous and constantly recurring whereby, if permitted to continue, irreparable injury may result, as where the continuous wrongful invasion of plaintiff's right might ripen into a prescriptive right, an injunction will lie to restrain such trespasser, both on the ground that the remedy at law by suit for damages is inadequate and to prevent a repetition and multiplicity of suits."

In Jones on Easements: "It is sufficient ground for such relief that the injury cannot be adequately compensated in damages or that the

injury is a continuing one and compensation at law could be had only by successive suits, when relief in equity will be granted to prevent multiplicity of suits and vexatious litigation." And in *Society v. Morris Canal Co.,* 1 New Jersey Eq., *supra,* it was held: "That an injunction is a preventive remedy and will not lie for past injuries, but if injuries are continued and the right to continue them is set up and persisted in, the court may interfere by injunction."

It is urged for defendant company that as the defendant company is a public-service corporation, required to afford equal facilities for all shippers who apply in like case, and the railroad track is an accomplished fact, the court will not interfere with additional use of the track for the purposes indicated, but will leave the plaintiff to its action for damages, citing, among other cases, *Waste Co. v. R. R.,* 167 N. C., 340; *Griffin v. R. R.,* 150 N. C., 312. But these decisions and the principle upon which they rest afford no protection to the defendant on the facts presented in this appeal. They were cases where the railroad company, under statutory authority, had entered on plaintiff's property or interfered with his proprietary interests and had the right to continue so in the exercise of the quasi-public franchise conferred upon the company for the public benefit, and the Court very properly held that the question presented was the award of compensatory damages. But in this case the entry, as stated, was under and by virtue of a contract between individuals in which a right of way was acquired for a specified and private purpose. The company, therefore, is not on this lot or using it in the exercise of its franchise, but only as agents of their co-defendants, the grantees of the easement.

And the same answer must be made to the position that the defendant company is protected in the use of this track and right of way under section 1097, Revisal, subsec. 5, authorizing, under certain conditions, the establishment of side-tracks for the accommodation of private industries. The section referred to confers upon the Corporation Commission the power to establish these sidings under certain conditions, and restricts the exercise of such right to 500 feet in length. But a railroad company, of its own initiative or by virtue of a contract with private persons, can acquire no right to construct and use side-tracks to private industries off their right of way and over the lands of intervening owners against the will of such owners. When they have once permanently located their line, they are, as a rule, restricted to that and the right of way incident to it. Pierce on Railroads, ch. 9, p. 254; Elliott on Railroads, 2 Ed., sec. 930. And the statute referred to was not intended to alter or impair this principle except in the way and by the agencies specified therein, that is, by the Corporation Commission, and after investigation by them.

The position is well illustrated and the authorities correctly applied in the recent case of *Butler v. Tobacco Co.*, 152 N. C., 416, and in which it was held:

"1. Without express legislative power, a city may not authorize a contract between a manufacturing company and a railroad company for the building of a side-track across its public street beyond the right of way of the latter for the benefit of the former and its business. *Griffin v. R. R.*, 150 N. C., 312, cited and distinguished.

"2. A citizen whose property is injured and who is deprived of his right of easement to freely pass and repass along a street and sidewalk of a town by reason of an unauthorized license to a railroad company by the town to build a private siding across the street beyond the right of way, for the benefit of another, is entitled to an injunction, although his property is not immediately adjacent."

And the case of *Jones v. Lassiter*, 169 N. C., 750, to which we were also referred, has very little or no resemblance to the facts of this record. In that case it appeared that the city of Raleigh, also defendant, was engaged in paving its streets; had placed a plant for preparing material on a lot acquired for the purpose, and was carrying on this work when plaintiff, the owner of a lot near to the plant and 175 feet distant therefrom, instituted suit to restrain the operation of the plant, on allegation with supporting affidavits that the operation of the plant created a nuisance, to the special injury of plaintiff's property. It appeared that the plant was fittingly located for the designated purpose, and its operation was required for carrying on the public work of paving the streets, and it would only continue for something like three months; and it was held that, under such circumstances, an injunction would not lie, the case being one where the immediate insistence on the private right must yield to that extent to the public good. It will be noted that defendants were engaged in a public work for the public benefit; that the fact of an actionable wrong had not been established, but only alleged, and that the interference with proprietary rights of plaintiff, if any existed, was only temporary, whereas, in our case the wrongful invasion of plaintiff's rights is admitted or plainly established: defendant company, as stated, has entered upon plaintiff's property and constructed the track under a contract between individuals in furtherance of a private enterprise, and this unwarranted and excessive user of the right of way is not only continuous and repeated, but is persisted in, under claim of right.

In our opinion, there was error in refusing to continue the injunction, and this will be certified, that judgment may be entered in accordance with this opinion.

Reversed.

WALTER SILVEY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 4 October, 1916.)

Railroads—Negligence—Unloading Car—Gang-plank—Accident—Trials—Evidence—Nonsuit.

Where the evidence tends to show that a consignee of plumbing material would not wait for the agent of the railroad company to unload it from the car, but voluntarily took two of his own employees, plaintiff and another, to help him do so; that they used an iron gang-plank about the usual size and kind ordinarily used at railroad stations for such purposes, which was placed at the time from the car door to the depot platform; that after several trips in unloading had been made the gang-plank slipped off of the car door as plaintiff was returning empty-handed for another load, when he could have reasonably seen its condition: *Held*, the plaintiff's injury resulted either from an unforeseen accident or from his own negligence, and recovery was properly denied upon a motion to nonsuit.

CLARK, C. J., dissenting.

CIVIL ACTION, tried at June Term, 1916, of HALIFAX; *Stacy, J.*

The usual issues in an action of this character were submitted to the jury and answered for plaintiff. His Honor set aside the verdict. The usual motions to nonsuit had been entered in apt time. The motion to nonsuit was allowed, and plaintiff excepted and appealed.

George C. Green, W. E. Daniel for plaintiff.
Murray Allen for defendant.

BROWN, J. The evidence, taken in its most favorable view for plaintiff, tends to prove that one Markham had some building and plumbing material in a car at defendant's station at Roanoke Rapids. The agent of defendant said to Markham that he could not unload the car just then, as he had no one to assist him. Whereupon Markham voluntarily undertook to unload his material, and procured two of his own employees, plaintiff and a colored man, one Hub Mills, to assist. The car was alongside the platform, about 18 inches from it. An iron gang-plank lay across the opening from car door to platform, one end resting on the car door and the other on platform. According to Markham, the gang-plank was about 2 feet wide and about 2 feet long and a quarter of an inch thick. According to plaintiff, "It was an ordinary piece like they always use, 2 or 3 feet wide. It is the kind of iron that was used at these places for unloading cars." Plaintiff further testified that it was wider and as long as the table in the trial court room, which is 2 feet wide and 3½ feet long. There was no defect in the iron and none in the car and platform.

The plaintiff with Markham and Mills commenced to unload Markham's material from the car by carrying it across the iron gang-plank, and each had carried several "turns." Plaintiff says: "I went in to get a turn. Before I went in, Mr. Markham went in. He went in and got a box of fillings." Plaintiff further stated that as he stepped on the end of the iron at the door it gave way and he fell between the car and platform and was injured. Plaintiff further testifies: "The end of the piece of iron was lapping over on the car and on the platform. It looked perfectly safe to me. The iron did not break. It slipped from the door of the car. That car door was open. The width of the door was the width of an ordinary car door. Platform was an ordinary platform. There was nothing about that piece of iron to in any way deceive me. I had been over this same piece of iron twice before—once in and once out. Markham had been over it a round trip, once in and once out, before I had. On the previous trips, when we came out of the car both Markham and I were bearing loads in our arms and could not see. When the iron fell it was in plain view. There was nothing to obstruct my view. I could have seen it. The position that the iron was in the car and the position it occupied on the platform was in my plain full view, and I could have seen it. Colored man helping us walked across the iron. I don't know how many trips he made. Mr. Markham and I were carrying out the light things and he was carrying the heavy things. That was before I was hurt. I don't know how many trips he made. I was going back in when I fell. I had nothing in my hands when I fell."

It is manifest, we think, that plaintiff's injury was due to an unavoidable accident or else to his own carelessness in failing to use his eyes as he crossed the gang-plank, and not to the breach of any duty defendant owed him. Markham was impatient for his material and voluntarily undertook to unload it with his own employees, plaintiff and Mills. The gang-plank was of the kind in general use and, according to plaintiff's own evidence, amply sufficient for unloading the car. Markham and his assistants used it with safety "several trips." When plaintiff was returning to the car for another "turn" the end of the plank in the car door slipped off and precipitated plaintiff to the ground.

The evidence shows that the method was the one necessarily employed in unloading cars and the implement was such as is in general use, without a defect and fully sufficient for the purpose for which it was intended. The use of the gang-plank is extremely simple, and its placing and supervision must of necessity be left exclusively to those who use it. It was the plain duty of plaintiff to watch it and see that it was in proper position so as not to slip before he stepped on it, and that too much of it was not on the platform and too little on the car, and *vice versa*.

It is a matter of common knowledge and observation that a gang-plank like the one used will slip from one side to the other so as to make it liable to fall unless kept in position. This is necessarily caused by rolling trucks or walking to and fro repeatedly over it in unloading a car.

It is the duty of those using it to use their eyes and watch it. The railroad can furnish them a safe gang-plank, as it did in this instance, but it cannot furnish eyes, nor can it compel their attention and care. The plaintiff very frankly said that the position of the plank was in full view and that he could have seen it. It is manifest that had he used his eyes, he could have averted the injury.

As said by Dean Swift, quoting from Matthew Henry: "None so blind as those who will not see; none so deaf as those who will not hear."

As declared in Holy Writ: "Having eyes, see ye not? and having ears, hear ye not? And do ye not remember?" Mark 8:18.

The plaintiff's injury is evidently the result of an unfortunate accident which defendant could not guard against and for which it is not liable, *Martin v. Mfg. Co.,* 128 N. C., 264; *Bryan v. R. R.,* 128 N. C., 387; or it is due to plaintiff's own lack of ordinary care, that equally bars his recovery, as he is not an employee of defendant.

Autry's case, 156 N. C., 293, and *Finch's case,* 151 N. C., 105, relied on by plaintiff, have no application. In the former the plaintiff was injured by driving his loaded wagon into a deep hole on defendant's right of way, of which it had previous notice and promised to repair. In the latter, the plaintiff established the fact that a hole, caused by a rotten plank in one of the permanent structures of the defendant, was covered by a bale of cotton, and when plaintiff, acting under the instructions of the defendant's agent, attempted to "head up" the bale of cotton, he stepped in this hole and was injured.

Affirmed.

The defendant's appeal in this case is dismissed.

CLARK, C. J., dissenting: In this action for personal injuries the plaintiff was in the employment of L. E. Markham, who went to the station of the defendant to get some freight that he needed in his work as plumber. The defendant's agent told Markham that his freight had not been unloaded, and "told him to unload the material himself." At the request of Markham, the plaintiff and another employee proceeded to help him unload the material from the car. The plaintiff had brought one load of fixtures from the car, and as he stepped upon the iron apron in going back into the car the apron slipped from the car door and he fell between the car and the platform, sustaining serious injury. This iron apron was not defective, nor the car nor the platform

of the car. But the car was 18 inches "or more" from the platform and somewhat higher than the platform, and the evidence of two witnesses, which must be taken as true, is that this apron was 24 inches wide, and as the car was higher than the platform the margin on each side must have been something less than 2 inches.

The plaintiff and his employer, Markham, and his coemployee, were engaged in unloading the car at the instance of the agent of the defendant company, and *pro hac vice* were employees of the company, and as such were entitled to a safe place in which to work. They had a right to presume that the iron apron was sufficient. There was no patent defect to put them on guard. There is no evidence whatever tending to fix the plaintiff with any contributory negligence in his manner of crossing from the platform to the car. The apron was placed there by the defendant, who invited him to make use of it, which he did in reliance that it was a safe gangway to pass over. If there had been evidence of contributory negligence, which was contradicted by the evidence of the plaintiff, the burden to prove it is by statute placed upon the defendant and could not be made use of on a motion to nonsuit, or, what is the same, to base a judgment setting aside the verdict as a matter of law.

"He that hath eyes should see, and he that hath ears should hear" is a maxim that applies to the defendant in this case, who furnished an apron that was of insufficient width and placed it in a position in which it was likely to slip and did slip. These were matters which were within the knowledge of the defendant and not within the knowledge of the plaintiff, to whom there was no defect apparent warning him of danger. There is nothing tending to show that the plaintiff tramped over the iron apron in a negligent manner or that his conduct caused him to slip.

The plaintiff went to the station at the invitation of defendant. He had a right to expect that the place which he was given to work in was in a safe condition. He testifies that he examined the iron apron and that it appeared to him to be safe to pass over. He insists that he did all that a reasonably prudent man could have done under the circumstances. The defect was in the width of the iron apron and that it was placed by the agents of the company in such a manner that it could and did slip. This iron apron was as much a part of the platform of the depot, so far as this plaintiff is concerned, as if it had been one of the planks of the floor thereof. If one of those planks had been sound, but laid down without nails to hold it, and the plaintiff had been injured by the plank tipping up or slipping, there could be no question of the liability of the defendant for such negligence. This iron apron was practically a part of the platform, being the gangway from the platform to the car, and with its narrow margin the defendant, in view of the car being higher than the platform, should have secured the lower edge

from slipping by a cleat, or by driving in two or three nails to prevent its slipping. The failure to do this was the negligence of the defendant, and not the contributory negligence of the plaintiff, to whom the place seemed safe, and who did not contribute to the injury by his negligent manner of using the gangway. There is not a scintilla of evidence tending to show contributory negligence, and, even if there had been, the burden was upon the defendant to establish contributory negligence by a preponderance of proof. It could not be determined by the judge as a matter of law.

In *Finch v. R. R.*, 151 N. C., 105, there was a hole in the platform left by a rotting plank which was concealed by a bale of cotton which the plaintiff was delivering for shipment and heading up for marking. His foot caught in the hole, whereby he was injured. A recovery was sustained, *Brown, J.*, saying: "Plaintiff was obeying the instructions of the defendant's agent." In the present case the defect was not in the iron apron, but in its slipping from the position in which it was placed and the narrow margin, both of which defects were known to the defendant, and it was not incumbent upon the plaintiff, who had never used the premises, to learn of the possible danger.

It was the defendant, and not the plaintiff, who placed the iron apron with its narrow margin in a slanting position without any cleat to hold it from slipping. The plaintiff did nothing to make it slip.

In *Autry v. R. R.*, 156 N. C., 293, plaintiff's intestate was riding in a wagon with goods which he had gotten from the station, and drove into a hole on the right of way, which caused him to fall from the wagon and, a box falling upon him, he was killed. The hole was in plain view, and with care he could have foreseen the probable injury from driving into the hole. But the recovery was sustained upon the ground that the defendant company was required to keep its premises in a reasonably safe condition for persons coming to receive freight. This is a much stronger case for the plaintiff, for here he was on the premises to receive his employer's freight, and by invitation of the company was unloading the car upon an implied assurance that it was safe for him to do so.

Moreover, in this case all these matters were submitted to the jury, and after argument by able counsel and a correct charge from the judge, the jury, whose province it is to ascertain the facts, found that the plaintiff was injured by the negligence of the defendant and that he neither contributed to his injuries nor assumed the risk of injury while unloading the car at the instance of the defendant, who should have unloaded it. Indeed, there was not a scintilla of evidence tending to show contributory negligence or assumption of risk. The injury would not and could not have occurred if the iron apron had been wider, or if a cleat had been placed in the lower edge to prevent it from slipping. The

negligence in these respects was solely the negligence of the defendant. Plaintiff's testimony is that the iron apron was in place when he got there.

The wisdom of the ages has found it necessary for the protection of the weak to formulate and place in our Constitution the provision, "The ancient mode of trial by jury is one of the best securities of the people, and ought to remain sacred and inviolable." Const. North Carolina, Art. I, sec. 19. When the Constitution of the United States was adopted this was one of the provisions which was omitted, but it was thought so essential that the vote of a sufficient number of the States could not be had for ratification until it was agreed that the first ten amendments should be adopted, and among them was this: "The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of common law."

It has been well said: "Power is constantly slipping from the many to the few." From the beginning there have been constant efforts to restrict the constitutional right to have issues of fact found by a jury of twelve impartial men and not by the judge, and to whittle down the province of the jury, especially in cases where corporations with great influence and numerous counsel at command are defendants in actions of this kind. Usually the plaintiff, as in this case, is an employee without means and without influence, who finds it difficult to secure counsel, except on a contingent fee, and that fact is used against him. When the parties are so unequally matched there is nothing more important in the administration of justice than that this great guarantee of even-handed justice, which is imbedded in the Constitution of the State and of the Union, shall be preserved without diminution and that the respect due the courts shall not be impaired by devolving upon the trial judges the duty, foreign to their functions and forbidden by the Constitution, both State and Federal, of deciding issues of fact.

In this case, as already stated, there is not a scintilla of evidence of contributory negligence or assumption of risk by the plaintiff. If there had been, still the statute of the State, Laws 1887, ch. 33, now Revisal, 483, correcting a former decision by a divided Court, *Owens v. R. R.*, 88 N. C., 502, forbade the judge to pass upon it, but required that it should be proven to the satisfaction of the jury by the preponderance of the evidence; and this has been observed ever since. See numerous cases cited under section 483 in Pell's Revisal. The only exception that the Court has hitherto ventured to make is when the contributory negligence is shown by the plaintiff's evidence, and in this case his evidence negatives, instead of proving, any contributory act on his part. For what purpose was this statute passed if it can be disregarded after the plaintiff has denied any negligence on his part and the verdict of

the jury has sustained his statement? There is no greater danger in the administration of justice than to take from the juries the ascertainment of the facts in actions of negligence against powerful corporations. It is this that has caused both the Federal and the State governments to provide that in all actions for negligence brought by an employee against a railroad company contributory negligence shall no longer be a defense; but that the jury, even when contributory negligence is proven, shall consider the whole matter and apportion the damages. The purpose of this was to prevent the possibility of the judges assuming that as a fact contributory negligence had been proven to the defeat of plaintiff's claim. On this occasion the plaintiff was acting *pro hac vice* as an employee, for at the instance of the defendant he was unloading the car, which it was the duty of the defendant to have done by its regular employees. If one of them had been thus injured by the slanting iron apron not being fastened and slipping, he could have recovered. For a stronger reason the plaintiff, who was there not only as a temporary employee, but to get his employer's goods, and was injured by the defective gangway, is entitled to recover. *Autry v. R. R.*, 156 N. C., 293.

Whether the place was safe or not was a fact for decision by the jury and not for the court. Markham testifies that the iron apron was laid down as a gangway "before he got there." The defendant invited him and the plaintiff to use it by putting them to work unloading the car, which required them to pass over it.

This was not an accident, but as the jury, the only lawful triers of the fact, have found, the injury was caused by the negligence of the defendant in inviting and permitting the plaintiff to unload the car for it by passing over an iron apron which the defendant had previously laid down for him to use in passing from the warehouse to the car, and which, being very little wider than the space between, and in a slanting position, slipped and precipitated the plaintiff into the abyss to his injury, and without any fault on his part.

I. H. LUTTERLOH, ADMINISTRATOR, ETC., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 October, 1916.)

1. Railroads—Flying Switches—Ordinances—Negligence per se.

It is negligence *per se* for the employees on a railroad train to make a flying switch along the streets of populous towns or at public or much frequented crossings, and especially in violation of a town ordinance prohibiting it.

2. Same—Pedestrians—Look and Listen—Contributory Negligence—Trials—Evidence—Questions for Jury.

While one who is undertaking to cross a railroad track is ordinarily required to look and listen and to take note of conditions which are likely to cause him injury in doing so, the facts and attendant circumstances may so qualify this obligation that the question of contributory negligence must be submitted to the jury; and where the plaintiff's intestate was injured by the defendant company in making a flying switch in a town in violation of an ordinance, there is evidence tending to show that the intestate, while attempting to avoid the locomotive, was struck by the switched cars following without warning on another track which he could have observed by looking, but which did not leave the main track more than five seconds before the collision, it is *Held*, that defendant's motion to nonsuit, or instructions tendered by it that the plaintiff could not recover, were properly denied and refused.

CIVIL ACTION to recover damages for alleged negligent killing of plaintiff's intestate as he was endeavoring to cross the defendant railroad in the town of Sanford, N. C., tried before *Lyon, J.*, and a jury, at March Term, 1916, of LEE.

There was denial of liability and plea of contributory negligence, and on the trial the jury rendered the following verdict:

1. Is the plaintiff the duly appointed administrator of his alleged intestate? Answer: "Yes."

2. Did the defendant negligently kill the plaintiff's intestate, as alleged in the complaint? Answer: "Yes."

3. Did the plaintiff's intestate, by his own negligence, contribute to his death? Answer: "No."

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: "$1,878."

Judgment on verdict for plaintiff, and defendant appealed, assigning for error chiefly a denial of defendant's motion to nonsuit and a refusal to charge that on the testimony, if believed, intestate was guilty of contributory negligence.

H. A. London & Son and Williams & Williams for plaintiff.
Hoyle & Hoyle and Rose & Rose for defendant.

HOKE, J. There were facts in evidence tending to show that in May, 1914, the intestate of plaintiff was endeavoring to go across the railroad track of defendant company in the town of Sanford, when he was run over and killed by some freight cars which had just been detached from the engine in making a flying switch and were coming down a side-track close behind the engine, which was running on the main line; that the occurrence took place in a thickly settled portion of the town of Sanford; that the path crossed the track in a diagonal direction and was and had long been much used by pedestrians crossing the track in that

part of the town and by numbers of employees of a manufacturing plant in that locality near the track; that as intestate was going along this diagonal path towards the main line the engine and cars came down the track, the engine on the main line at the rate of 20 to 25 miles an hour and making a noise "puffing and blowing," and the cars close behind on a side-track, at 15 or 20 miles an hour, approaching rather from the side or rear of intestate, and, as the latter stepped back to avoid injury from the engine, he was run over and killed, as stated, by the detached cars; that these cars had just been switched off and commenced leaving the main line at the switch of the "warehouse track," about 170 feet back, and might have been seen by intestate if he had looked at the time in that direction. An ordinance of the town of Sanford was also put in evidence which prohibited the making of these flying switches within the town, and the evidence on the part of plaintiff tended further to show that there was no one on the detached cars and that no signal whatever was given of their approach until after or just at the time intestate was struck.

Upon these, the facts chiefly relevant, we are of opinion that his Honor properly denied the motion to nonsuit and refused to charge as requested on the question of contributory negligence.

It is established with us by repeated decisions that it is negligence *per se* to make one of these flying switches along the streets of populous towns or at public or much frequented crossings. *Johnson v. R. R.*, 163 N. C., 431; *Farris v. R. R.*, 151 N. C., pp. 483-487; *Vaden v. R. R.*, 150 N. C., 701; *Wilson v. R. R.*, 142 N. C., 333. A position emphasized in this case by the existence of a town ordinance expressly forbidding it. *Paul v. R. R.*, 170 N. C., 230.

The negligence of the defendant company being clearly established, we have also held in numerous cases that although one who is undertaking to cross a railroad track is required to look and listen and to take note of conditions which are likely to cause injury, the facts and attendant circumstances may so qualify this obligation that the question of contributory negligence must be submitted to the jury. *Johnson case, supra; Farris case, supra; Fann v. R. R.*, 155 N. C., 136; *Morrow v. R. R.*, 146 N. C., 14; *Sherrill v. R. R.*, 140 N. C., 252.

Under conditions presented by this evidence, the intestate, endeavoring to cross the track by the usual and much frequented way, was not required to anticipate that the employees of defendant company, in breach of a recognized duty and in violation of a municipal ordinance, would detach cars onto this side-track and thus suddenly and without warning create a condition of deadly peril. At the rate these cars were moving, they did not commence to leave the main line more than five seconds in time before the collision, and, under existent circumstances, it was less than that before their departure from the main line could

have been reasonably noted by intestate. As said by *Agnew, J.,* in *Rodrian's case,* a statement stated with approval in *Sherrill's case* and others, "Although one approaching a railway crossing is required to look and listen, it does not always follow, as a rule of law, that one is remediless because he did not look at the precise time and place when and where looking would have been of the most advantage."

On the facts of this case, and under the principles sustained by these authorities, there was no error, certainly to defendant's prejudice, in submitting the question of contributory negligence to the jury, and the judgment is therefore affirmed.

No error.

MAMIE W. CROSS ET AL. v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 4 October, 1916.)

1. Limitation of Actions—Title—Adverse Possession—Continuity—Instructions—Appeal and Error.

In an action involving the title to land, where the defendant claims by adverse possession, evidence is sufficient to be submitted to the jury if it warrants the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected some portion of the disputed land to the only use of which it was susceptible; and an instruction that such possession must be shown to have been without any break, or moment of time when the land was not occupied, is reversible error.

2. Limitation of Actions—Adverse Possession—Continuity—Definition.

Acts of adverse possession sufficient to ripen the title of a claimant of lands, the title being out of the State, are such as to put the true owner to his action, and consist in actual possession with an intent to hold solely for the possessor, to the exclusion of others, and of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, the acts to be so repeated as to show they are done in the character of owner, in opposition to the right or claim of any other person, and thus continued for seven years, if done under color, and for twenty years if done without color.

3. Limitation of Actions—Adverse Possession—Railroads.

A railroad company may acquire a right of way over the lands of the owner by showing sufficient adverse possession for the statutory period.

4. Railroads—Rights of Way—Ultra Vires Acts—Objection by State.

Where the owner of lands brings action against a railroad company involving its right of way thereon, it is not open to the plaintiff to show that the defendant was acting *ultra vires* in its use and occupation, such position being available only to the State.

5. Same—Deeds and Conveyances.

Where a railroad company takes a conveyance of lands for use beyond its charter powers, the deed is not void, but only voidable upon the objection of the State.

6. Railroads—Limitation of Actions—Adverse Possession—Ultra Vires Acts—Trials—Evidence—Questions for Jury.

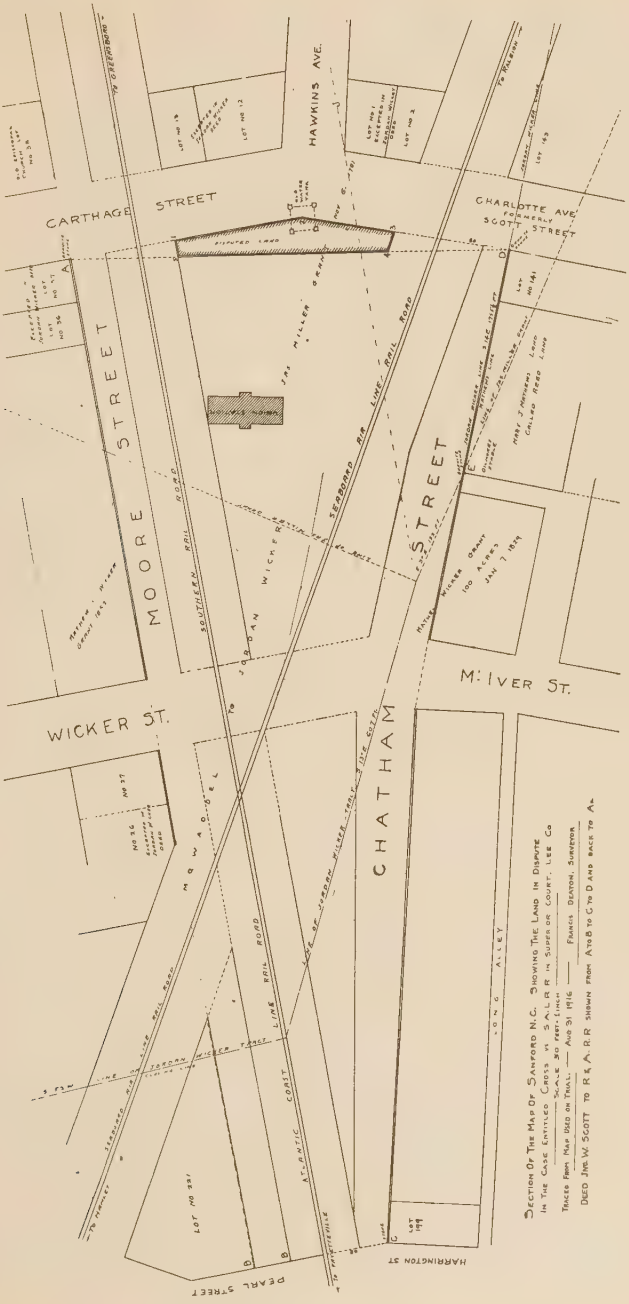
In this action involving the right of defendant railroad company to the land claimed for it by adverse possession, and its occupation and use for railroad purposes, the plaintiff also claiming to be the owner of the lands, the evidence is held sufficient to take the case to the jury.

CIVIL ACTION tried before *Lyon, J.,* and a jury, at May Term, 1916, of LEE.

Williams & Williams, Seawell & Milliken for plaintiff.
W. H. Neal, Hoyle & Hoyle for defendant.

WALKER, J. The action was brought to recover a parcel of land in the town of Sanford outside of the defendant's right of way, and designated on the map filed in this Court with the record by the figures 1, 3, 4, and 5. It seems that the parties claimed from a common source of title, John W. Scott, and defendant also claimed the land by adverse possession for twenty years; and upon this branch of the case the court charged the jury as follows: "Adverse possession must be continuous. There must not be any break at all—no moment of time when the land is not occupied; but it must be an intention to take possession, and the possession must be such as to notify the public, generally, and the owners themselves, who claim title, that there is an adverse possession; and if you find that the defendant has had such possession as this, it would be your duty to answer the first issue 'No' and the second issue 'Yes.'"

This instruction was erroneous, as we have often decided that the possession may be adverse for the required period without being unceasing. Referring to adverse possession in *Berry v. McPherson,* 153 N. C., 4, *Justice Brown* says: "This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected some portion of the disputed land to the only use of which it was susceptible. *Ruffin v. Overby,* 105 N. C., 83; *McLean v. Smith,* 106 N. C., 172; *Hamilton v. Icard,* 114 N. C., 532. While the evidence offered is not necessarily conclusive, if taken to be true, as to the fact of possession, we think it sufficient to be submitted to the jury, under appropriate instructions, that they may draw such inference as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance in


HAWKINS AVE.
CARTHAGE STREET
CHARLOTTE AVE. FORMERLY SCOTT STREET
MOORE STREET
S. STREET
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M. IVER ST.
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SEABOARD AIR LINE RAIL ROAD
SOUTHERN RAIL ROAD
ATLANTIC COAST LINE RAIL ROAD
PEARL STREET
HARRINGTON ST
SECTION OF THE MAP OF SANFORD N.C. SHOWING THE LAND IN DISPUTE
IN THE CASE ENTITLED CROSS VS S.A.L.R.R. IN SUPR. CR. COURT. LEE CO
TRACED FROM MAP USED ON TRIAL — AUG 31 1916 — FRANCIS DEATON, SURVEYOR
DEED JNO. W. SCOTT TO R.R. & A.R.R. SHOWN FROM A TO B TO C TO D AND BACK TO A.

the proof." This statement of the law has been approved in *McLean v. Smith,* 106 N. C., 172; *Coxe v. Carpenter,* 157 N. C., 561; *Locklear v. Savage,* 159 N. C., 239.

But the plaintiff contends that this error is harmless, as the defendant cannot acquire title to land by adverse possession, and, if it can do so, there is not evidence of such possession for twenty years by defendant and those under whom it claims. The position, in our opinion, is not tenable. The defendant could acquire title by grant or deed, and why not by adverse possession for twenty years, which tolled the entry originally, because there arose therefrom the presumption of a grant or deed? If the land had been conveyed to the defendant, and the act of acquiring and holding it was *ultra vires,* no one but the State could complain, and a private person would not be heard to attack the title on that ground. This question is learnedly discussed by *Justice Ashe* in *Mallett v. Simpson,* 94 N. C., 37, 41, which was an action, as here, to recover land. In that case it appeared that the land had been purchased by the railroad company for the purpose of getting cross-ties, and firewood for fuel, and it was held that it might be bought for that purpose, even under its charter powers, and sold when no longer needed. But the Court took another view of the subject which it said was fatal to the plaintiff's contention that the company could not acquire land save for railroad purposes and under the powers contained in its charter. Considering, it was said, that the company had not purchased the land in question nor used it for purposes contemplated by its charter, the deed to it from the grantor vested the legal title, and its right to purchase and hold the land cannot be collaterally assailed. No one but the State can take advantage of the defect that the purchase was *ultra vires.* This principle is fully sustained by the authorities. Like an alien who is forbidden by the local law to acquire real estate, he may take and hold title until "office found." *Fairfax v. Hunter,* 7 Cranche, 604.

At common law, corporations generally have the legal capacity to take a title in fee to real property. They were prohibited in England by the statutes of mortmain, but these statutes have never been adopted in this State, so that the common-law right to take an estate in fee, incident to a corporation (at common law), is unlimited, except by its charter and by statute. But the authorities go to the extent that even when the right to acquire real property is limited by the charter, and the corporation transcends its power in that respect, and for that reason is incompetent to take title to real estate, a conveyance to it is not void, but only the sovereign (here the State) can object. It is valid until assailed in a direct proceeding instituted by the sovereign for that purpose. *Leazern v. Hilegas,* 7 Sarft., 313; *Gonndie v. Northampton Water*

Co., 7 Pa. St., 233; *Bank v. Whiting*, 103 U. S., 99; Angel and Ames on Corporations, secs. 152-177; *Runyon v. Coster*, 14 Pet., 122; *Bank v. Poiteaux*, 3 Ran. (Va.), 136. In the *Leazern case* the corporation had been restricted by its charter from purchasing land except for certain purposes, which it had transcended, and the title was assailed upon the ground that the purchase was void, but the Court held: "The corporation might take independent of a provision in the act of incorporation, and the title of the corporation, like that of an alien, would be defeasible only by the State. No one can take advantage of the defect (of title) but the State." In another case it was held: "When a corporation was authorized by its charter to purchase real estate for certain purposes, but for no other, a deed executed to it by one having capacity to convey vested the title in the corporation, and such title could be assailed, on the ground that the purchase was *ultra vires*, only by the State or by a stockholder." *Hough v. Land Co.*, 73 Ill., 23. This Court in *Mallett v. Simpson, supra*, drew the following deduction from the authorities, that "If the corporation acquired the land for any of the purposes authorized by the charter, its purchase and sale was valid; and if, on the other hand, it transcends the authority conferred by the charter, its purchase and sale would still be valid against everybody except the State, and its title could not be collaterally assailed, as was attempted in this case." The same doctrine is stated as the prevailing one in Womack's Law of Corporations, pp. 76 and 77, where cases decided by this Court are collected. The same question is fully discussed in *Barcello v. Hapgood*, 118 N. C., 717, and *Bass v. Navigation Co.*, 111 N. C., 439, by *Justice Avery*, and the principle we have cited was approved.

A text-writer says: "Where a corporation, having the power to acquire and hold land for certain purposes only, takes a conveyance of land for a purpose not authorized, or takes more land than it is authorized to hold, the conveyance is not absolutely void. The State may proceed directly against it for exceeding the powers conferred upon it; but the question is solely between it and the State. Neither the grantor nor any other private individual can attack the conveyance in a suit by or against the corporation to recover the land. So long as the State remains inactive, no one can complain; for it would lead to infinite embarrassment if in suits by corporations to recover possession of their property inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." Clark on Corporations (Ed. of 1897), p. 167.

There is evidence in this case, though, that the defendant had been using the lot in dispute for railroad purposes. In *Raleigh v. Durfey*, 163 N. C., 154, we held that a corporation (in that case a municipality)

can acquire title to land by adverse possession. It was treated by the justice who wrote the opinion as a matter of course, by the use of this language: "It is admitted that the plaintiff has been in undisputed actual adverse possession under known and visible lines and boundaries of the entire land and property for sixty years, occupying the same and collecting the rents. Upon these facts it would seem to be plain that plaintiff has acquired an absolute title to the property. One of the methods of acquiring title to land is by adverse possession. *Mobley v. Griffin,* 104 N. C., 115. We know of no reason or authority by which a municipality is excluded from that rule and rendered incompetent to acquire title by that method."

We are also unable to agree to the proposition that there is no evidence of adverse possession by the defendant in this record. The evidence of several of the witnesses, and especially of J. W. Cunningham and Dr. W. A. Monroe, was that the defendant "had been in possession of the land (which was fenced in January, 1914) for more than twenty years." The witness W. A. Monroe said he had lived in Sanford for twenty-two years and knew the land in question, and that the defendant had been in possession since he had lived there, and that he resided within 200 or 250 feet from it. This carried the case to the jury under the authority of *Bryan v. Spivey,* 109 N. C., 71, and *Berry v. McPherson,* 153 N. C., 5. It was said in *Bryan v. Spivey, supra,* by *Justice Shepherd:* "A witness may testify directly, in the first instance, to the fact of possession, if he can do so positively, subject, of course, to cross-examination," citing Abbott Trial Ev., 622 and 590; *Rand v. Freeman,* 1 Allen (Mass.), 517. "Possession expresses the closest relation of fact that can exist between a corporal thing and the person who possesses it, implying either (according to it strictest etymology) an actual physical contact, as by sitting or (as some would have it) standing upon a thing." Burrill Law Dict., 318.

It is for the jury to determine finally, upon the evidence and under the instructions of the court, whether there has been adverse possession, in the sense of the law, sufficient to bar the plaintiff's original right of entry, or to divest his title if he had one. The testimony of a witness may, perhaps, be disregarded sometimes, if it clearly appears to be without any substantial basis, as said in *Berry v. McPherson, supra;* but the right to exclude it, if such exists, should be exercised sparingly and with great caution, lest the court invade the province of the jury, whose special function is to pass upon the facts.

But we are of the opinion that, in this record, there is to be found ample testimony of such a possession for twenty years as the law regards to be adverse, and which, if found by the jury to correctly embody the facts, will defeat the plaintiff's recovery. We would refer particularly to the testimony of D. N. McIver, R. R. Riley, Primus Holmes, J. C.

Gregson, J. K. Perry, J. W. Cunningham. Other witnesses testified to the same effect, and some as to the adverseness of the possession, but not for the full time, though their testimony if it related to different years of the full period of time would go to the jury for what it is worth.

What will constitute adverse possession is a question we have often decided. It is such a possession as will expose the occupant to an action by the true owner, and which, if continuous and notorious for seven years under color, or for twenty years without color, title being out of the State, will ripen into a perfect title. It consists in actual possession with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to the right or the claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that the occupant is exercising thereon the dominion of owner. *Loftin v. Cobb,* 46 N. C., 406; *Montgomery v. Wynns,* 20 N. C., 527; *Williams v. Buchanan,* 23 N. C., 535; *Burton v. Carruth,* 18 N. C., 2; *Gilchrist v. McLaughlin,* 29 N. C., 310; *Bynum v. Carter,* 26 N. C., 310; *Simpson v. Blount,* 14 N. C., 34; *Tredwell v. Reddick,* 23 N. C., 56; *Currie v. Gilchrist,* 147 N. C., 649; *Berry v. McPherson, supra; Coxe v. Carpenter,* 157 N. C., 561; *Locklear v. Savage,* 159 N. C., 239; *McCaskill v. Lumber Co.,* 169 N. C., 24.

We do not, of course, pass upon the credibility of witnesses, as that is solely for the jury to consider and determine. The utmost limit of our province has been reached when we decide that there is some evidence for the jury; and we are not permitted to go beyond it. The jury are left to settle disputed questions of fact, without any intimation from us as to the weight of the evidence or as to its preponderance.

There was error in the charge as above indicated, and, therefore, the case must be submitted to another jury.

New trial.

J. C. CHITTY ET AL. V. J. J. PARKER ET AL.

(Filed 4 October, 1916.)

1. School Districts — Petitions — Conditions Precedent — Jurisdictional — Statutes.

The signing of the petition by the requisite number of the resident freeholders in a proposed new school district, Gregory's Supplement, sec. 4115, is a condition precedent and jurisdictional to the establishment of the district by popular vote therein, and noncompliance therewith renders the subsequent proceedings void.

2. Same—Women.

In ascertaining the necessary number of resident freeholders for a petition in a proposed new school district, Gregory's Supplement, sec. 4115, women freeholders must be counted. Ch. 22, Laws 1915.

3. School Districts—Petition—Qualifications—Listing Property.

Resident freeholders of a proposed new school district, who have not listed their property within the district for taxation, are not to be counted in ascertaining whether the petition has the requisite number of signers. Gregory's Supplement, sec. 4115.

4. School Districts—Petition—Qualifications—Freeholders—Temporary Absence.

Those who have temporarily left the proposed new school district, but having the *animus revertendi* and the statutory requirements, are to be counted in ascertaining whether a sufficient number of resident freeholders in the district have signed the petition; also those who have dower interests in lands therein, heirs at law of an estate, a resident tenant in common of lands, landowners at the time who died before the election was ordered, and a resident wife who holds lands in entireties with her husband; but an inmate in an insane asylum in another State will not be counted as a resident freeholder of the proposed district.

5. School Districts—Petition—Qualifications—Listing Property—Taxes.

Those who are residents of the township, but outside of a proposed new school district, are not to be counted in ascertaining whether a sufficiency of the resident freeholders have signed the petition for an election. Gregory's Supplement, sec. 4115.

6. School Districts—Petition—Enlarging District—Ratification—New Petition.

Where the boundaries of a proposed new school district have been changed since the signing of the petition by the resident freeholders within the district first proposed, the original petition is not sufficient, unless again submitted to the signers thereof for their approval and ratification; and the assent to the change of boundaries by the signers present at the hearing on the petition is not sufficient. The proceedings may, however, be commenced *de novo*.

CHITTY *v.* PARKER.

APPEAL by plaintiffs from *Winston, J.*, at July Term, 1916, of HERTFORD.

R. C. Bridger and J. H. Matthews for plaintiffs.
Stanley Winborne and D. C. Barnes for defendants.

CLARK, C. J. This is an action by certain taxpayers in a proposed special-tax school district in Hertford County to restrain the defendants, registrar and judges of election in said district, from making the canvass and return of said election to the board of county commissioners of Hertford and to restrain said county commissioners from receiving the returns, declaring the result, and from levying a tax in said district.

Pursuant to sundry acts summed up in Gregory's Supplement, sec. 4115, the board of education of Hertford, on a petition filed on the first Monday in May, 1916, purporting to be signed by one-fourth of the resident freeholders of the proposed district, requested the county commissioners to call an election therein, submitting the question of establishing said district and levying a special tax. The commissioners, in compliance with said petition and request, ordered said election to be held, and appointed the defendants Parker, Pipkin, and Gardner registrar and judges thereof.

Said section 4115 authorizes the laying off of said districts and the ordering of an election "upon the petition of one-fourth of the freeholders within the proposed special-tax school district in whose name real estate in such districts is listed in the tax lists of the current fiscal year."

In *Gill v. Comrs.*, 160 N. C., 176, it was held that women were not "freeholders" in the purview of this act; but subsequently the General Assembly, ch. 22, Laws 1915, enacted as follows: "In all cases where a petition by a specified number of freeholders is required as a condition precedent to ordering an election to provide for the assessment or levy of taxes upon realty, all residents of legal age owning realty for life or a longer term, irrespective of sex, shall be deemed freeholders within the meaning of such requirement." The requirement that the petition shall be signed by one-fourth in number of the freeholders, male or female, in the proposed district is a condition precedent, and is jurisdictional. *Gill v. Comrs., supra.*

The plaintiffs contend that fourteen names, which they give, most of whom are women, were not counted, and that if they are counted it will be found that one-fourth of the freeholders in said proposed district did not sign the petition. But they admit that unless thirteen of these names are entitled to be counted as freeholders this point is not well taken; that is, they admit that if as many as two of the names given are disallowed as freeholders this point is not well taken. We find that no

property was listed for taxation in the names of two of said parties, to wit, Winborne Wheeler, who lived on land which belonged to his father, but which had been sold under mortgage prior to signing this petition, and deed made to purchaser, who went into possession, and Laodicea Parker, who resides on land which belonged to her husband and in which she is entitled to dower, but which had not been listed for taxes. Elisha Hicks owns a tract of land within the boundary, but he is now an inmate of an insane asylum in Virginia, and his wife went to that State. He is not a resident, can have no *animus revertendi,* and should not be counted.

As to the other eleven, Molly Parker, landowner, who was temporarily absent in a hospital and will return when discharged, should be counted. Also Miss Corinne Parker, who owns and resides on land within the boundary, but who was at times temporarily away from home working at her trade as a milliner, should also be counted, these having the *animus revertendi. Hannon v. Grizzard,* 89 N. C., 115, and cases cited in the Anno. Ed. Mrs. W. D. Deans, who resides on the land of her husband, which is listed in the name of his estate, and Virginia Wilson, widow of Joe Wilson, as to which the facts are the same, both of whom it is admitted are entitled to dower, should also be counted. Charles Watson, son and heir of Charles Watson, deceased, also resides on land listed in the name of "Charles Watson's estate"; Harry Newsome and Annie Newsome, who are heirs at law of Isaac Newsome, who reside on the land in said district listed as "Isaac Newsome's estate," and Miss Williamson, who lives on land which she owns jointly with her brothers and sisters, who are nonresidents, which land is listed in the name of the "Williamson heirs," should also be counted. James Lawrence and Tony Deans were landowners residing within the boundary whose lands were listed for taxes, but who have died since the election was ordered. They should be counted, because the petition speaks as of its date; also Mrs. Liverman, cotenant in entireties, the land being listed in her husband's name.

It appears from the above fourteen names, that Winborne Wheeler was not a freeholder; that Laodicea Parker, though entitled to dower interest in her husband's estate, had not listed the land for taxes, and that Elisha Hicks was not a resident. These three being disqualified, according to the plaintiffs' own showing, one-fourth of the freeholders of land listed in the district signed the petition, which is valid, therefore, so far as that objection goes.

The plaintiffs further object that the board did not count the number of freeholders residing in the territory of the township outside of the proposed district. This objection is not well founded, for the statute requires only that the petition shall be signed by one-fourth of the freeholders "within the proposed special school district."

The plaintiffs further object because the board of county commissioners on 5 June, 1916, permitted a change in the boundaries of the district as set out in the original petition to be made by the board of education without submitting it again to the signers thereof for their approval and ratification.

Assent by the signers present at the hearing is not sufficient. We think this was error which vitiated and made void the petition, which was the jurisdictional question upon which the validity of the election depended. It may well be that with the changed boundaries some of the petitioners, if the question had been again presented to them, might have refused to ratify their signatures to the former petition asking for a district with different boundaries. This change was presumably material, else the boundaries would not have been changed. It appears that $15,000 in property and seventy-five voters were excluded by the change.

The requirement that one-fourth of the freeholders of land lying in the district and listed for taxation should sign the petition is a protection to the landowners in any given district against taxation which otherwise might be voted by a majorty consisting of nontaxpayers.

For the reason above given the election should have been held null and void and a perpetual injunction should have been issued against levying the tax.

Should one-fourth of the resident freeholders irrespective of sex owning land within said district (with the present boundaries) listed for taxation sign the petition, and a majority of the registered voters therein shall vote for the special tax, this can still be done; but the election cannot be sustained upon a petition, though signed by one-fourth of the said freeholders, when it appears that the boundaries set out in such petition were different from those of the district in which the election was ordered.

Reversed.

ROBERT K. DUNN v. JOHN L. ROPER LUMBER COMPANY.

(Filed 4 October, 1916.)

1. Evidence—Res Ipsa Loquitur.

Where the plaintiff in his action to recover damages for a personal injury alleged to have been negligently inflicted on him by the defendant shows damages proximately resulting from the defendant's act, which act, with the exercise of due care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, under the doctrine of *res ipsa loquitur*, which requires the defendant to go forward with his proof or take the chances of an adverse verdict.

2. Same—Evidence.

Where the plaintiff was employed at the defendant's mill, and was directed to operate the logs on the saw carriage, and there is evidence tending to show that while he was holding with both hands the lever to keep the log in place for the saw a part of the machinery, called a hammer-dog, fell upon the saw, breaking it into fragments, and caused the injury; that the saw and machinery operating it were not properly running; that a certain other piece of the machinery becoming loose could have jostled the hammer-dog so that it would fall with the effect stated, it is sufficient to raise the presumption of the defendant's negligence, under the doctrine of *res ipsa loquitur*, and take the case to the jury.

3. Same—Master and Servant—Instructions.

Where the evidence permits, and the court has charged the jury, upon the doctrine of *res ipsa loquitur* arising in an action for damages, and has further instructed them that they must find that the defendant had not acted with reasonable care or had failed in its duty to inspect the machinery, and this upon the entire evidence of both the plaintiff and defendant, the further instruction goes beyond the strict application of the doctrine in defendant's favor, of which it cannot complain.

4. Master and Servant—Dangerous Instrumentalities—Duty to Instruct.

The plaintiff was employed at the defendant's sawmill as a millwright, and was directed by his superior to operate a saw carriage used to take the logs to the saw for the purpose of sawing them, and to operate the appliances for holding the logs properly upon the carriage. *Held*, evidence tending to show that the plaintiff was inexperienced and ignorant, and was not properly instructed as to the danger of performing such duties, was material for the consideration of the jury upon the question of the defendant's actionable negligence under the facts of this case.

5. Master and Servant—Negligence—Safe Place to Work—Inspection—Duty of Master.

Where the servant is required to work with dangerous instrumentalities and surroundings, such as operating the log carriage of a sawmill, it is the legal duty of the master to provide a reasonably safe place to work and reasonably safe tools and appliances with which to perform his work, and make such inspection thereof as a reasonably prudent man would make under the circumstances, as if the risk were his own.

6. Same—Evidence—Trials.

The plaintiff was injured while operating a log carriage at a sawmill by a hammer-dog falling upon the saw in an unusual manner, causing it to fly off in fragments and injure him. *Held*, evidence as to the defective condition of the saw, and the defective working of the other parts of the machinery having a bearing upon the resultant injury, was proper for the consideration of the jury.

7. Master and Servant—Safe Appliances—Selection—Rule of Prudent Man—Known and Approved, etc.

While it is the duty of the master to provide such implements and appliances for the servant in performance of his work as are known, ap-

proved, and in general use, this does not exempt him from liability if, notwithstanding, he has otherwise negligently failed in his duty to supply him a reasonably safe place for the work to be done, or reasonably safe machinery, tools, and appliances for that purpose.

8. Negligence—Concurrent Causes—Proximate Cause.

In this action to recover damages for personal injury received by the plaintiff while operating defendant's log carriage at its sawmill, there was evidence tending to show that the defendant was operating a defective saw furnished by the defendant, and through defective machinery a hammer-dog fell upon it, resulting in the injury: *Held*, the proximate cause of the injury would be the result of the two negligent acts of the defendant, if established.

CIVIL ACTION tried before *Whedbee, J.*, at February Term, 1916, of CRAVEN.

Plaintiff alleged that while in the service of the defendant, as a dogger at the sawing machine, the hammer-dog fell and broke the saw into pieces and he was severely injured on his arm and hand by the flying pieces of the broken saw, which was the result of the defendant's negligence in having for his use a defective machine.

Plaintiff Robert K. Dunn in his own behalf testified: "About 1 November, 1913, I was employed as a millwright by the Roper Lumber Company, and have been for about eighteen months at their New Bern mill, and on that date I was taken and put on the saw carriage. I was dogging on the carriage by direction of the foreman, C. H. Barrow. The dog on the carriage is used for holding the logs to keep them from going off when sawing and cutting them up. The dog works by a lever that throws in the dog when the log first goes on the carriage, to keep the log from rolling off; that is the hammer-dog. The carriage is about 18 feet long and runs by steam backwards and forwards as the saw goes through the log and cuts it up. The saw they were using was one they picked and brazed and fixed it up. It was a double band saw. I was standing in my place holding the lever to keep the log from rolling off the carriage, and while I was doing that I happened to see the hammer-dog falling. I had both hands on the lever holding the log to the block; I looked and saw the hammer-dog fall. I reached to get it, but before I could the dog struck the saw, and the saw went to pieces and cut me on the arm and my hand. I was using the board-dog at the time; we were not using the hammer-dog, because they didn't cut but one side of the log, and I was holding it by the board-dog; the hammer-dog works on the outside and the board-dog with a lever, and I was working the board-dog at the time. The saw had been brazed in a good many places. There are scars on my arm and it cut three fingers off. I was a millwright, and not the regular man to work on the carriage. They were short of men that day and put me on it. I am not an experienced

dogger. The foreman told me to go in that place and work there until the boy came back. He did not instruct me as to how it should be worked. I did not know anything about the saw they were using at that time, or I would not have gone on the carriage. I found out afterwards what kind of saw it was, from what I heard, and I saw it afterwards on the junk pile in the yard; they said it was the same saw. When I saw it there it had three or four brazes in it. A braze is where it is grounded up and welded together with two pieces of iron. I think 2½ inches are laid in and welded together; I never brazed any, but all saws have brazes in them; only when one cracks it is supposed to be cut off and brazed so they can make the saw run. It is patched up; you can take a piece and make a saw out of it by brazing together. I worked in the file room and know how it was brazed, but not this particular saw. I have an opinion as to the strength of a saw after it is brazed, and I know it is not as strong; I worked two or three months in the filing room; the strain on a saw when it is operated is about 8,000 to 10,000 pounds. George Keys was setting the logs. I was working on the rear end. George Ormand was on the front end of the carriage. That wasn't my job; they put me there that day. I wasn't supposed to do any kind of work; the foreman asked me to do that work; it was not my duty to relieve those men; I was supposed, as a millwright, to be familiar with all character of work around there. The board-dog holds the log when the log is turned over and the hammer-dog is then thrown over and keeps the log from turning; the hammer-dog projects about 3 or 4 inches from the block. The steel dog is about 2 inches in diameter (indicating from model of the dog); that is set in here and that goes through there; that is what is called the dog. I have seen the teeth of the saw all stripped off. If it don't break it will knock the teeth out. I don't know if the dog getting in front of the saw caused the saw to break when it was struck. The saw broke all to pieces. It was part of my duty, when the log was set, to throw the dog in. They run about two to three brazes in a saw; they can't fix it without a braze. I don't know what they have in other mills. I guess that was the kind of dog used on carriages like that. I was working on the left-hand side of the mill. The saws become dull after running a little while and then they put on new ones. I don't know about the custom in other mills—that is, what they did in those mills. They changed saws. When I was in the filing room it was the custom, if a saw struck iron or anything, to put a new one on. I didn't do anything to cause the dog to fall into the saw. I didn't touch the dog until I saw it falling."

The plaintiff Robert K. Dunn was recalled and testified: "This model don't look like the same machine to me. The saw hit the dog right along there; this right-hand dog struck the saw and I was standing with my hand on the lever. I looked down and saw the dog falling and I

grabbed this lever to pull it back, but before I could do that and get it away the saw struck it and the saw burst and cut me like it did. I didn't throw it in, as I had both hands on the other lever like this (indicating). It is possible for the hammer-dog to fall in. In holding the log on the carriage we had trouble twice that night, and the nigger struck the face of the dog, and rolled it over and I saw it jump in the center and gradually fall in; the motion of the carriage after it started gradually works it one way or other. The steam nigger starts very suddenly on the lower floor to the carriage upstairs. When that nigger comes through it has to come from below and turn the log. The dog that fell over was on my right-hand side. I was on the rear part of the carriage."

Without stating more of the case, it is sufficient to say that there was testimony in corroboration of plaintiff, and also testimony in behalf of defendant which tended to contradict his version of the occurrence, and to show that plaintiff was injured, not by defendant's negligence, but by his own want of care in moving the lever at the wrong time, and thereby causing the hammer-dog to fall against the saw and break it.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff by his own careless and negligent conduct contribute to such injury? Answer: "No."

3. What damage, if any, is the plaintiff entitled to recover by reason of such injuries? Answer: "$2,000."

Defendant appealed from the judgment, and assigned numerous errors.

Guion & Guion and D. L. Ward for plaintiff.
Moore & Dunn for defendant.

WALKER, J., after stating the case: There are many exceptions in this record, but a careful analysis of them will disclose that they may be greatly reduced in number by classification, and that, at last, there are only a few when we confine ourselves to those which go to the real merits of the case.

The two principal assignments of error are that the court in its charge permitted the jury to consider the doctrine, *res ipsa loquitur,* as applicable to the facts, and that defendant's motion for a nonsuit and its prayer for a peremptory instruction that in any view of the evidence, if believed by the jury, the issue as to negligence should be answered in the negative, were refused.

We are of the opinion there was evidence in this case which warranted the charge of the court to which exception was taken below. Where the plaintiff shows damage proximately resulting from the de-

fendant's act, which act, with the exercise of due care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which requires the defendant to go forward with his proof or take the chance of an adverse verdict, or, as otherwise stated: "The accident, the injury, and the circumstances under which they occurred are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault. Proof of an injury, occurring as the proximate result of an act of the defendant which would not usually, if done with due care, have injured any one, is enough to make out a presumption of negligence. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." *Ellis v. R. R.,* 24 N. C., 138; 1 Shearman and Redf. on Negligence (16 Ed. by Street), sec. 59; *Aycock v. R. R.,* 89 N. C., 321; *Lawton v. Giles,* 90 N. C., 374; *Haynes v. Gas Co.,* 114 N. C., 207.

These general definitions were approved and the subject fully discussed in the recent case of *Ridge v. R. R.,* 167 N. C., 510.

The statement of the doctrine which has usually been accepted by the courts was that reported in *Scott v. London Docks Co.,* 3 Hurlst. and C., 596.

The maxim, *res ipsa loquitur,* does not dispense with proof, but permits the jury to draw a reasonable inference from circumstances which, *prima facie* and in the ordinary course of things, are generally indicative of negligence. It applies here because there is proof that the plaintiff did not move the lever which controlled the hammer-dog, and did not move the hammer-dog itself. The first and only thing he did was the effort he made to stop the falling hammer-dog, which, in some way, had escaped from its proper place, where it was held in position, and intended to be so held, by its own weight. The eccentric action of this implement might well be inferred to have been caused by some defect in the machine itself, of which it was an important part. There is also evidence that what is called the "nigger" could have jostled the hammer-dog out of place, "though, when it is at rest and out of use at the other end of the circle, it would take a considerable jar to do so." The witness Barrett, who gave this testimony, also stated that the saw was oscillating, and that this does not occur if it is in good order and properly placed and adjusted.

So we have a case not, in principle, unlike *Ross v. Cotton Mill,* 140 N. C., 115, and *Morrisett v. Cotton Mills,* 151 N. C., 31, where a machine was suddenly and unexpectedly set in motion and the doctrine we are discussing was applied, the Court holding that evidence, which was not

more convincing than that we have in this record, was sufficient to raise a *prima facie* case of negligence under the maxim.

The more recent case of *Deaton v. Lumber Co.*, 165 N. C., 560, seems to be directly applicable to the facts of this case. It appeared there that the plaintiff, who was in the employ of the defendant, was engaged in operating a sawing machine and "that a cut-off saw which had been placed in a hood or shield, and should have remained there, sprang forward out of the shield and injured him." If the facts of the two cases are even casually compared, they will be found to bear the very closest resemblance to each other, if they are not substantially alike; and upon the facts in the cited case, the Court did not hesitate to apply the doctrine, *res ipsa loquitur*. *Justice Brown* thus states the Court's opinion upon those facts: "We think that this version of the testimony would justify the jury in drawing the inference of negligence in the manner in which the saw had been placed in its bearings. The manner in which the saw unexpectedly sprang out of the shield and injured the plaintiff, in the way testified by him, is very conclusive evidence that there was something unusually wrong with it, and presents a case where the doctrine of *res ipsa loquitur* will carry the case to the jury. In this case the facts and circumstances attending the injury speak for themselves, and in the absence of explanation or disproof give rise to the inference of negligence. It is evident that the accident would not have occurred if the saw had not unexpectedly sprung out of its protecting shield. Why it did so is not very clear, but the circumstance calls upon the defendant for explanation."

The court, in its charge, did not leave the jury to decide solely upon the naked doctrine of *res ipsa loquitur*, but required the jury, in addition, to find that "the fact and circumstance" of the hammer-dog falling upon the saw "came from a want of reasonable care and inspection on the part of defendant," and that it was the proximate cause of the injury. This instruction necessitated a finding by the jury that defendant had failed in its duty toward the plaintiff, whereby he had been injured as described by him, and was not a strict application of the rule that "the thing itself speaks." The jury were further told that they could draw the inference of negligence, or not, after they had heard the defendant's evidence, or, in other words, from the entire evidence.

This disposes of the exceptions numbered 11, 14, 17, 18, 20, 21, 22, 23, 24, and 25.

The part of the charge to which exception 26 was taken was no more than a statement of plaintiff's contention, except the latter part of it, which was favorable to defendant, as we have shown; and exceptions 27 and 28 were merely formal.

The questions as to plaintiff's inexperience, and his ignorance as to the condition of the machine and the necessity to warn him of any

special danger in using it were all material for the consideration of the jury. It is the legal duty of the master to provide a reasonably safe place where the servant may work and reasonably safe tools and appliances with which to perform his work, and in order that the master may discharge this duty, he should make reasonable inspection of them from time to time, so that the place, the machinery, implements and appliances may be kept in proper condition—such an inspection as an ordinarily prudent man would make under the same circumstances, if the risk were wholly his own. *Marks v. Cotton Mills,* 135 N. C., 287; *Parrott v. Wells,* 15 Wallace (U. S.), 524; *Hicks v. Mfg. Co.,* 138 N. C., 319; *Moore v. R. R.,* 141 N. C., 111; *Pigford v. R. R.,* 160 N. C., 93; *Steele v. Grant,* 166 N. C., 635; *Cochran v. Mills Co.,* 169 N. C., 57. A cognate duty, which rests upon the master, in order to secure the safety of his servant while at work, is the one of careful instruction, if the servant be inexperienced or "green," to the end that he may know how to handle the particular machine or other appliance, and may understand and appreciate the dangers in its use. *Marcus v. Loane,* 133 N. C., 54; *Chesson v. Walker,* 146 N. C., 511; *Avery v. Lumber Co., ibid.,* 592; *Craven v. Mfg. Co.,* 151 N. C., 352; *Wood v. McCabe, ibid.,* 457; *Horne v. R. R.,* 153 N. C., 239. These well settled principles dispose of the fifteenth and sixteenth exceptions. It was also competent and relevant under them to show that plaintiff was not an experienced dogger, and was not properly instructed as to his duties, and did not know of any defects in the machine or of any dangers in the use and operation of it. It was also competent to inquire as to the condition of the saw, and, of course, in this connection, as to what effect brazes on it would have upon its strength and fitness for the work. It all tended to show the true situation at the time the hammer-dog fell on the saw and splintered it, and plaintiff's inability to take care of himself. This covers the 1st, 2d, 3d, 5th, 6th, 7th, and 10th exceptions. It was relevant to show whether the steam nigger, if defectively working, could cause the dog to rise over the metal arch upon which it moved and fall on the saw; but this is not what the witness said, as he merely answered that he had seen such a thing occur. He was not giving an opinion, but testifying to a fact which had come under his observation. And it was also proper to prove anything unusual, or out of the ordinary, in the operation of the machine, either the peculiar noise it made or its swaying or oscillating motion, or anything else of a like kind, which indicated that it was not in good order, for the allegation is that the machine being defective was what caused the injury. It was for the jury to say whether the plaintiff moved the hammer-dog in the careless operation of the machine or whether it was forced from its place by some defect in the machine itself. The question as to the use of in-

ferior saws by defendant was not answered so as to do any harm, for the witness disclaimed any knowledge of it. It was not claimed that there was any defect in the hammer-dog itself, but that it was not sufficiently secured, or, if this was not so, that a defect in the machine caused it to fly out and drop on the saw. If the plaintiff was not responsible for the movement of the hammer-dog, and the jury found that he was not, it must have been either improperly secured or some defect in the machine, either in its original construction or in its needed repair, must have caused the hammer-dog to fall on the saw.

It is not always a full performance of the master's duty to provide merely for his servant implements and appliances which are known, approved, and in general use. He will still be liable for any injury proximately resulting from a failure to perform that duty in any other respect. He is not permitted to put defective machines or appliances in the hands of his servant with which to do the work, even though they may be of the requisite model, or type; and if he is negligent in so doing, and thereby causes injury to the servant, he must answer in damages for the wrong. *Ainsley v. Lumber Co.,* 165 N. C., 122; *Kiger v. Scales Co.,* 162 N. C., 133. This rule has frequently been recognized by us in negligence cases. It is a part of his obligation to furnish appliances, "which are known, approved, and in general use," but not necessarily all of it, and if he complies with that part of it, and is otherwise negligent in not supplying a reasonably safe place for the work to be done, or reasonably safe machinery, tools and appliances with which to do it, he falls short of the legal measure of his duty.

In this case the injury was caused neither by the saw nor by the hammer-dog alone, or acting separately, but by both together, they being in rapid motion and coming together with great violence, which caused the heavier body to almost demolish the other, and so shiver it that plaintiff was cut and injured by the flying pieces. This was the proximate cause of the damage.

Several of the objections were taken to a mass of evidence, some of which was competent. Where this is the case, the objection is too broad. It should be confined to the incompetent part of the evidence. *S. v. Ledford,* 133 N. C., 714; *Ricks v. Woodard,* 159 N. C., 647.

We conclude that there was no error in the trial.

No error.

IN RE WILL OF H. J. STAUB.

(Filed 4 October, 1916.)

1. Wills—Trials—Evidence—Questions for Jury.

In an action to set aside a will for mental incapacity and undue influence, testimony of a witness which tends to contradict his former evidence favorable to the sufficient mental condition of the testator is competent, the truth of the matter being for the jury to determine, and it is also competent for him to testify from his own knowledge as to the mental capacity of the testator to make the will.

2. Trials—Evidence Stricken Out—Appeal and Error—Objections and Exceptions.

Where testimony on the trial has been stricken out by the judge at appellant's request, his exception as to its admission is without merit on appeal.

3. Wills—Evidence—Contradictory Testimony—Undue Influence.

In an action to set aside a will for mental incapacity and undue influence, it is competent for propounder's witness to state, on cross-examination, that the testator was at the time entirely under the dominion, direction, and control of a religious denomination which is the principal beneficiary under the will, and, as corroborative of substantive evidence of mental incapacity, the dependent condition of testator's family.

4. Wills—Mental Incapacity—Undue Influence—Unanswered Issue—Appeal and Error—Harmless Error.

Where a will has been caveated for mental incapacity and undue influence, and under proper evidence and instructions the jury has answered the first in favor of the caveators and left the second unanswered, exceptions to the admissibility of testimony as to undue influence become immaterial; but in this case it was proper upon the element of mental incapacity.

5. Wills—Mental Incapacity—Undue Influence—Trials—Evidence—Questions for Jury.

In an action to caveat a will there was conflicting evidence of mental incapacity and undue influence; that the wife of the deceased was dependent, that his daughter had supported the family except for a small portion of the deceased's income from his property; that the testator devised only a small amount of personal property and $2,500 in real estate to his family, and $20,000 to the Christian Scientist Church, which dominated his actions and of which he was a member. *Held*, sufficient for the jury under proper instructions.

6. Same—Instructions—Burden of Proof.

The instructions given by the court to the jury in this action to caveat a will, defining the right of the testator to dispose of his property as he pleased, applying the various phases of the testimony to the issues of mental incapacity and undue influence, defining the former, and placing the burden of proof on the caveator, are approved.

BROWN, J., dissenting.

In re STAUB'S WILL.

APPEAL by propounders from *Whedbee, J.*, at May Term, 1916, of CRAVEN.

Guion & Guion, D. L. Ward, and S. Brown Shepherd for propounders.
Moore & Dunn for caveators.

CLARK, C. J. The caveat was filed upon the ground of insufficient mental capacity and undue influence. The issue as to undue influence was not answered by the jury and the appeal depends solely on the finding that the deceased did not have mental capacity to make a will. The first six exceptions are to testimony brought out upon cross-examination of the witnesses for the propounders, and cannot be sustained.

The first exception is because the witness who had testified favorably as to the mental condition of the deceased was asked as to contradictory statements made by himself prior to the trial. This was competent.

The second exception is without point, as the testimony objected to was stricken out by the court on motion of the propounders.

The third exception was to permitting the propounders' witness to state on cross-examination that from his experience and observation of the deceased he was entirely under the domination, direction, and control of the Christian Scientist people, who were the principal beneficiaries of the will. This was competent on the third issue and also as tending to contradict this witness's testimony as to the mental capacity of the deceased to make a will.

The fourth exception is that the same witness stated on cross-examination that in his judgment the deceased was crazy and of unsound mind when he signed the will. This was competent, *Clary v. Clary*, 24 N. C., 78, and besides, because it was in direct contradiction of the testimony of this witness, who was a witness to the will and who had stated on his examination in chief that the deceased was of sound mental condition when he signed the will.

The fifth exception was to the refusal to strike out that portion of this witness's evidence on cross-examination because on reëxamination the witness was of opinion that the deceased was of sound mind. The witness having stated his testimony differently, both phases of it should have been presented to the jury.

The sixth exception, as to the dependent condition of the wife of the deceased, and her inability to take care of herself, was competent in corroboration of the evidence as to the mental incapacity of the defendant, since he devised the bulk of his property to the Christian Scientist people, leaving his wife and daughter, who had supported him for so many years, practically destitute.

The seventh exception was for the admission of the opinion of the witness Mrs. Bell as to the condition of her father's mind for a few

years prior to his death. The eighth and ninth exceptions, as to the influence exerted by the propounders over the deceased, it is unnecessary to consider, since the jury did not pass upon the issue as to undue influence. If they considered this testimony at all, it could have been only from the light it threw upon the issue as to mental incapacity, and for that purpose it was competent.

The tenth and eleventh exceptions were to the testimony of the daughter of the deceased that she practically supported the family, and this was competent in corroboration as tending to show the unsound mental condition of the testator in devising his property away from his wife and daughters.

The twelfth exception was to the testimony that the mind of the testator had become unsound and his conversation that of a monomaniac on the subject of Christian Science.

The prayer of the propounders to instruct the jury that the evidence was not sufficient to set the will aside was properly refused. The issue was one for the jury upon the whole evidence.

It was in evidence that the deceased did not support or provide for his family, and that his daughter paid the grocery bill and meat bill and paid the rent, and that the other children contributed to their mother's support. Though the deceased had an income of $50 per month, he contributed only $7 for the support of the family. By his will he devised the small amount of personal property he had and $2,500 in real estate to his family and $20,000 to the Christian Science Church. There was evidence as to his sanity, both pro and con, and the jury upon proper instructions found that the deceased did not have sufficient mental capacity to make the will. This was a matter within the province of the jury, and we cannot disturb it.

The judge in a very full, clear, and impartial charge, to which no exception was taken, instructed the jury, among other things, as follows:

"The fact that a man gives his property other than to his relatives and their dependents does not of itself vitiate his will, and any man who has testamentary capacity and is not unduly influenced to execute a will can give his property to any body or any one that he pleases; he can give it to individuals; he may give it to a person whom he never knew; he can give it all to a religious denomination, to any church, to any nonreligious society, to any charitable organization; he has the right to give it to one or more persons or objects to the exclusion of all others; but it is a circumstance a jury may consider in connection with other evidence in passing upon a man's mental capacity; and if you find that he has testamentary capacity, and is not influenced unduly, he has the right to give his property to any one and anywhere; that it is not illegal and not contrary to public policy. You have no right to find as a fact that this is not the will of H. J. Staub because he gave

his property to the Christian Science Church, if he had the testamentary capacity and was not unduly influenced. He had the right to give it wherever he pleased, if he had the testamentary capacity and was not unduly influenced."

The court gave the prayers for instruction asked by the appellants. The court defined testamentary capacity: "A person has testamentary capacity within the meaning of the law if he has a clear understanding of the nature and extent of his act, of the kind and value of the property devised, of the persons who are the natural objects of his bounty, and of the manner in which he desires to dispose of property to be distributed"; and, further: "The law presumes that every man possesses mental and testamentary capacity, and he or they who allege that he does not possess such testamentary capacity, upon them the law throws the burden of proof to offer evidence that satisfies the jury of the absence or the lack of the possession of such mental or testamentary capacity," and that the burden was upon the caveators to show that the testator did not possess such mental capacity, adding that if the jury find that issue in the affirmative it need not pass upon the third issue as to undue influence.

Upon review of the whole case we find

No error.

BROWN, J., dissenting: I cannot agree with the majority of my brethren that no reversible error was committed on the trial of this case. This is one of those cases which naturally appeals to the sympathy of a jury, and they are naturally prone to set the will aside. Therefore, I think this Court should be very careful to see that no substantial injustice has been done to the propounders on the trial.

Upon carefully reading the record, I think that some of the assignments of error should be sustained and a new trial ordered, and I will briefly call attention to one or two of them.

The following questions and answers were permitted by the court over the propounders' objection:

The witness Cook was asked, "When you heard what that paper contained, after that, did you state that in your opinion Mr. Staub did not have his right mind when he made that paper?" Answer: "I said that if I thought I had done a thing like that, or another man did that, he was not treating his family right, and he must be crazy."

To my mind, this question and answer are plainly incompetent. The witness Cook was permitted to give his opinion of the character of the will and of the propriety and justness of the disposition which the testator had made of his property. He was permitted to say substantially that any man who would make such a will must be crazy. It is common learning that it is not for the witness to give his opinion of the

character of the will nor the wisdom and justice of the disposition of the property. That is a matter to be considered by the jury as a circumstance. In this case the witness is permitted to put himself in the place of the jury and to pass on the weight of that species of evidence. This witness occupied a position which gave him peculiar weight with the jury. He was a witness to the will, consequently, not the witness of either party, but the witness of the law, and what he states is calculated to have more weight with the jury than that of an ordinary witness.

The witness was further asked: "From your experience and observation of him, is it not a fact, in your opinion, that he was entirely under the domination, direction, and control of the Christian Science people?" Answer: "Yes, sir." It is true that the issue as to undue influence was not answered, but this testimony was well calculated to prejudice the propounders as to the issue of mental capacity and to create in the minds of the jury a hostile feeling. It is not competent for a witness to give his opinion as to whether an individual is dominated by a church or any other society, religious or otherwise. It is a matter for the jury to pass on, taking into consideration all the evidence and surrounding circumstances. The very reason that the jury is impaneled is to pass on the condition of the mind of the testator, and it is not for the non-expert witness to give his opinion as to what effect certain surroundings would have upon that mind. The witness may give his opinion as to whether a man at a certain time was sane or insane, but he cannot give his opinion upon the sufficiency of certain surroundings and conditions to produce that condition of mind.

R. L. JOHNSON AND EVERETT STROUD, TRADING AS JOHNSON & STROUD, v. RHODE ISLAND INSURANCE COMPANY.

(Filed 4 October, 1916.)

1. Insurance—Fire, Tornadoes—Policy Contract—Interpretation—Statutes.

The rule of construction that a policy of fire or tornado insurance is construed against the insurer and in favor of the insured, when its terms admit of interpretation, applies to the statutory form of fire and tornado insurance policies.

2. Same—Presumptions—Validity.

The construction of a contract which will make it legal and binding will be adopted as against one that will not make it so, when the contract would otherwise be susceptible of these two interpretations.

3. Same—Stipulations—Future Conditions—Performance.

When a tornado policy of insurance is issued on a building in course of construction, containing a stipulation that the policy is void unless the building were enclosed and under roof, and at the time of issuing the policy the building was not enclosed and under roof, but such had been done before the damages sought in the action had accrued, the stipulation in the policy fixed the time and conditions under which the policy should be valid; and as such had been done at the time of the damage and while the policy was in force, the insurer is liable for its payment.

4. Insurance — Fire, Tornadoes — Stipulations — Conditions — Principal and Agent—Delivery.

Where a policy against loss by tornadoes has been delivered by the agent of the insurer on its regular printed form, the agent knowing at the time that the building insured was not roofed and covered, which was required by a printed stipulation in the policy contract, the knowledge of the agent is imputed to his company.

5. Same—Written Contracts—Parol Evidence.

Where the authorized agent of an insurance company delivers to the insured a policy against loss by tornadoes, containing stipulations that the building insured shall be roofed and closed in, which the agent knew at the time had not been done, the policy provision that the agent could not vary the terms of the written contract is construed as not applying to conditions existing at the inception of the policy.

6. Principal and Agent—Evidence—Declarations of Agent.

Declarations of an agent made after the event and as mere narrative of a past occurrence, are not competent as substantive evidence against the principal.

7. Evidence—Principal and Agent—Insurance—Records—Corroborative Evidence.

Where the agent of an insurance company has testified as to certain facts in connection with the delivery of a policy contract sued on, it is competent to introduce the record of the transaction made by him, in corroboration of his testimony.

APPEAL from *Lyon, J.*, at August Term, 1916, of PITT.

This is an action to recover upon two policies of tornado insurance issued by defendant company and alleged to be in force on 3 September, 1913, when a storm partially destroyed the tobacco warehouse alleged to be insured. Policy No. 2105 bears date 5 June, 1913, and Policy No. 2106 bears date 23 June, 1913, and each ran for one year from date. The premium on these policies was $4 each, and they were in the sum of $2,000 each. The policies purported to insure "one-story brick building, with metal roof, and inclosed addition thereto attached, including foundations, plumbing, steam, gas, and water pipes, and all permanent fixtures, occupied as a warehouse." The plaintiffs, for whom the build-

ing was insured, were contractors. Policy 2106 had attached thereto and forming a part thereof a 50 per cent coinsurance clause. The defendant contends that Policy 2105 had a coinsurance clause, but this was denied by the plaintiff.

The defendant contended that neither of the policies was ever in force under the following provisions of the policy, to wit: "This company shall not be liable for loss or damage to buildings or their contents in process of construction or reconstruction, unless same are entirely enclosed and under roof, with all outside doors and windows permanently in place," and "No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed thereon, or added thereto; and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached to the policy." The warehouse was not enclosed and under roof when the policies were issued, but was at the time of loss.

The defendant pleaded that the policies had been canceled before the loss, and offered evidence in support of its plea.

The defendant excepted to the admission, over objection of the defendant, of statements alleged to have been made by the agent, Wilkinson, after the storm, affecting the company's liability, and alleged to have been made in the presence of the plaintiff Stroud and of the witnesses Monk and Smith.

The statement alleged to have been made in the presence of Stroud was as follows:

"That he (Wilkinson) said he thought the insurance ought to be canceled; that the insurance was canceled, morally, but in the eyes of the law it was in full force, and he didn't think we (plaintiffs) ought to make his company pay the loss"; and the further statement, "That he (Stroud) heard Wilkinson say, after the storm of 3 September, 'I have $4,000 insurance on this building, but morally I do not think my company ought to have to pay; but in the eyes of the law they are in full force.'"

The statement alleged to have been made in the presence of the witness Monk was as follows:

"Monk, I have $4,000 insurance on this building in full force. From the standpoint of merit and principle, I do not feel like my company ought to pay it. Mr. Stroud asked me to cancel that insurance on Friday, but I did not do it. You will get your insurance."

The statement alleged to have been made in the presence of Smith was as follows:

"That the policies were not canceled, but morally the risk would not hold good, as they had been ordered canceled by Stroud."

The agent of the defendant testified to the cancellation of the policies; but this evidence was offered after the evidence introduced by the plaintiffs of the declarations of the agent above set out.

The agent also testified that he failed to attach the coinsurance clause to policy 2105 by mistake; that after its delivery he mailed a coinsurance clause to the plaintiff, sent one to the office at Raleigh, and retained one in his own office, and that he at the time made an entry upon the registry of his office of having done so.

The defendant offered the registry in corroboration of the agent. This was excluded, and the defendant excepted. The coinsurance clause would reduce the amount of the liability of the defendant.

His Honor charged the jury on the seventh issue as follows:

"That is a disputed issue. You have heard the evidence on both sides, and I have given you the contentions on both sides, and it is a question of fact for you to determine. If you find from the evidence that Stroud, one of the plaintiffs, directed the agent to cancel the policies on the 25th of August, and again on the 29th of August, and that the policies were canceled at his direction, by his orders, then you would answer that issue 'Yes,' notwithstanding the fact that the policies themselves were not actually delivered; but if you find, according to the contentions of the plaintiffs, that the policies were not canceled, and that the company treated them as still in force by the declarations of the agent Wilkinson, made after the storm, then you would answer that issue 'No.'"

The jury returned the following verdict:

1. Did the defendant execute and deliver to the plaintiffs its two policies of insurance, Nos. 2105 and 2106, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiffs accept said policies upon condition that the defendant should not be liable for loss or damage to buildings, or their contents, in process of construction or reconstruction, unless same are entirely enclosed and under roof, with all outside doors and windows permanently in place, as alleged in the answer? Answer: "Yes."

3. Was said building, at the time of the injury complained of, in process of construction, and entirely enclosed and under roof, with all outside doors and windows permanently in place? Answer: "Yes."

4. Did Policy No. 2105 have attached thereto, and forming a part thereof, a coinsurance clause? Answer: "No."

5. Had the plaintiffs, on 3 September, 1913, delivered the warehouse described in the policies to J. Y. Monk, the owner thereof, and was the

owner, on said date, in full control and occupation of the same, as alleged in the answer? Answer: "No."

6. If the plaintiffs had delivered the possession of said warehouse to J. Y. Monk, did the defendant company, or its agent, have notice or knowledge of the same before the collection of the premium therefor? Answer: .....

7. Had the plaintiffs, prior to 3 September, 1913, caused the policies in suit to be canceled, as alleged in the answer? Answer: "No."

8. What damage was done to said building by reason of said storm? Answer: "$1,496.80."

Judgment was entered upon the verdict in behalf of the plaintiffs, and the defendant excepted.

Harding & Pierce for plaintiffs.
Albion Dunn for defendant.

ALLEN, J. The warehouse, covered by the policies of insurance, was not enclosed and under roof at the time the policies were issued, and the defendant bases its motion for judgment of nonsuit upon this fact, contending, as the policies provide that the company shall not be liable for any loss or damage to buildings in process of construction or reconstruction unless the same are entirely enclosed and under roof, that there is no liability on the defendant, although the warehouse was enclosed and under roof at the time of the loss.

The rule of construction prevails almost universally that contracts of insurance are construed against the insurer and in favor of the insured, and this has not been changed by the adoption of a standard form of insurance. *Wood v. Ins. Co.*, 149 N. Y., 385; *Gazzam v. Ins. Co.*, 155 N. C., 338; *Cottingham v. Ins. Co.*, 168 N. C., 265.

In the last case the Court says: "The terms of a policy of insurance are construed against the insurer and in favor of the insured, and this is true although a standard form of policy has been adopted under legislative enactment. *Gazzam v. Ins. Co.*, 155 N. C., 330."

It is also a rule of construction applicable to all contracts that if the language admits of two constructions, one of which is legal and binding and the other not, that the first will be adopted. 6 R. C. L., 839.

The courts also look with disfavor upon forfeitures (*Skinner v. Thomas*, 171 N. C., 98), and the trend of modern authority is that a stipulation in a policy which might avoid it does not have this effect if it in no way contributes to the loss, and if the conditions provided for in the stipulation do not exist at the time of the loss. *Cottingham v. Ins. Co.*, 168 N. C., 264.

In this last case a policy of insurance provided that the policy would be void if the property insured became encumbered by a chattel mortgage, and it was held that the amount of the insurance could be collected

from the company although the insured had executed a chattel mortgage upon the property, which was, however, canceled before the loss.

If these principles are applied to the clause of the policy under consideration, it would seem that the proper interpretation is that the company was not to be liable until the warehouse was enclosed and under roof, and that when it was enclosed and under roof its liability would attach.

The clause indicates clearly that the company intended to insure a building in process of construction, and the language upon which the defendant seeks to escape liability was only intended to fix the time and the conditions when the defendant would be liable.

This construction gives some force and life to the policies and saves the defendant from the imputation of having issued a worthless policy.

If, however, the stipulation refers to conditions existing when the policy issued, the agent of the company who issued the policies and delivered them to the plaintiffs had full knowledge that the warehouse was not at that time enclosed and under roof, and this knowledge is imputed to the defendant company.

In *Bergeron v. Ins. Co.*, 111 N. C., 47, the Court quotes with approval from May on Insurance, that "Facts material to the risk, made known to the agent (or a subagent intrusted with the business) before the policy is issued, are constructively known to the company, and cannot be set up to defeat a recovery on the policy"; and in *Grabbs v. Ins. Co.*, 125 N. C., 395: "It is well known that as a general rule fire insurance policies are issued in a different way from those of life insurance companies. The latter are usually issued directly from the home office, while fire insurance policies are generally sent to the local agent in blank, and are filled up, signed, and issued by him. The blanks, while purporting to be signed by the higher officers of the company, usually have their names simply printed thereon in autographic *facsimile*. Under such circumstances, can it be doubted that the policy is issued by the agent, who, for all purposes connected with such insurance, is the *alter ego* of the insurer? That he is seems too well settled to need citation of authority, and therefore his knowledge is the knowledge of the company. We can only repeat what we have so recently said in *Horton v. Ins. Co.*, 122 N. C., 498, 503: 'It is well settled in this State that the knowledge of the local agent of an insurance company is in law the knowledge of the principal; that the conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer; and that such waiver may be presumed from the acts of the agent.'"

The same authorities also support the position that if the defendant issued the policy knowing the conditions existing at the time, it cannot now avoid responsibility on account of those conditions.

Nor does the provision in the policy restricting the power of the agent to waive conditions and stipulations affect the application of this rule, because those restrictions are generally construed to apply to something that occurs after the policies have been issued, and not to conditions existing at the inception of the policy.

In *Grabbs v. Ins. Co., supra,* the Court approves the statement in *Berry v. Ins. Co.,* 132 N. Y., 49, that "Conditions which enter into the validity of a contract of insurance at its inception may be waived by agents, and are waived if so intended, although they remain in the policy when delivered"; and in *Wood v. Ins. Co.,* which is approved in *Gazzam v. Ins. Co.,* 155 N. C., 336, the Court says: "The restrictions inserted in the contract upon the power of the agent to waive any condition unless done in a particular manner cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. The principle is not a new one, and has not been shaken by any decisions of our Court since the adoption of the standard policy."

And again, in *Forwood v. Ins. Co.,* 142 N. Y., 387: "It could not be supposed that it intended to deliver to the insured a policy which it knew to be void."

We are therefore of opinion that whether the clause in the policy refers to conditions existing at the time it was issued or not, it was not necessarily fatal to the plaintiff's cause of action that the warehouse was not enclosed and under roof at the time the policies were issued, and that the motion for judgment of nonsuit was properly denied.

We are, however, further of opinion that error was committed which entitles the defendant to a new trial.

The authorities in this State are all to the effect that the declarations of the agent made after the event, and as mere narrative of a past occurrence, are not competent against the principal. *Smith v. R. R.,* 68 N. C., 115; *Rumbough v. Improvement Co.,* 112 N. C., 751; *Morgan v. Benefit Society,* 167 N. C., 265.

This evidence of the declarations of the agent would have been competent if the agent had been first introduced and had testified to the cancellation of the policies, as it would have had the effect of impeaching his evidence, and it may be that the order of the introduction of the evidence would not be fatal; but it further appears that his Honor not only failed to restrict the effect of the evidence, but he gave it the force of substantive evidence in his charge, which, in this particular, is excepted to.

It was also competent for the defendant to introduce the record made by the agent in corroboration of his evidence.

We call attention to the discussion of cancellation, which question will arise upon the new trial, which will be found in *Mfg. Co. v. Assurance Co.*, 161 N. C., 98.

For the errors pointed out, a new trial is ordered.

New trial.

THOMAS GOLD v. C. S. MAXWELL.

(Filed 4 October, 1916.)

1. Appeal and Error—Judgments—State's Lands—Protest—Improper Form—Court's Discretion.

Where a judgment or order holding that a protest to an entry on State's lands is not in proper form, and that another protest be filed within a certain time, has not been complied with or appealed from, it is within the discretion of the trial judge thereafter to grant or refuse a further extension of the time to file the protest, from the refusal of which an appeal will not lie, in the absence of abuse of this discretion.

2. Judgments—Motions to Set Aside—During Term—Excusable Neglect—Statutes.

A motion to set aside a judgment for excusable neglect, made at the time the judgment was signed, will be denied, such matters being *in fieri* during the term, and Revisal, sec. 513, applies only to judgments rendered at prior terms.

CIVIL ACTION tried before *Devin, J.*, at June Term, 1916, of CARTERET.

This is a proceeding to protest an entry of land, heard upon motion of enterer to dismiss, for failure to file amended protest.

C. R. Wheatley, at the time of filing of this protest and up to the March term of said court, 1916, was attorney of record of the protestant.

At October Term, 1915, an order was made in said cause by his Honor, W. M. Bond, judge presiding, adjudging the protest not in proper form and requiring this protestant to file an amended protest within sixty days.

At March Term, 1916, C. R. Wheatley was permitted by the court to withdraw as counsel for protestant.

Between the March and June terms of said court E. H. Gorham, Esq., was employed by protestant to represent him as attorney in said proceedings, and at the first term thereafter, to wit, the June term of said court, Mr. Gorham moved the court to be allowed to amend the protest in accordance with the order of Judge W. M. Bond, of October Term, 1915. This motion was refused, and his Honor signed the judg-

ment dismissing the protest and adjudging the defendant C. S. Maxwell entitled to recover the cost in the action, to which said judgment the protestant excepted and appealed.

Judgment was then signed. That upon signing said judgment, and at the same term of court, the protestant moved to set aside the judgment upon the ground of excusable neglect, and in support of his said motion offered the court the affidavit of E. H. Gorham, Esq. Counter-affidavit of C. R. Wheatley was filed on behalf of enterer.

The motion was refused, and the protestant excepted and appealed.

E. H. Gorham for protestant.
Graham W. Duncan and R. E. Whitehurst for enterer.

ALLEN, J. It was adjudged at October Term, 1915, that the protest was not in proper form, and this judgment has not been appealed from, and is binding on the parties, although it may have been erroneous, as the protestant now contends. *Weeks v. McPhail,* 128 N. C., 131.

It was also within the discretion of the judge presiding to allow or disallow the motion to file an amended protest after the time limited in the judgment of Judge Bond (*Church v. Church,* 158 N. C., 564), and we cannot interfere with the exercise of the discretion when, as in this case, there is no evidence of its abuse.

The motion to set aside the judgment at the time it was signed for excusable neglect was properly refused, as the remedy under Revisal, sec. 513, applies only to judgments rendered at prior terms (*McCulloch v. Doak,* 68 N. C., 267), for the reason that orders and judgments are *in fieri* during the term. *Gwinn v. Parker,* 119 N. C., 19.

Affirmed.

HENRY D. SMITH v. S. P. HANCOCK AND THOMAS THOMAS.

(Filed 4 October, 1916.)

Mortgages—Foreclosure — Injunction — Partnership Profits—Verdict—Judgments.

In a suit to restrain the foreclosure of a mortgage there was evidence in plaintiff's behalf tending to show that the mortgage was only given to indemnify the defendant in advancing money for partnership purposes, and that the enterprise had resulted in a profit; and in defendant's behalf that the mortgage was given to secure an additional debt owed by the plaintiff, with evidence to the contrary. Under appropriate issues and correct instructions the jury found that the note and mortgage had been paid and that defendant was indebted to plaintiff for partnership

profits: *Held*, the verdict established the fact that plaintiff owed defendant nothing for outside individual transactions, and judgment was properly entered in plaintiff's favor. The principle that reversals are not granted upon slight technical errors alone discussed by WALKER, J.

CIVIL ACTION tried before *Devin, J.*, and a jury at June Term, 1916, of CARTERET.

The action was brought by plaintiff to restrain defendant from foreclosing a mortgage, given by plaintiff and wife in 1905. The plaintiff and defendant Hancock, in June, 1905, formed a partnership for the purpose of buying, bedding, and shipping clams. Hancock was to furnish the money to be used in the business, not exceeding $500, and Smith was to give his time and work when necessary. There was evidence that Smith and wife executed a mortgage on their home for $250 to secure Hancock for half of the amount to be expended in the business. Smith received no money on the mortgage, but executed the same to secure Hancock in case of loss, and they were to share profits, if any, and losses, if any should be sustained. There was a profit, which plaintiff alleges was $168, and he thought that the mortgage had been canceled, until some one read in his hearing a notice in a local paper that his home was advertised for sale under foreclosure. He secured an injunction to restrain the same, and now asks the court to cancel the mortgage, which he alleges was satisfied or had served its purpose, as there was no loss in the clam business, and for the payment to him by Hancock, his partner in the clam business, the sum of $84, one-half of the profit of said business.

Smith gave his time and services and Hancock furnished the money to carry on the clam business, as set out above. There was received by Hancock, over and above all the money furnished by him, more than $168, which was profit in the business. Defendant Hancock received all the money for the sale of clams.

The jury returned the following verdict:

1. Have the note and mortgage described in the complaint been paid? Answer: "Yes."

2. What amount, if any, is the defendant S. P. Hancock indebted to the plaintiff? Answer: "$84."

W. R. Wheatley and Abernethy & Davis for plaintiff.

J. F. Duncan for defendants.

WALKER, J., after stating the case: The principal questions in this case may be reduced to only two, the first being whether the mortgage for the $250 was executed to secure S. P. Hancock against any loss by reason of the money he advanced to run the business or whether it was intended to secure him not only against loss in the business, but also to

secure the payment of an outside debt owing to him by the plaintiff; and the second, whether, if it was given to indemnify Hancock against any loss, it had been satisfied, or had served its purpose, by there not being any loss in the business, but a profit of $168, half of which belonged to the plaintiff. The issues were quite simple and the difference between the contentions sharply drawn. The court explained the case fully to the jury, instructing them if they found the facts to be as stated by the defendant, to return a verdict for him, answering the first issue "No"; but if they found the contrary to be true, that is, that the mortgage was given merely as an indemnity to S. P. Hancock against any loss in the business, for half of which the plaintiff was responsible, and there was no loss, but a gain, they should answer the first issue "Yes," and award plaintiff half of the profit, if any there was. It was conceded that the mortgage was given as an indemnity, but defendant claimed that it had been given also to secure a debt due by plaintiff to him. This contention was fairly submitted to the jury. We think that, under the charge, the defendant had the substantial benefit of all his contentions. The jury evidently found the contract to be as stated by the plaintiff, that the mortgage was given only for the plaintiff's part of the capital advanced by Hancock which should be lost in their partnership dealings, and was to be used only for that purpose. As the jury found that there was a profit, the verdict excludes the idea that there was anything due to the defendant on account of outside individual transactions between them. It appears that the court, in the charge, directed the attention of the jury specially to defendant's contention as to the settlement, which he says was in 1905, and which plaintiff alleges was in 1908; and the charge, therefore, was a sufficient response to defendant's prayers for instructions on this phase of the case, so far as he was entitled to them.

We are of the opinion that the defendant has had a fair and full hearing upon his contentions—if not in the exact form of them, as stated by him, then in substance and legal effect. Reversals are not granted merely for the slightest technical error, which a precise or exhaustive analysis of the charge might disclose, if there is no prejudice or injustice done; but the appellant has had a fair submission to the jury of the real issues, both upon the law and the evidence, and the determinative facts have been found against him. Verdicts and judgments should not be lightly set aside upon grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it. There should be at least something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. Hilliard on New Trials (2 Ed.), secs. 1 to 7. "The motion should be meritorious and not frivolous." *S. v. Smith,* 164 N. C., 475-480. As that case shows, the courts have said that

the foundation of the motion for a new trial is the allegation of injustice, and the prayer is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings, and may compel a surrender of property; but this alone is not sufficient ground for a new trial, although there may not have been strict regularity. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the legal injury, otherwise the interference of the court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtains a new trial, he must incur additional expense; and if there is no corresponding benefit, he is still the sufferer. Besides, courts are instituted to enforce right and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit. 3 Graham and Waterman on New Trials, p. 1235; *S. v. Smith, supra; S. v. Heavener,* 168 N. C., 156; *Ferebee v. Berry, ibid.,* 281; *Brogden v. Gibson,* 165 N. C., 16; *Steeley v. Lumber Co.,* 165 N. C., 27. What all this means is that there must be real and substantial harm done by the alleged error—not that we will merely guess at the probable effect of it upon the result, but that if we can clearly and surely perceive that it has not affected the result, it would be vain to be influenced by it and allow it to vitiate the judgment. But there was not even theoretical error in the trial of the case. The position of defendant as to the settlement, and the credit of the mortgage on the amount found to be due, was fairly submitted to the jury, and they had the whole matter before them, and the verdict is inconsistent with the defendant's view of the case.

The defendant's counsel ably presented his contentions, but upon a careful review of the record we conclude that there was no reversible error in any of the rulings of the court.

The defendant in this case had ample opportunity to make good his contention, but failed to convince the jury of its validity.

No error.

VIRGINIA-CAROLINA CHEMICAL COMPANY v. ELI ROGERS ET AL., TRADING AS ELI ROGERS & CO.

(Filed 4 October, 1916.)

Vendor and Purchaser—Proceeds of Sale—Trusts—General Assignment—Priorities—Commingling of Goods.

A partnership conducting a general merchandise business, including the sale of fertilizers, handled the plaintiff's fertilizers and that of others, under agreement that the proceeds of the sales of plaintiff's fertilizers should be segregated and held in trust to be paid over to it, which they failed to do, and made an assignment for the benefit of their creditors. The plaintiff being unable to identify such proceeds, it is *Held*, that it was not entitled to any preference over the other creditors in their action against the trustee; and this principle applies to the proceeds of collateral notes which the partnership set apart for plaintiff, which had not been registered or sent to it, and which could not be identified. The doctrine of confusion of goods is not applicable to this case.

APPEAL by plaintiff from *Whedbee, J.*, at May Term, 1916, of PITT.

R. G. Grady and L. I. Moore for plaintiff.

Harry Skinner, Harry W. Stubbs, Albion Dunn, and A. D. McLean for defendants.

CLARK, C. J. This action was begun against the defendants, who were country merchants doing business as Eli Rogers & Co., to recover for certain fertilizers sold by plaintiff under contract which it contends made the defendants its agents; that later in the year the plaintiff closed the account by notes and took as collateral certain running accounts due said Rogers and Jenkins. It appears that the defendants purchased fertilizers from various other concerns, keeping no separate account as to the goods purchased from the plaintiff or from others, and in selling and charging the same they did not distinguish on their books from what source the fertilizers came. They sold general merchandise to farmers, and in the fall when payments were made the same were credited by cash or check without making application in favor of any particular creditor of the firm. In December, 1911, Rogers & Co. made an assignment to A. R. Dunning of all their assets, including the stock of goods on hand and accounts collectible, amounting to about $8,000. There is due by the firm to the plaintiff a note of $2,340.33, being about one-third of the amount originally owed the plaintiff, and about $20,000 to other creditors. This action is brought to compel said Rogers & Co. and the trustee to pay the same in full out of the collection on said accounts and notes, claiming a priority over other creditors. It appeared that the plaintiff had already received prior to the assignment

a larger percentage of its claim than other creditors, and that the accounts and notes remaining in the hands of the assignee give no indication of being the proceeds of the fertilizers bought of the plaintiff, and the assignment gave no preference to the plaintiff over any other creditors.

On the issues submitted, there is no controversy on the first issue, that the amount due the plaintiff is $2,340.33, with interest from 1 December, 1911. On the fourth issue, as to whether the plaintiff is entitled to any preference or priority out of the funds in the hands of the trustee, Dunning, over the other creditors of Rogers & Co. from the sale of the stock, and the fifth issue, whether the plaintiff is entitled to such priority out of the funds so collected from the book accounts, the court instructed the jury to answer "No." The plaintiff took a nonsuit as to the second and third issues relating to the alleged fraud by the defendants Rogers & Co. in misappropriating or misapplying the funds collected on the fertilizers bought by them from the plaintiff and resold.

The assignee and several other creditors have been made parties to this action. We find no error in the instruction of the judge. The fund in the hands of the trustee was derived from the sale of the stock of general merchandise and collection of book accounts, and there is nothing to indicate that any specified portion of these funds was derived from the proceeds of the fertilizer sold by plaintiff to Rogers & Co. in the spring of 1911. There is no allegation that the trustee is insolvent or that he has commingled his own funds with the fund of the trusteeship. It also appears that the plaintiff sold these fertilizers to Rogers & Co. with the understanding that they would buy fertilizers also from other concerns, and that such dealings were a part of their general merchandise business. Rogers & Co. made an agreement that the proceeds from the sale of these fertilizers sold them by plaintiff should be segregated and held in trust to be paid over to the plaintiff, but the plaintiff has failed to identify and point out any proceeds of such sales by Rogers & Co. that were derived from the goods sold to them by the plaintiff. Rogers & Co. did not observe the agreement to keep the proceeds of the sales of fertilizers bought of plaintiff separate and distinct, but the plaintiff not having identified such proceeds, it cannot as against the trustee and other creditors assert any priority out of the general fund in the hands of the trustee.

As to the accounts assigned as collateral to the plaintiff, such assignment was not registered, nor were they delivered to the plaintiff. Even if such collateral had been forwarded to the plaintiff and returned to the defendants for collection, the proceeds have not been identified. Moreover, in *Corporation Commission v. Bank*, 137 N. C., 699, it is held: "When paper is sent to the bank for collection, if restricted by indorsement, after collection made, if the proceeds are mingled with the

general funds of the bank the relationship becomes that of creditor and debtor, and on an assignment by reason of insolvency such claim can share only in the assets pro rata with general creditors." To same purport, *Bank v. Davis,* 114 N. C., 343; 3 A. and E. Enc. (2 Ed.), 819.

The court properly held that there being no evidence that the funds derived from the sale of the fertilizers purchased from the plaintiff had been held separate and distinct, it is not entitled to priority over the other creditors. The doctrine as to the "confusion of goods" cannot avail against other creditors.

No error.

GILES ROGERS ET ALS. v. SUSAN H. JONES AND HUSBAND.

(Filed 4 October, 1916.)

1. Appeal and Error—Assignments of Error—Rules of Court.

The rules of the Supreme Court regulating appeals are necessary for the proper consideration of the public business and will be impartially enforced against all litigants; and where the assignments of error are not comprehensive enough to give a clear idea to the court of the matters to be debated without examining the record, they will not be considered, as, on this appeal, "to the question and answer in the admission of the evidence" of a certain witness, "as contained in the exception 1 on page —— of the record"; and the giving of proper page will not cure its insufficiency.

2. Deeds and Conveyances—Delivery—Intent—Control of Grantor—Presumptions—Burden of Proof.

An instruction as to the valid delivery of a deed, that should the jury find that the grantor intended to part with the deed to his wife, the grantee, under the evidence in this case, and lose legal control over it, he had no right to take it back, and that upon its registration, whether before or after the grantor's death, the burden shifted to the other side to rebut the presumption of a valid delivery, is held to be a correct charge.

APPEAL by plaintiffs from *Allen, J.,* at January Term, 1916, of DUPLIN.

Gavin & Wallace, George R. Ward, and Thad. Jones for plaintiffs.
H. D. Williams and Stevens & Beasley for defendants.

CLARK, C. J. This is an action to set aside a deed under which the defendants claim on the ground that it had never been delivered, the lack of sufficient mental capacity from the grantor to execute the same, and undue influence. The jury found all three issues in favor of the

defendants. The trial seems to have hinged, however, almost solely upon the question whether there had been a sufficient delivery.

The assignments of error, except 6, 7, 8, and 9, are totally insufficient and must be disregarded. The first assignment is: "1. To the question and answer in the admission of the evidence of the witness J. R. Jones as contained in the exception 1 on page ... of the record." In the same form are the other exceptions other than the four above stated. For example, exception 10 is "To the refusal of the court to give the plaintiffs' prayer for instruction, No. 1, as contained in the plaintiffs' 13th exception (see page ... of the record)." These would be insufficient even if the blanks had been filled up. In *McDowell v. Kent,* 153 N. C., 555, the Court, citing numerous cases, said: "In *Thompson v. R. R.,* 147 N. C., 412, there is a very clear discussion of the requirements as to assignments of error, and of the methods in which they must be set forth. The Court will not accept a mere colorable compliance, such as entering the 'first exception is the first assignment of error,' etc. This would give no information whatever to the Court, for it would necessitate turning back to the record to see what the exception was. What the Court desires, and, indeed, the least that any appellate court requires, is that the exceptions which are *bona fide* presented to the Court for a decision, as the points determinative of the appeal, shall be stated clearly and intelligibly by the assignment of errors, and not by referring to the record, and therewith shall be set out so much of the evidence, or of the charge, or other matter or circumstance (as the case may be) as shall be necessary to present clearly the matter to be debated."

"This requirement of the Court is not arbitrary, but has been dictated by its experience and from a desire to expedite the public business by our being enabled to grasp more quickly the case before us and thus more intelligently follow the argument of counsel. In this practice we have followed what has been adopted by other courts."

"This Court is decidedly averse to deciding any case upon a technicality or disposing of any appeal otherwise than upon its merits. But having adopted this rule from a sense of its necessity, and having put it in force only after repeated notice, and having uniformly applied it in every case since we began to do so, it is absolutely necessary that we observe it impartially in every case."

"That the rule has not been difficult to observe, and that the profession have loyally observed it, is shown by the fact that on an average our records show that the failure to do so does not exceed two appeals in a thousand. We trust that there will be none hereafter."

This case has been repeatedly cited and applied since. See citations in Anno. Ed. to *Thompson v. R. R.,* 147 N. C., 412, especially *Barringer v. Deal,* 164 N. C., 249, and cases cited, and *Porter v. Lumber Co.,* 164 N. C., 396, reviewing the cases and citing with approval in italics the

following quotation from *Hoke, J.*, in *Thompson v. R. R.*: "Always the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is. The assignment must be so specific that the Court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary." The subject is fully discussed in this last cited case. See, also, *Register v. Power Co.*, 165 N. C., 234, where the Court holds that assignments identical with those in this case "give the Court no information, and must be disregarded," citing several cases, and *Carter v. Reaves*, 167 N. C., 132, where the Court holds that "such assignments cannot be considered."

As the Court has repeatedly stated, these rules have not been arbitrarily made, but experience has shown us that they are necessary for the proper consideration of the public business coming before us, and will be impartially enforced against all litigants. If a case is worth bringing to this Court for review, counsel should think it worth the trouble to present it in the manner required by the statute and the rules of the Court.

As to the four assignments of error, 6, 7, 8, and 9, which are properly made, they are all to the charge of the court on the question of delivery, and we find no error. The charge of the court was that on the question of delivery the jury should find whether the plaintiff "intended to part with the deed and lose legal control of it, and that if the grantor parted with the deed absolutely, then he would have no right to take it back. If he parted with it, holding control over it, then he would. Then you have a question there to consider, because it is a man and his wife, as to what the intention was."

Exceptions 8 and 9 are to an instruction that where a deed has been recorded, whether after or before the death of the grantor, it is presumed to have been delivered, and the burden shifts to the other side to rebut that presumption. This is familiar law, and it is clearly so stated by *Brown, J., Fortune v. Hunt*, 149 N. C., 362, citing numerous cases.

No error.

J. A. BIZZELL AND WIFE, RUTH BOND BIZZELL, v. MUTUAL BUILDING AND LOAN ASSOCIATION.

(Filed 4 October, 1916.)

1. Wills—Interpretation—"Lawful Heirs"—Children—Contingent Interests—Defeasible Fee— Estates.

A will should be construed as a whole and to give effect to every part; and in a devise to a granddaughter, S., of a certain house and lot, but

should she die without lawful heirs, to certain named of the testatrix's other grandchildren, to construe the word "heirs" as general heirs, and vest the fee simple in S., would be to render other terms of the will meaningless; and construing the will to arrive at the intent of the testatrix, it is *Held*, that the word "heirs" meant "children," and that S. took a defeasible fee, to be divested if she die without leaving children surviving her.

2. Same—Lapsed Devise—Intestacy.

A devise to S. of certain lands in fee, defeasible upon her death without children, in which event to go to those of her brothers, by name, one of whom died in the testatrix's lifetime without having married, and S. and her other two brothers are now living and the sole heirs at law of the testatrix: *Held*, the testatrix died intestate as to the contingent interest of the deceased brother of S., one-third of which would vest in S.; and pending the happening of the event which would divest the title of S. to the other two-thirds, she cannot make a good and indefeasible fee-simple title to the entire property.

CONTROVERSY without action, submitted under Revisal, sec. 803, to *Allen, J.*, in the Superior Court of LENOIR, August Term, 1916.

From the judgment rendered, the defendant appealed.

C. M. Allen for plaintiff.

Loftin, Dawson & Manning for defendant.

BROWN, J. The only question involved in this controversy is the estate that the plaintiff Ruth Bond Bizzell takes under the will of her grandmother, Susan J. Bond. Said plaintiff is the wife of her coplaintiff, and they have one child, now 4 years of age. The clause of the will reads as follows:

"Second, I bequeath to my beloved granddaughter, Ruth Bond, my house and lot situated on East Street in the city of Kinston, North Carolina. Should said Ruth Bond die without lawful heirs, said house and lot to go to Clarence Bond, Paul Bond, and William Bond, my grandchildren."

His Honor held that Ruth Bond, the plaintiff, took an estate in fee in the whole, and could, therefore, make a good title to the property. In this we think there was error.

The word "heirs" as used in the will evidently means children, and was used in that sense by the testator; else it is meaningless. The will should be construed as a whole so as to give effect to every part of it. It was, therefore, erroneous for the learned judge to discard entirely the limitation over to testator's grandchildren.

It is well settled that where the context of the will indicates that the testator used the word "heirs" in the sense of children, the courts will so construe the will as to give effect to the intention of the testator,

which is a cardinal rule in the construction of wills. *Smith v. Lumber Co.*, 155 N. C., 389; *Smith v. Proctor,* 139 N. C., 322.

The ulterior limitation to testator's other grandchildren plainly indicates that the testator intended that her granddaughter's estate should terminate at her death if she should die without leaving children. Whether she will die leaving children cannot be determined until *feme* plaintiff's death. She thus takes a defeasible fee, that is to say, a fee-simple estate, to be divested if she dies without leaving children surviving her. *Whitfield v. Garris,* 131 N. C., 148, and 134 N. C., 25, on rehearing.

It is stated in the record that William Bond, mentioned in the will, died before the testator, having never married. The testator, therefore, died intestate as to the contingent interest devised to him.

According to the record, Ruth Bond, the *feme* plaintiff, Clarence Bond, and Paul Bond, children of W. R. Bond, deceased, are the sole heirs at law of their grandmother, Susan J. Bond, the testator. Thus the said plaintiff is seized of a present estate in fee as to one-third of the lot and of a defeasible fee as to the other two-thirds. She, therefore, cannot convey a good and indefeasible title to the entire property to defendant.

Reversed.

ALICE H. HUNTER v. TIFFANY WEST ET AL.

(Filed 4 October, 1916.)

1. Limitation of Actions—Alleys—Nonuser—Adverse Possession — Trials—Evidence—Instructions.

An alleyway for the use of certain lots in a plat of land which in fact has never been laid off, but fenced in and used by one of the parties for more than twenty years under sufficient adverse possession, and this appears by the admissions in the pleadings and the unconflicting evidence of the parties to the litigation: *Held,* in an action to enforce the opening of such way an instruction by the court that if the jury believed the evidence they should answer the appropriate issue in the affirmative, that the plaintiff had lost the right to the alley by failure to use it, etc., was not erroneous.

2. Limitation of Actions—Judgments—Executions—Alleys.

An action to enforce the execution of a decree of court confirming a report that an alley was to be laid off in certain lands is barred by the ten-year statute of limitations. Revisal, sec. 399

APPEAL by plaintiff from *Bond, J.,* at April Term, 1916, of LENOIR.

T. C. Wooten and Rouse & Land for plaintiff.

G. V. Cowper and R. H. Lewis, Jr., for defendants.

CLARK, C. J. This is an action to enforce the opening of an alleyway. The plaintiff's grantor and the defendants, or those under whom they claim, were parties to a partition of the lands of R. W. King, deceased. A clause in the report of the commissioners, confirmed 16 March, 1894, provides: "In order to make said allotment convenient, the committee have laid off and allotted an alleyway 20 feet wide, to run in a northern and southern direction through all of said lots beginning on the northern side of King Street at a point 210 feet from the corner of King and Queen streets and running parallel with Queen Street to the Miller or Dunn line."

The summons in this case was issued 9 August, 1915, more than twenty-one years later. The defendants plead the statute of limitations of twenty years adverse possession. There is evidence that the alley described and allotted in the report was never physically and actually laid off and used. The defendants also rely upon the plea of abandonment and nonuser. On the intimation of the court that it would instruct the jury if they believed the evidence they should answer the second issue, "Has the plaintiff lost the right to the alleyway by failing to use the same, or by adverse user thereof by others, or in any other way?" in the affirmative, the plaintiff took a nonsuit and appealed. In the view expressed by the court there was no error.

We pass by the objections urged by the defendants, that certain of the defendants have not been served, and, therefore, that the decree could not be entered opening up only a disconnected part of the alleyway, and also the objection raised that it was beyond the scope of the authority of the commissioners in making partition to direct an alleyway to be laid off. We prefer to put our decision upon the ground that the alleyway not having been shown ever to have been in use, there has been an abandonment by the plaintiff of any right to cause the same to be now laid out after twenty years of nonuser, and that the presumption of abandonment is not rebutted. And also upon the ground that possession for twenty years by the defendants and those under whom they claim is necessarily an adverse possession as to a right of way, and the same having continued more than twenty years with possession under known and visible metes and bounds, is a bar to a recovery by the plaintiff, especially as there is no evidence that the alleyway has ever been used.

If the proceeding be considered as an action to enforce the execution of the decree which confirmed the report directing the alleyway to be laid off, and such action was within the scope of the authority of the commissioners, the action is barred by the lapse of ten years. Rev., 399; *Smith ex parte*, 134 N. C., 495; *McAden v. Palmer*, 140 N. C., 258; *Rice v. Rice*, 115 N. C., 43. The decree does not mention the alleyway.

Adverse possession by defendants for more than twenty years is

admitted by the allegations in the complaint, which are binding on the plaintiff, and which set out that the defendants have held continuous adverse possession of the alleyway. The complaint does not allege that the alley was ever laid off and in use. This would justify a nonsuit. Besides, there is abundant testimony as to the actual holding of the land adversely. The allegations in the complaint in paragraphs 9, 10, and 11 are that the defendants, "against the interest and rights of the plaintiff, have denied and continued to deny the plaintiff's right and privilege of ingress and egress over and through the alley." The evidence of the defendants is that there never has been such an alley, no attempt to lay it off, and that all the land covered by the proposed alley has been in the open, notorious, and adverse possession of the defendants and those under whom they claim ever since the division proceeding; that it has been under fence and with buildings on it, and at no time would it have been possible to lay out the alley except by invading the actual inclosures of defendants and tearing down permanent structures. This state of fact is shown also by plaintiff's evidence and is nowhere contradicted. The mere fact that the parties have had the same agent to collect rents and pay taxes in no wise conflicts with the allegations in the complaint and the evidence of both parties to the above effect. *Land Co. v. Floyd,* 171 N. C., 543.

No error.

K. B. JOHNSTON v. BOARD OF ELECTIONS OF WAKE COUNTY AND B. H. PATE.

(Filed 4 October, 1916.)

1. Election—Primary Laws—County Boards—Second Primary—Written Notice—Statutes.

Applying the rule of construction that every part of a statute should be given effect when possible, it is *Held*, that section 24 of the State Primary Law, ch. 101, Laws of 1915, providing, among other things, that the successful candidate for certain offices, in this case for member of General Assembly, shall receive a majority of the votes cast, when construed in connection with the proviso of the same section, that the one receiving the next highest vote, under a majority, shall file a request, in writing, with the appropriate board of elections for a second primary, entitles the one receiving the highest number of votes to be the candidate of the party to the office, upon the failure of the one receiving the next highest vote to comply with the provision within the time stated, i. e., within five days after the result of the primary has been officially declared.

2. Same—Results Declared.

Laws 1915, ch. 101, sec. 21½, requires that the county board of elections shall tabulate the returns made by the judges and registrars, etc., so as to

show the total number of votes cast for each candidate, etc., and with reference to county officers, when thus compiled on blanks, the returns shall be made out in duplicate, one copy filed with the clerk of the Superior Court, one retained by the board, which shall forthwith declare the result: *Held*, when this has been properly done, and the result posted at the courthouse door of the county, the result of the election is sufficiently declared, and the contestant receiving the next highest vote, less than a majority, must file his written request for a second primary within five days thereafter, in accordance with the proviso of section 24 of the State Primary law.

3. Elections—Primary Laws—County Boards — Statutory Rights — Courts—Jurisdiction.

While ordinarily courts may not control political parties in the selection of their candidates for office, this principle does not apply where the Legislature, in the exercise of its powers, has taken control of the subject, and enacted a statute conferring on successful contestants in a legalized primary certain specified and clearly defined legal rights, and enjoining upon an official board ministerial duties reasonably designed to make these rights effective.

4. Same—Mandamus—Board of Elections—Ministerial Duties.

Where a candidate for membership in the General Assembly who has received the next highest vote in a legalized primary, but less than a majority of the votes cast, has failed to comply with the proviso of section 24, chapter 101, Laws 1915, in giving the written notice to the board of elections for a second primary within the time prescribed, and after duly declaring the result of the election (sec. 21½), the board then orders the second primary, the ministerial duty of recognizing the one receiving the highest vote as the candidate and putting his name on the ticket as such will be enforced by mandamus.

5. Elections—Primary Laws—County Boards—Ministerial Duties—Offices—Title—Quo Warranto.

Quo warranto lies when the office in question is presently filled by an incumbent *de jure* or *de facto*, and not where the object of the proceeding is to compel the performance by a board of elections of its ministerial duty of recognizing, and properly putting upon the ticket, one who under the provisions of the primary law is entitled to be placed thereon as the rightful nominee of a party.

6. Elections—Primary Laws—County Board of Elections—Advice from State Board of Elections.

It appearing in these proceedings that the county board of elections has wrongfully denied the right of the plaintiff, under our primary law, to have his name placed upon the ticket as the choice of his party: *Held*, the fact that it acted therein under the advice of the State Board of Elections is without controlling significance.

BROWN, J., dissenting.

CIVIL action to compel defendant board of elections of Wake County, by writ of mandamus, to place the name of plaintiff on the regular

election ticket as one of the nominees of the Democratic Party for the position of Member of the General Assembly, tried before *Bond, J.*, at July Term, 1916, of WAKE.

There was judgment for plaintiff, and defendants excepted and appealed.

James H. Pou and Manning & Kitchin for plaintiff.
Douglass & Douglass for defendant.

HOKE, J. On the hearing it was properly made to appear that on 3 June, 1916, an election was held in Wake County, pursuant to chapter 101, Laws 1915, same being entitled "An act to provide for primary elections throughout the State" for the purpose of selecting, among others, the nominees of the Democratic Party as candidates for the lower House of the General Assembly; that Wake County is entitled to three members of the House of Representatives, and there were at said election six candidates for the Democratic nominees for these positions, and the vote for the candidates was as follows:

R. W. Winston, Jr., received	2,609 votes
J. E. Holding received	2,306 votes
K. B. Johnston received	2,016 votes
B. H. Pate received	1,924 votes
B. Moore Parker received	1,781 votes

That the returns having been duly made, the county board of elections of Wake County met on Monday, 5 June, 1916, and duly canvassed and tabulated the returns of said primary. That the canvass and tabulation of the vote of said primary was not completed until the morning of 6 June, when the said county board of elections filed a copy of said tabulated vote, accompanied with the affidavit of its chairman, as required by the provisions of the primary election law, with the clerk of the Superior Court of Wake County, retained one copy for its own use, and posted at the courthouse door in the said county of Wake a copy of said vote, attested by the chairman of the said board of elections. That the board of elections then adjourned *sine die*. That no demand was made by the said B. H. Pate for a second primary until 15 June, 1916. That the said board of elections fully performed all the duties required of it by the said primary election law. That thereafter, on 15 June, and not before, B. H. Pate, who received the vote next highest to plaintiff, having been advised that there had been no nomination for the third place on the ticket for the alleged reason that no one had received a majority vote, as required by the statute, filed in writing his request

for a second primary, and same was allowed, the county board being advised thereto by the State Board of Elections; that since said 15 June, 1916, the defendant board has declined to recognize said K. B. Johnston, plaintiff, as one of the Democratic nominees for the House of Representatives.

On these the facts chiefly relevant to the question presented, the Court concurs in the view embodied in the judgment, that plaintiff is entitled to the position claimed by him, and that the writ of mandamus lies to make such claim effective.

It is objected to the validity of his Honor's ruling that plaintiff may not be declared the nominee because it appears that he did not receive a "majority of the votes cast" at the primary as required by the statute."

It may be that the board, in adding up the entire vote for all the candidates and dividing the amount by the number of places to be filled, pursued the correct method for ascertaining the number of votes cast at such a primary, and that, so ascertained, the present plaintiff did not have a majority of such votes, within the meaning of the statute; but the position is not open to defendant on this record, because, in our opinion, and on the admitted facts, the plaintiff is the third nominee of the party, whether he received the majority or plurality of the votes cast, and this by reason of the fact that his only legal opponent did not demand a second primary within the time required by the law. On this question the portion of the act more directly pertinent is as follows:

"SEC. 24. That nominations for President and Vice President of the United States in the several congressional districts shall be determined by a plurality of the votes cast, and in the case of all other officers mentioned in this act nominations shall be determined by a majority of the votes cast. If in the case of an office other than the offices of President and Vice President no aspirant shall receive a majority of the votes cast, a second primary, subject to the conditions hereinafter set out, shall be held, in which only the two aspirants who shall have received the highest and next highest number of votes shall be voted for: *Provided*, that if either of such two shall withdraw and decline to run, and shall file notice to that effect with the appropriate board of elections, such board shall declare the other aspirant nominated: *Provided further*, that unless the aspirant receiving the second highest number of votes shall, within five days after the result of such primary election shall have been officially declared, file in writting with the appropriate board of elections a request that a second primary be called and held, the aspirant receiving the highest number of votes cast shall be declared nominated by such appropriate board."

It is said to be an "elementary rule of construction that effect must be given, if possible, to every part of a statute." Lewis Sutherland on

Statutory Construction, sec. 380; and while it is true that this act, in the first portion of the section, requires a majority of the vote cast in order to the selection of the nominee, it enacts further, that if no aspirant shall receive such majority, a second primary may be had, but "subject to the conditions hereafter set out," to wit, that in the second primary only the highest and next highest shall be voted for, and provides that either one of these two may withdraw, filing notice to that effect; and if neither withdraws, the one receiving the highest vote shall be declared the nominee unless the second highest shall demand in writing a second primary within five days after the result of the first primary shall have been officially declared.

On the record, the result of this primary was officially declared, at latest, on 6 June. The demand for a second primary was filed by contestant on 15 June, and not before, and by the express provision of the statute, therefore, the plaintiff was entitled to the position of nominee, and it became the duty of the election board to so declare.

It is no satisfactory or sufficient answer to this position that the county board did not, in formal terms, undertake to declare who were the nominees, nor does the statute in this aspect of the case make any such requirements. Section 21½ of the act in effect provides that the county boards of election "shall tabulate the returns made by the judges and registrars of the several precincts of their respective counties so as to show the total number of votes cast for each candidate, etc., and when thus compiled on blanks, etc., and in reference to county officers these returns shall be made out in duplicate and one copy thereof shall be filed with the clerk of the Superior Court, one copy shall be retained with the board, which shall forthwith declare the results."

All this was properly done and the results posted by the board at the courthouse door; that is, the "results of the election, as shown by these returns, tabulated pursuant to law." This right to become a candidate arises from the vote, tabulated, declared, and published as required by the statute, and is not dependent on a formal declaration of such right by the board. There is no claim or suggestion that there was any irregularity in the election or any error in the returns by the precinct officers or in the tabulation of the vote by the board.

R. W. Winston, Jr., having received a clear majority of all the votes cast, was one of the nominees and entitled to go on the ticket. J. E. Holding, also, having a majority, had the same right; and plaintiff, if his votes, as shown by the returns officially tabulated, constituted a majority, would have had the same right; but if, as contended by defendant, it was only a plurality, the law clothed him with an additional right: he was still the nominee unless the next highest opponent should in writing demand a second primary in five days. This he did not do,

and plaintiff, under the express provision of the statute, thereby became as of right the lawful nominee for the third place.

In recognition of the fact that if a second primary is to be ordered much time may be required not only for holding the election, but for investigating irregularities that may occur therein, this provision for prompt notice becomes of the substance, and should be given substantial effect in passing upon the rights of the parties under the law.

It is also contended for defendant that the courts may not control the action of political parties in reference to the selection of their candidates nor undertake to determine controversies concerning them, but will leave such questions to the agencies and bodies which they themselves have established for the purpose.

While this has, no doubt, been heretofore recognized as the sound rule, it does not prevail when, as in this case, the Legislature, in the exercise of its acknowledged powers, has taken control of the subject and enacted a statute conferring on successful contestants in a legalized primary certain specified and clearly defined legal rights, and enjoined upon an official board ministerial duties reasonably designed to make these rights effective. In such case, where the rights, as stated, are manifest and the duties clearly ministerial, the action of these boards becomes the subject of judicial scrutiny and control, and, on authority, the writ of mandamus is the remedy by which relief may in proper instances be obtained. *McCullers v. Comrs.*, 158 N. C., 75; *Edgerton v. Kirby*, 156 N. C., 347; *Kitchin v. Wood*, 154 N. C., 565; *Board of Education v. Board of Comrs.*, 150 N. C., at page 121, citing Moses on Mandamus, p. 68.

In this connection it is further insisted that mandamus will not lie in the present instance, because the case is in effect a contest involving the title to an office, and the rights of the parties thereto can only be tried by action in the nature of *quo warranto*, citing *Rhodes v. Love*, 153 N. C., 468; *Ellison v. Raleigh*, 89 N. C., 125, and other cases.

If it be conceded, as suggested, that this controversy is in effect a contest over an office, the principle recognized in these cases does not apply except where a defendant is in the present possession of the office and under some color of right.

The very term, *quo warranto*, signifies that the office is presently filled by an incumbent *de jure* or *de facto*, and the cases cited by defendant recognize the position that when the office is vacant or an incumbent is in without color or pretense of it, mandamus lies in favor of the rightful claimant, and authority elsewhere is to like effect. *S. ex rel. Moore v. Archibald*, 5 N. D., 539; *People ex rel. Brewster v. Kildreff*, 15 Ill., 769. And if the second primary has been held, as suggested though it does not appear in the record, and defendant Pate selected, the plaintiff not participating therein, the result is the same, for the right of plain-

tiff being complete by reason of the failure of his adversary to give the notice required by the statute, the order for the second primary is absolutely void, and affords no color to said defendant.

The other authorities cited and relied upon by counsel will be found to apply in cases, as stated, where the action complained of was that of political parties through their own agencies and unaffected by statute, or they referred to discretionary as distinguished from ministerial duties, or where the questions chiefly considered were as to the regularity of the election itself and the results of same, as indicated by the votes cast—questions which are usually and in large measure referred by the statute to the decision of the election boards, as in section 26 of the present act; but these decisions have no application to the facts of the present record, where, as heretofore stated, the election board having done all that it was required or permitted to do, in the way of ascertaining and declaring the result of the election, it appears that the right of the plaintiff to the position is clear, and the performance of the duty sought is the ministerial one of placing his name on the general ticket, the only method of making his right effective. 19 A. and E. Enc. (2 Ed.), pp. 745-746.

The fact that the defendant board acted under advice of the State Board of Elections in the matter is without controlling significance. It was only given in courteous response to a request for it by the local board, and was not and was not claimed to be authoritative.

There is no error, and the judgment of the Superior Court is

Affirmed.

BROWN, J., dissenting: I am of opinion that the courts have no jurisdiction in actions of this character in the absence of express statutory provision. The only matter in controversy is the title to the nomination of a certain political party to a public office, and not the title to the office itself. There is no statute in this State that authorizes the courts to try the title to a party nomination. It is the policy of the courts, in the absence of express statutory authorization, to leave the settlement of such controversies to the political party organization interested.

It is for the controlling power of the Democratic Party in Wake County, the executive committee or the State committee, to determine who shall be placed upon the tickets of that party as its nominees; and the same may be said as to other recognized political organizations. I think the authorities sustain this view. "The Court has no power to entertain contests between candidates at primary elections, the decision of the executive committee of the party being conclusive." *Barbee v. Brown* (Miss.), 44 So., 769. To the same effect is *Reis v. Foster,* 36 So., 200.

The Wisconsin Court says: "The creation of a tribunal to determine controversies (political disputes), no provision being made for a judicial review of its decisions, necessarily makes its jurisdiction exclusive and its decisions unimpeachable, except for jurisdictional defects." *S. v. House,* 122 Wis., 534.

S. ex rel. Burke v. Foster (La.), 36 So., 32, *Land, J.,* delivering the opinion, says: "The decision of disputes as to party nominations rests with the party whose nomination is claimed, in the absence of statutory regulation to the contrary. The jurisdiction of courts in such matters is purely statutory." To the same effect is *Reis v. Foster,* 36 So., 200; *Harris v. Bruce* (Ky.), 87 S. W., 1078; *Moody v. Trimble,* 58 S. W., 504.

In re Fairchild, 151 N. Y., 359, the New York Court of Appeals says: "It is much more proper that questions which relate to the regularity of conventions, to the nomination of candidates, and the constitution of committees should be determined by the regularly constituted party authorities than to have every question relating to caucus, convention, or nomination determined by the courts, and thus in effect compel them to make party nominations and regulate the details of party procedure instead of having them controlled by party authority."

In *Walls v. Brundoger,* 160 S. W. (Ark.), 230: "Since no equitable right of title is involved in a contest over an election, equity cannot acquire jurisdiction to interfere therein by injunction, even though necessary to protect the rights conferred by the statute. Since the Legislature, by the Primary Election Act (Acts 1911, page 342), has provided a tribunal for hearing contests of such elections, the decision of such tribunal is final, and cannot be reviewed by the courts. Even though a State central committee acted fraudulently in determining a primary election contest, and there was no time for an appeal to the State Convention, the fraud will not give courts of chancery jurisdiction to review the findings and declare the result of the election, since only political rights are involved." See, also, *Cain v. Page,* 42 S. W., 336.

The cases are numerous to the effect that the courts have no power to review or interfere with the action of boards of election or executive committees authorized to control and manage primary elections in which only party nominations are contested, unless there is express statutory authority for an appeal to the courts or some other method provided for judicial review. Our State makes no such provision. In the absence of it, I think the action of the defendant cannot be reviewed and controlled by the courts, and that this proceeding should be dismissed.

IN RE INHERITANCE TAX, W. P. BAUGHAM'S ESTATE.

(Filed 11 October, 1916.)

1. Taxation—Inheritance Tax—Wills—Widow—Support of Children.

A bequest of an annuity from the increase and profits of testator's estate to the wife during widowhood, to be paid at her request, not exceeding $5,000, for her own use and the support and education of the minor children of the marriage, gives such children a vested right and interest in the funds, the amount of which is to be determined by the widow upon a consideration of what will be required for their support and education.

2. Same—Interest Ascertained—Courts.

Where an annuity not exceeding $5,000 is bequeathed to a widow and the maintenance and education of the children of the marriage, to be used by her in accordance with her judgment, the portion of the annuity for her own use is not subject to the tax under our inheritance tax laws, chapter 438, section 6 (5), Laws 1909; but the part for the use of the children is presently subject to such tax in accordance with section 6 thereof, and the courts will adjudge what is a fair and reasonable allowance for the children in accordance with the terms of the will, and so tax the same that no part thereof shall be laid upon that part bequeathed to the widow, under the method set out in the opinion in this case.

3. Same—Trusts.

The fact that a testator has bequeathed to his widow the discretionary control of an interest in his estate for the use and benefit of the children of the marriage cannot affect the imposition of the inheritance tax upon such interest. Chapter 438, section 6, Laws 1909.

4. Same—During Widowhood—Interpretation.

A bequest of an annuity to the widow of the testator and the testator's children during her widowhood is construed, for the purpose of valuing the children's interest subject to the inheritance tax, as for her life, and this should be ascertained and determined in accordance with the expectancy fixed by the life tables and other competent evidence thereof as permitted in such instances. *S. v. Bridgers*, 161 N. C., 246, cited and distinguished.

5. Appeal and Error—Findings—Inheritance Tax—Valuation of Property.

Findings of fact in the Superior Court will not be disturbed on appeal when there is evidence to sustain them; and the finding in this case that the widow will require for herself and children the full annuity of $5,000, which is given by her husband's will in a sum not to exceed that amount, is determinative of the question on appeal.

CIVIL ACTION heard by *Allen, J.*, upon a waiver of trial by jury, at May Term, 1916, of BEAUFORT.

W. P. Baugham died in Washington, N. C., on 8 February, 1910, leaving a large estate and a will by which it was devised and be-

queathed to his widow, Mary A. Baugham, and his children as therein set forth. The inheritance tax appraiser for Beaufort County, on 24 January, 1916, appraised the estate at $145,302, and, deducting the exemptions allowed by law and the value of an annuity to the widow, he found that the clear balance subject to the inheritance tax was $102,052, and the tax thereon $765.39. In estimating the value of the annuity to the widow he made the sum of $2,500 per annum the basis of his computation. The appraiser made his report to the clerk of the Superior Court, and exceptions were filed thereto by the executrix and other parties interested in the estate, and the exceptions were heard by the court, and a reappraisement made, as will hereinafter appear upon facts found by the court.

W. P. Baugham left a widow and six children, five of whom were minors, being respectively 16, 14, 12, 8, and 5 years of age. He gave his property, both real and personal, to his children, subject to an annuity created for the benefit of his widow in the following terms: "I hereby direct an annuity be paid to my beloved wife, Mary A. Baugham, of whatever amount that she may require for her own use and maintenance and such of the children as she has in her care; and such of the amount as she uses to raise and educate the younger ones shall not be a charge against such minor child. I want my dear wife to have ample to live on and rear and educate our children, let it be $3,000 or $5,000 a year. I know she will only use what she needs, the same to be paid her as she may require it; this to remain in force during her widowhood, the same to be paid out of the increase of my estate—such as interest, dividends, rents, etc."

In regard to the value of the annuity, the court found the following facts: "At the time of the death of the said W. P. Baugham the said widow, Mary A. Baugham, was 41 years of age; that she was then and is now in good health, and there is no reason known why she should not live to the full expectancy contemplated by law. It is further found as facts that at the time of his death W. P. Baugham was survived by five minor children with ages respectively of 16, 14, 12, 8, and 5; that the reasonable and proper expenses for the support of the said Mary A. Baugham has been from the time of the death of W. P. Baugham $5,000 per year; that the said Mary A. Baugham has not remarried; that under the provisions of the will of W. P. Baugham there is to be, and has been since the death of W. P. Baugham, paid an annuity of $5,000 per year, which said annuity is created by the said will and the payment of same a lien and charge upon all of the property and estate of said W. P. Baugham, passing by his will and which is appraised; that the cash value of the said annuity at the time of the death of the said W. P. Baugham was $66,500."

It was thereupon adjudged that there should be deducted from the total value of the estate the said sum of $66,500, which was based upon an annuity of $5,000, and the tax assessed and collected on the balance; whereupon the State Tax Commission appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert and Daniel & Warren for Tax Commission.

Harry McMullan for appellees.

WALKER, J., after stating the facts: It is conceded that the case is governed by Laws 1909, ch. 438, sec. 6 (5), by which the husband and wife are exempted from the payment of an inheritance tax, and this provision of the law is what has raised the question presented in this case, as to how the annuity left in the will to the testator's widow for the joint benefit of herself and children should be valued in order to ascertain the clear value of that which is subject to the inheritance tax.

The testator, W. P. Baugham, evidently intended that his widow should be supported, and his children should be supported and educated, out of the annuity given to the widow in the fourth clause of his will. It was not his purpose that the widow should take all of it, even if necessary for her annual support; but he set apart a sum not to exceed $5,000 annually for the benefit of both widow and children, to be administered by his widow and to be expended according to her best judgment and discretion. The children, therefore, have a vested right and interest in the fund, the value of which is dependent to some extent upon the volition of the widow in making provision for their maintenance and education; but notwithstanding this fact, the children still have an interest in the annuity, the amount of which only is to be determined by the widow upon a consideration of what will be required for their support and education. That the children have a vested interest in the annuity we think was held in *Young v. Young,* 68 N. C., 309, 314, where a substantially similar trust was created by the will under construction there. The devise and bequest was in these words: "To my beloved wife I give all my estate, personal and mixed, to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her to them in that manner she may think best for their good and her own happiness." With reference to this clause of the will and its proper construction, the Court (by *Reade, J.*), said: "Our conclusion is that the gift is to the wife in trust, not for herself, and not for the children, but for both, to be managed at her discretion for the benefit of herself and children. That the trust is coupled with the power to dispose of the property among the children, discriminating at her own discretion as to time, quantity, and

person. The *trust* is that it shall be managed and disposed of for the family. The *power* is that she may discriminate as aforesaid. It is a vested interest in the children, subject to be divested by the exercise of the power as aforesaid. And, upon failure to exercise the power, or upon its partial exercise only, in the disposition of the property, so much as remains undisposed of at the death of the mother will go to the children as tenants in common."

The children of a testator or intestate are not exempt by the law from the inheritance tax, but they are required to pay 75 cents for each and every $100 of the clear value of their interest in the property, and that is the rate at which the balance of the estate, after deducting the value of the annuity, has been taxed. Laws 1909, ch. 438, sec. 6. The interest acquired by the children, whether by gift, under a will, or by inheritance, is taxable, and it does not escape taxation by reason of the fact that the testator has placed the interest given to the child in his estate under the discretionary control and disposition of its mother or any other person. If this were otherwise, any owner of property could so dispose of it by will as to avoid all inheritance tax imposed by the law, by simply creating a trust similar to the one in this will. There should be a reasonable construction of the statute, with a view of executing its provisions according to the true intention of the Legislature, and it was the purpose that there should not be any evasion of the inheritance tax by the intervention of a trust, but that the property should be taxed the same as if it had been given directly to the child. It is the gratuitous or unearned benefit derived from the inheritance that is made to bear its proper burden of taxation and thereby contribute its just share to the public revenues, and the law is not particular as to how the property comes to the beneficiary. Whether the property given to a minor child for its support and education should be taxed is a question of public policy for the Legislature to determine. We must take the law as we find it and so interpret it as to further the purpose of its enactment.

We think the widow's share of the annuity which is exempt from the tax was properly valued as a life interest, instead of an interest during widowhood simply. Any one who would contract for the purchase of the remainder of the estate left to the children would, in estimating the encumbrance upon it, consider the longest term during which it could endure, and not merely the chance of its terminating sooner by the remarriage of the widow; and if we should regard it as an estate during widowhood there would be no known way of estimating its value now, nor until the death or remarriage of the widow, as when a woman, widow or not, will marry, is such an unknown quantity in the science of mathematics that it defies all calculation. The object of the

law is to collect the tax at once, or within a reasonable time after the death of the decedent (Laws 1909, ch. 438, sec. 8.); and if payment is delayed more than two years it will bear 6 per cent interest, and the executor or administrator is required to deduct the tax before paying any legacy or share in the distribution of the estate.

Section 9. An estate during widowhood has always been classed as an estate for life, because it may last for that full period, though determinable, of course, upon remarriage. It is an estate of freehold. Coke's Litt., 42a; Cruise's Digest, 115; 4 Kent, 26; 2 Blackstone, 121. It was so decided to be in *Gillespie v. Allison,* 115 N. C., 542, and to come within the meaning of Laws 1887, ch. 214, relating to sales for partition as between persons holding life estates and remaindermen.

If the widow marries, the estate will terminate; but if she does not, it will continue during her life, and the wise and prudent purchaser of the remainder would attach more importance to its possible utmost duration than to its earlier ending by mere chance of marriage—an utterly indeterminable event, so much so that the value of the estate based upon that chance cannot possibly be estimated, even approximately, as a life estate can and is by the life tables.

The same argument for treating the estate for widowhood as one of such uncertain duration that its value is not now appraisable will apply to any life estate, which may determine by the chance of death short of the period of expectancy fixed by the life tables. The one contingency is no greater than the other, the only difference between the two being that death is an event which must happen at some time, while the remarriage of a widow may never take place; but this does not destroy the analogy between them as uncertain events.

We therefore affirm the decision below, with this amendment, that the court shall ascertain and adjudge what is a fair and reasonable allowance for the support, maintenance, and education of the children, under the terms of the will, and this amount will be deducted from the present appraised value of the annuity, the remainder thereof to be then taken from the total value of the estate, as already fixed by the court, and upon this final amount the tax shall be assessed and paid by the executor. He is directed to pay the same from the income of the remainder left to the children after deducting the full present value of the annuity (estimated at $5,000), if this is sufficient for the purpose, and if not, from the principal, so as not to interfere with the control and disbursement of the annuity by the widow for her own support and the support and education of her children; but if there is not sufficient for the purposes, any deficiency will be paid out of that part of the annuity allowed for the children to the extent necessary for the purpose. By this method we leave intact the share in the annuity of the widow, and

also her control, so far as possible, of the entire sum of $5,000 annually. As a general rule, each legacy must pay its own tax under the law, when the life tenant and the remainderman are not the same persons, *In re Plum's Estate,* 75 N. Y. Suppl., 940; but in this case the children of the testator take their share of the life annuity and also are the beneficiaries of the residue of the estate.

We understand the finding of fact to be, by a fair construction of the judgment, that the widow will require the full amount of $5,000 annually for the purposes declared in the will, and we will not disturb it or any other finding of fact made by the court, but they will all stand, except as modified herein. Findings of fact, when there is evidence to sustain them, are not reviewable in this Court. *Bailey v. Hopkins,* 152 N. C., 748; *Williamson v. Bitting,* 159 N. C., 321; *Drainage District v. Parks,* 170 N. C., 435. The rule is the same where the judge tries the case without a jury. *Matthews v. Fry,* 143 N. C., 380.

The method indicated for the valuation of the entire interest of the children in the estate, including any amount indirectly given in the annuity, will save the full tax to the State and, at the same time, leave the annuity under the discretionary management of the widow, thereby effectuating the intention and will of the testator. The general result is that the value of the children's interest in the annuity must be ascertained in order that it may be taxed under the statute, but said value will not be deducted from the amount of the annuity, nor will the tax thereon, if it can be paid out of the balance of the estate, all of which is left to the children, which seems to be the case here. It will make little or no material difference to them in the final outcome whether the tax be paid out of the annuity, so far as they are concerned in it, or the remainder of the estate left to them by the will. The statute does not necessarily require that the tax shall be paid out of the annuity, as a legacy, upon which it is assessed, but simply that it shall be paid before the legacy or the annuity itself is delivered to the legatees. It can just as well be paid out of other property as out of the legacy, though it may be a lien on the legacy and its payment is made a condition precedent to the transfer thereof to the legates. Laws 1909, ch. 438, sec. 9. The value of the interest of the children in the annuity, though somewhat of an indeterminate nature, depending upon how much, under the directions of the will, their mother may expend for their support and education, may yet be estimated with sufficient approximation by a consideration of their ages, the amounts heretofore expended for those purposes, and any other relevant facts or circumstances. Don Passos on Inheritance Tax Law, p. 243, sec. 54. Such valuation is permissible where the amount of the legacy is not fixed, as will appear by Laws 1909, ch. 438, sec. 10.

The obvious intent of the statute is to tax every interest passing by will to persons not exempt, and, within the meaning of the statute, this includes an interest made subject by the will to the appointment of a third person. *Howe v. Howe,* 179 Mass., 546.

Before concluding this opinion, we should state that the reference in *S. v. Bridgers,* 161 N. C., 246, to an estate for widowhood as being one incapable of present valuation, on account of the uncertainty as to the time when it will come to an end, was based upon its supposed liability to taxation under the inheritance tax law, whereas the law governing this case exempts such an estate. The question there mooted was, Could its present valuation be made for the purpose of taxing it? while here the question is, What is the value of the remainder or residue of the estate? which naturally must be determined by assuming that the widow's estate or interest will endure for the full period of her life, as its value in the market would be so estimated by purchasers.

The case is remanded with directions to assess and pay the tax according to method herein stated. The costs of this Court will be taxed against the estate of W. P. Baugham.

Modified.

G. C. GRAVES v. W. J. JOHNSON ET ALS.

(Filed 11 October, 1916.)

1. Deeds and Conveyances—Probate—Statutes—Constitutional Law.

Revisal, sec. 952, providing a method and form for the execution of a deed by husband and wife is constitutional and valid.

2. Same—Husband and Wife—Husband's Acknowledgment—Wife—Separate Examination.

A deed from a husband and wife to the former's land must be executed in the form and according to the method prescribed by Revisal, sec. 592, and where a mortgage of the husband's lands has been acknowledged and properly probated as to the wife, with her separate examination taken in the statutory form, it is not sufficient to pass any of her interest or estate therein unless the acknowledgment thereof of her husband has also been duly taken and the deed regularly probated as to both in accordance with the statute.

CLARK, C. J., dissenting.

CIVIL ACTION tried before *Devin, J.,* at October Term, 1915, of LEE.

This is an action to foreclose a mortgage and to determine the right in certain lands as between first and second mortgagees.

D. N. Black was the owner of the land, and on 31 November, 1909, he and his wife, Sarah J. Black, delivered to the plaintiff a mortgage conveying said land to secure a debt of $281 due the plaintiff. Said mortgage was signed by the husband and wife. It has never been acknowledged by the husband or otherwise probated as to him, but it has been acknowledged by the wife and her private examination taken, and it was placed on the records in the office of the register of deeds on 10 December, 1909.

On 5 October, 1906, the said Black and wife executed a mortgage conveying said land to the defendant Johnson, to secure a debt of $300 due him, which was duly probated and was duly registered on 14 July, 1910.

It is agreed by counsel, on these facts, that the only question to be decided in this cause is whether or not the mortgage to W. J. Johnson constitutes a lien on all interest in said land prior to that of the plaintiff; that is to say, the defendant W. J. Johnson contends that inasmuch as the mortgage deed to the plaintiff was not probated as to D. N. Black, the dower interest of Sarah J. Black did not pass by virtue of said mortgage to the plaintiff; whereas the said plaintiff, admitting that the interest of D. N. Black did not pass by virtue of said mortgage, contends that the dower interest of the said Sarah J. Black is vested in him, the plaintiff, by virtue of said mortgage.

Judgment was rendered in favor of the plaintiff, condemning the dower interest of Sarah J. Black to be sold, and the defendant excepted and appealed.

No counsel for plaintiff.
Shaw & McLean and Sinclair, Dye & Ray for defendant.

ALLEN, J. The statute in force when the mortgage to the plaintiff was executed (Revisal, sec. 952) provided that it should be signed by the husband and the wife; that it should be duly acknowledged by both, and that the private examination of the wife should be duly taken in order to affect the estate, right, or title of the wife; and while the Constitution, Art. X, sec. 6, says that the real and personal property of a married woman "may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried," it has been held that the General Assembly may prescribe the form in which the assent of the husband shall be evidenced, and that these forms are material and must be complied with.

The case of *McGlennery v. Miller,* 90 N. C., 218, is almost directly in point. In that case the husband and wife signed the deed, the private examination of the wife was duly taken in 1852 and proof of the execution of the deed as to the husband was made in 1857 by a subscribing

witness. It was held that the deed did not convey the title of the wife, and the Court says: "It is contemplated and required by the statute that the deed shall be first acknowledged by the husband and wife, and that her privy examination shall be taken afterwards; or if, for any of the causes specified in the statute, this cannot be done, then, first, the husband must acknowledge the execution of the deed, or it must be proved as to him by witnesses before a judge or the county court, and then, upon suggestion to the judge or county court, as directed by the statute, the commission may go out to take the acknowledgment and privy examination of the wife.

"This is the order of acknowledgment of the execution of a deed by husband and wife provided by the terms of the statute, and this order is regarded as material, and of the substance of the execution of such a deed. The leading purpose of the statute, it is true, was to facilitate alienations by married women, but it was likewise intended to protect them against the undue influence of their husbands. Hence the privy examination; this was to take place after the acknowledgment of the signing of the deed, apart from the husband, in the presence of the examining officer where the wife was supposed to feel free to express herself under the examination as to her will and desire in respect to the deed. It was intended, also, that the husband should first acknowledge the execution of the deed, to the end it appears that the wife signed the same with his knowledge and consent. She is to be protected by him as well as by the law. This view of the statute is fully warranted by its terms and purpose, and it has been so repeatedly and uniformly construed. *Burgess v. Wilson,* 2 Dev., 309; *Pierce v. Wanett,* 10 Ired., 446; *Malloy v. Bruden,* 88 N. C., 305."

Again, in *Ferguson v. Kinsland,* 93 N. C., 339, the Court held that the requirement that the deed should be jointly executed by the husband and wife must be complied with, and the Court considers and answers the constitutional objection as follows: "The only point made by the appellant's counsel is that the Constitution, Art. X, sec. 6, which secures to a married woman all the property acquired previous to and since her marriage as her sole and separate estate, free from her husband's debts, and confers upon her power to devise and bequeath, and, with her husband's written consent, to convey it as if she were unmarried, sanctions this mode. But it is for the General Assembly to provide the method by which this right may be exercised, as it has done heretofore when her real estate was not less her own, and when she was permitted to convey it only by observing a prescribed form. The requirement that the husband should execute the same deed with his wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion

and undue influence from him. These have been deemed prudent safeguards to insure freedom of violation and action on her part when she is disposing of her real property, and these are none the less necessary now, when she retains her full real and personal estate. The statute in force when the deed was made comprehends her sole and separate estate in land, retained under the Constitution, as well as that she held before, after entering into the marriage relation. It no more abridges her rights of property, and is but a legislative direction as to the manner in which it may be exercised. The consent necessary under the Constitution must be given in the manner provided by law, and whether by the husband's writing in the deed or by a separate writing as attempted here, it equally restricts her capacity of disposal, and is alike exposed to the imputation of being in conflict with the Constitution."

The statute has been changed since these decisions to permit the acknowledgment of the husband to be taken after that of the wife and before a different officer (Revisal, sec. 953), but section 952 still requires the acknowledgment of the husband or proof of his execution of the deed to pass the title or interest of the wife; and the principle announced, that the General Assembly has power to prescribe the form in which the assent of the husband to the execution of a deed by the wife shall be evidenced, is unimparied, and was fully recognized in *Warren v. Dail,* 170 N. C., 409.

The case of *Southerland v. Hunter,* 93 N. C., 310, which has been approved on this point in *Lineberger v. Tidwell,* 104 N. C., 511, and in *Slocomb v. Ray,* 123 N. C., 574, construes section 1256 of The Code (1883), now Revisal, sec. 952; and it is there held that a deed signed by the husband, but not proved as to him, was ineffectual to pass the title of the wife, although her acknowledgment and private examination were taken, which is the precise question now before us.

The fact that the General Assembly saw fit to change the statute requiring proof as to the husband and wife to be taken before the same officer, and that proof as to the husband should precede proof as to the wife, after the decisions of *McGlennery v. Miller* and *Ferguson v. Kinsland,* and left the statute unchanged as to the requirement that the deed must be *proved* as to the husband to pass the title or interest of the wife, after the decision in *Southerland v. Hunter,* furnishes the strongest possible evidence that the General Assembly thought the latter a safeguard which ought to be retained.

The case of *Jennings v. Hinton,* 126 N. C., 48, does not deal with the statutes prescribing the forms for conveying the real estate of a married woman, as there was no land involved in the action, and the question for decision was the validity of an assignment of an insurance policy.

It follows, therefore, that as the mortgage under which the plaintiff claims was not acknowledged by the husband, nor proof made as to his execution thereof, it does not operate to pass the dower interest of the wife, and that there was error in the judgment.

Reversed.

CLARK, C. J., dissenting: D. N. Black and Sarah J., his wife, joined in a conveyance of land which belonged to the husband, to secure a debt of the wife to the plaintiff. This mortgage was not probated as to D. N. Black, but was duly probated as to the wife, whose privy examination was taken, and registered. Thereafter D. N. Black died. No dower has been allotted or demanded.

The court held that the mortgage conveyed the dower interest of Sarah J. Black in the lands in controversy to the plaintiff, and enjoined the defendant, a subsequent mortgagee, from selling such dower interest during the lifetime of the widow.

There is no question as to the due execution of the mortgage by Sarah J. Black. The proof of the deed as registered necessarily included the signing by the husband, as shown on its face, but no delivery by him as his deed. There is no claim that the interest of the husband passed. It has been often held that when the conveyance is executed by the husband and not by the wife, or defectively executed by her, that the conveyance is good as to the husband. Here, where the conveyance was duly and fully executed, probated, and registered as to the wife "with the written assent of the husband" proven as part of the deed, for the same reason it passes the wife's dower interest, and she is estopped by her deed to assert title against the mortgagee.

The mortgage on its face (and it is duly probated and registered) shows that the husband gave his written assent to his wife joining in the conveyance. The statute does not require the husband's privy examination, and it has been often held that his signature appearing to the conveyance, which is duly probated, is a sufficient "written assent of the husband." *Jennings v. Hinton,* 126 N. C., 48. In that case the husband signed the deed only as a witness, and it was held that this was a sufficient assent. This case cites *Farthing v. Shields,* 106 N. C., 289, which held that the husband "signing his name to the paper was a writing, and his assent would be inferred." It also cites *Jones v. Craigmiles,* 114 N. C., 613, and *Bates v. Sultan,* 117 N. C., 94. There are other cases to the same effect.

In *McGlennery v. Miller,* 90 N. C., 215 (in 1884), and *Ferguson v. Kinsland,* 93 N. C., 337, it was held that a deed must be probated as to the wife after its execution had been proven as to the husband. This was changed by the act of 1899, now Revisal, 953, which provides that

the deed may be acknowledged by the wife at a different time and place and before a different officer from the acknowledgment by the husband, and in taking the probate of such instruments executed by the husband and wife, including the private examination of the wife, it shall not be material whether the execution of the instrument was proven as to, or acknowledged by, the husband before or after the acknowledgment and private examination of his wife."

This mortgage, therefore, being duly and legally probated as to the wife, the failure to have it probated as to the husband and recorded before registration of the second mortgage makes it invalid only as a conveyance by him. It is complete as a conveyance by the wife.

The Constitution, Art. X, sec. 6, provides that the wife may convey her realty "with the written assent of her husband as if she were unmarried."

Revisal, 952, it is true, does provide in the first part that the conveyance must be executed by the married woman and her husband and due proof and acknowledgment must be made as to the husband and also by the wife with her privy examination (which was had here). This part of the statute was referring to a complete conveyance by both. for the second paragraph of the section provides: "Any conveyance . . . executed by any married woman in the manner by this chapter provided [which was done], and executed by her husband also, shall be valid." It was executed by him, though not proven as his conveyance. It certainly was not intended by this section to repeal the provision of the Constitution which authorized a wife to convey land "with the written assent of her husband." At most it meant only that her privy examination was still requisite. Whether that requirement is constitutional or not does not arise here, for her privy examination was duly taken. There being also the written assent of her husband, as is shown by the deed itself as proven and recorded, the conveyance is complete and valid as the act of the wife. In *Jennings v. Hinton, supra*, the husband signing the deed as a witness was held sufficient as his "written assent," though, of course, such deed was not, and could not be, probated as his deed. The Constitution does not require that he should join in the deed, but requires only his written assent, which duly appears. In *Hatcher v. Hatcher*, 127 N. C., 200, there was no signing to show the "written assent of the husband."

In this mortgage the words used by the wife were a conveyance, absolute in its terms, and not a mere release of her dower interest. Whether, if it had been in the latter form, it would have been as effective, the judgment of *Devin, J.*, in this case is in accordance with the Constitution and the precedents.

The decisions in *Southerland v. Hunter,* 93 N. C., 310 (1885); *Lineberger v. Tidwell,* 104 N. C., 511 (1889); and *Slocumb v. Ray,* 123 N. C., 574 (1889), were all prior to chapter 235, Laws 1899, now Revisal, 953, which was passed for the very purpose of correcting those decisions. Previous statutes had been passed curing the first two of those decisions as to past conveyances, but after the decision in *Slocumb v. Ray,* the act of 1899 was passed, and soon thereafter *Jennings v. Hinton,* 126 N. C., 48 (Feb., 1900), held the signature of the husband as a witness to a deed was a sufficient "written assent." Revisal, 953, was enacted thirty years after Revisal, 952, and in the light of the above decisions must be taken as limiting Revisal, 952, as both must be construed together.

The privy examination in this case recites and probates the joinder of the husband, which is therefore proven as a written assent, though his execution of the deed as his conveyance is not.

It has been forty-eight years—nearly half a century—since the Constitution guaranteed to every married woman that her property rights should "remain as if she had remained single," save only that her husband should give his written assent to her conveyances of realty. In this case the wife conveyed her dower interest by apt and appropriate words in a deed with the written assent of her husband, all duly proven, probated, and registered in accordance with the constitutional requirement, Revisal, 953, and the decision in *Jennings v. Hinton, supra.* There is also superadded her privy examination, which is not required by the Constitution. What more could the grantee require of her?

W. A. PINNELL ET ALS. v. J. W. BURROUGHS ET AL.

(Filed 11 October, 1916.)

1. Judgments—Parties—Estoppel.

The widow of the deceased had her dower allotted in the lands in controversy, and in proceedings to sell lands of the deceased to pay his debts, regularly held, L., her father, became the purchaser of her reversionary interest, and, again, under proceedings regularly had, in which the present plaintiffs were made parties, his executor sold the lands to make assets to pay his debts, and B. became the purchaser, which sale the court confirmed and ordered the executor to make a deed to him, which was accordingly done. B. was the second husband of the widow, now deceased, by which marriage children were born, the defendants in the present action, the plaintiffs being children by the first marriage, and

claiming as heirs at law of their father. *Held*, the plaintiffs are estopped to claim title to the lands by the judgment in the second proceedings to sell them to make assets, to which they were parties.

2. Same—Lost Records—Evidence — Judicial Sales — Recitations in Deed — Prima Facie Evidence—Presumptions.

Where there is evidence tending to show that the courthouse of the county was rebuilt, and its records during the time had been placed in an attorney's office near by, and many of them were not recorded; that due and diligent search had been made for the records and proceedings in the present case in the courthouse and elsewhere, the recitals in the deed from an executor in proceedings to sell lands to make assets to pay the debts of the decedent became *prima facie* evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to have been founded, and permits the conclusion of the regularity of the proceedings, the presence of all proper parties and the binding force of the decree specified and referred to, unless it should in some portion of the record more directly apposite affirmatively appear to the contrary. In this case the record proper showed only an entry of report of sale, purchaser, price and payment, with recommendation of confirmation.

3. Judgments—Parties—Estoppel—Judicial Sales—Parties—Presumptions.

A final decree in proceedings to sell lands to make assets in this case against W. A. P. *et als.*, is held to conclude a granddaughter of the testator, both under his will and as his heir at law, it appearing that two of testator's daughters married the same person, and that children of both the first and second marriage were necessarily the testator's grandchildren, and those of each marriage were equally necessary parties to the proceedings.

CIVIL ACTION to recover a tract of land, tried before *Stacy, J.*, and a jury, at June Term, 1916, of WARREN.

The evidence having been introduced, on motion made in apt time, there was judgment of nonsuit, and plaintiff excepted and appealed.

The cause was before the Court on a former appeal, and will be found reported in 168 N. C., 315.

T. M. Pittman and W. E. Daniel for plaintiff.
John H. Kerr and A. C. and J. P. Zollicoffer for defendant.

HOKE, J. The facts contained in the former case on appeal are all included in this record, amplified and extended by additional testimony introduced on the present hearing, and from these facts it appears that the land in question was formerly owned by Jackson Pinnell who died in said county in 1865, leaving him surviving his widow, Lucy W. Pinnell, and present plaintiffs, W. A. J. Pinnell, R. L. Pinnell, and Lucy Andrews, his children and heirs at law; that some time after the death of Jackson Pinnell his widow intermarried with John H. Burroughs,

and they had three children, the present defendants, who resist recovery, claiming to own the land as heirs at law of their father, now deceased; that soon after the death of Jackson Pinnell his widow, having qualified as the administratrix, filed a petition to sell his land to make assets. Decree was had, the land sold, report made, and sale confirmed. At said sale, the widow's dower having in the meantime been allotted to include the land now in dispute, the reversion in said tract was purchased by Willis Lloyd, father of Mrs. Pinnell, at the price of $856.80, and note and bond for purchase price executed by him with James E. Drake as surety. It does not affirmatively appear that this bond has ever been paid in full. A return of Mrs. Pinnell, administratrix, was offered in evidence, containing an item of a small amount as received on the Willis Lloyd note, no other testimony on that question being offered.

The record shows that decree for sale was had, November Term, 1866. Sale took place December, 1866. Report made and confirmed in August, 1867, or soon thereafter.

It further appeared that Willis Lloyd died in 1869, having made his last will and testament, appointing Henry B. Hunter his executor, and, in proving the will, it appeared that the heirs at law of Willis Lloyd and owners of his property under the will included, among others, the present plaintiffs, W. A. J. Pinnell, R. L. Pinnell, and Lucy L. Pinnell (now Mrs. Andrews). The docket of probate court of Warren County was then offered in evidence, containing the following:

NORTH CAROLINA—WARREN COUNTY.
In the Probate Court.

Henry B. Hunter, executor of Willis Lloyd, respectfully showeth to the court that in accordance with the order of sale to him directed by this honorable court he did, on 14 May, 1870, after the requisite advertisement, sell at the courthouse door in the town of Warrenton the land mentioned in said order, when John H. Burroughs became the last and best bidder in the sum of $1,000, and has paid the amount so bid. He is of the opinion that the price is as much as the land is worth, and respectfully recommends that the sale be confirmed and that he be directed to execute a deed to the purchaser.

H. B. HUNTER,
Executor of Willis Lloyd, Deceased.

There was also offered in evidence a deed from H. B. Hunter, executor of Willis Lloyd, conveying the tract of land in dispute to John H. Burroughs, father of defendants, and now deceased, containing recitals as follows:

"This indenture made and entered into on this the 20th day of September, A. D. 1870, between Henry B. Hunter, executor of Willis Lloyd, party of the first part, and John H. Burroughs, party of the second part, all of the county of Warren and State of North Carolina, witnesseth: that whereas the said party of the first part was by a decree of the Superior Court of the said county of Warren, made in a certain cause wherein the said party of the first part was plaintiff and Willis A. J. Pinnell, an infant under 21 years old, and others, were defendants, ordered to sell for the purpose of paying the debts of the said Willis Lloyd, which his personal property was insufficient to discharge, certain real estate of the said Willis Lloyd, to wit: the reversion after the life estate of Mrs. Lucy W. Burroughs in a tract of land of 238 acres, situate in said county of Warren on the waters of Rich Neck Creek, adjoining the lands of Jacob Parker, Henry Williams, and others, the same being the tract which was assigned to the said Lucy W. Burroughs, then Lucy W. Burroughs, for dower in the lands in the late Jackson Pinnell; and whereas the said party of the first part, in pursuance of said decree, did on 14 May, 1870, sell said real estate at auction at the courthouse in the town of Warrenton, when the said party of the second part became the purchaser in the sum of $1,000, and paid the whole of the purchase money in cash; and whereas, upon the report of said sale to the said court, the same was in all respects confirmed, and the said party of the first part was, by the final decree in the said cause, ordered to execute a deed for the said real estate to the said party of the second part," etc.

It was also shown in evidence that a few years ago the courthouse of Warren County was rebuilt, and that, during its construction, boxes containing some of the former records and dockets of proceedings of the court were placed in an attorney's office near by, many of them never having been recorded; and it was proved that due and diligent search had been made for the record and proceedings in this present case of *Hunter v. Pinnell et al.* in the courthouse and elsewhere, and that said papers could not be found. It was also shown that two of plaintiffs, R. L. Pinnell and Lucy Andrews, were children of Jackson Pinnell by Lucy, his second wife, and W. A. Pinnell, the other plaintiff, was a child of the said Jackson by a former wife, and she was a sister of Lucy; and this last having died in 1914, plaintiffs sue and claim the land as children and heirs at law of Jackson Pinnell, the former owner; and defendants resist recovery, claiming ownership as children and heirs of their deceased father, John H. Burroughs.

On these, the controlling facts in reference to this title, the Court is of opinion that the judgment of nonsuit is clearly correct, and this without reference to any rights that may or may not exist in plaintiffs,

from perusal of the first proceedings, but from the estoppel created by the judgment in the second record, that of Henry B. Hunter, executor of Willis Lloyd, deceased, v. W. A. J. Pinnell and others, and in which, by decree of a court having jurisdiction of the cause and parties interested, including the present plaintiffs, the land now in question was sold as the property of the testator, Willis Lloyd. True, in this last proceeding the only entry appearing upon the record proper is a report of sale and purchase by John H. Burroughs at the price of $1,000 and payment of the money by him, with a recommendation that the sale be confirmed; but, defendants having first laid the foundation by satisfactory proof that due and diligent search had been made at the proper places for the papers and proceedings in the cause, and that same could nowhere be found (*Rackley v. Roberts,* 147 N. C., 201; *Barefoot v. Musselwhite,* 153 N. C., 208), the recitals in the deed to John H. Burroughs became pertinent evidence, and, by force of the statute, became *prima facie* evidence of the existence and validity of the decree, judgment, order or other record upon which the same purports to be founded, Revisal, sec. 342; and, under various decisions in which this statute has been construed and applied, it permits the conclusion of the regularity of the proceedings, the presence of all proper parties, and the binding force of the decree specified and referred to, unless it should in some portion of the record more directly apposite affirmatively appear that the court had not acquired jurisdiction of the parties or that the decree was entirely beyond the scope of the issues involved in the cause. *Pinnell v. Burroughs,* 168 N. C., 315; *Sutton v. Jenkins,* 147 N. C., 11; *Morris v. House,* 125 N. C., 550; *Sumner v. Sessoms,* 94 N. C., pp. 371-376; *Hare v. Holloman,* 94 N. C., pp. 14-18; *Johnson v. Whilden,* 171 N. C., 153.

In the case then referred to of Hunter, executor of Willis Lloyd, v. W. A. J. Pinnell *et al.,* we have the record entry showing the report of sale of the land here in dispute, that same was bought by John H. Burroughs and purchase price paid; due and proper search for the papers and failure to find the same, and recitals in the deed showing a cause properly constituted; the presence of the proper parties; decree for sale to make assets to pay debts of the testator; report of sale, showing payment and purchase price; confirmation of sale and order to make title, and the deed conveying such title to defendants.

It was suggested for plaintiff that while the evidence shows that two of the plaintiffs are grandchildren of Willis Lloyd, the other plaintiff, being a child of the first wife, may not be so, and, therefore, as we understood the argument, there would arise no presumption that this first child was a grandchild of Willis Lloyd, and, therefore, to be included in the terms of the recital as to parties, wherein Henry B.

Hunter, executor of Willis Lloyd, is plaintiff and W. A. J. Pinnell *et al.* are defendants; but to our minds the position is without merit. Not only does the record, in the application for proof of will, show that these present plaintiffs were entitled to these lands under the terms of the will, but the proof shows that the wives of Jackson Pinnell were sisters, presumably full sisters, and both the daughters of the testator, and, if it were otherwise, if, as plaintiff contends, the record in the first case of Lucy W. Pinnell, admx., v. the heirs at law of Jackson Pinnell, should disclose that the legal title was in plaintiffs as heirs at law of Jackson Pinnell, that record also shows that Willis Lloyd, on confirmation of sale to him, had an equity in the property, and that, in any subsequent proceedings to sell this as his, the children and heirs at law of Jackson Pinnell would have been proper parties and properly included in the term, W. A. J. Pinnell *et al.*

The facts in evidence, then, are stated, showing the existence of a cause properly constituted, in a court having jurisdiction of the parties and subject-matter, in which the land in dispute was sold as the property of Willis Lloyd. If the present plaintiffs, who were properly parties to that record, had any title superior to that of Willis Lloyd, they should have set it forth, and not having done so, they are now concluded on the issue as to Willis Lloyd's title. This was fully adverted to and the case practically decided on the former appeal, in which *Associate Justice Walker,* speaking to this question, said: "If they were parties to the latter suit, they are bound and concluded by the judgment rendered therein, and it can make no difference whether they acquired title to the land as the heirs of Jackson Pinnell or as heirs of Willis Lloyd, as they are estopped by the judgment without regard to the source from which they may have derived title. If they had any other right or title to the land at the time they were called upon to answer the complaint, they should have disclosed it, and pleaded it, and having failed to do so, they are concluded by the judgment as to the title, which was alleged to have been in Willis Lloyd, and will not be heard to aver against it in this action. *Armfield v. Moore,* 44 N. C., 157; *Carter v. White,* 134 N. C., 474; *Gregory v. Pinnix,* 158 N. C., 147. The Court, in *Owens v. Needham,* 160 N. C., 381, quoting from and approving *Coltrane v. Laughlin,* 157 N. C., 287, held it to be a well recognized doctrine here and elsewhere that 'when a court, having jurisdiction of a cause and the parties, renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing.' "

We find no error in the record, and the judgment of nonsuit is

Affirmed.

NORFOLK SOUTHERN RAILROAD COMPANY v. NEW BERN IRON WORKS AND SUPPLY COMPANY.

(Filed 11 October, 1916.)

1. Carriers of Goods—Railroads—Shipment Refused—Demurrage.

A carrier of goods, under the requirements of the Interstate Commerce Commission, must collect freight charges according to established rates, and exhaust all legal remedies to collect such charges, and incidental undercharges, in order to prevent undue discrimination; and where a consignee refuses to pay a charge for the shipment accordingly rendered, and to accept the goods, he is responsible for such freight charges at the suit of the carrier, and for proper demurrage and storage charges reasonably incident and attributable to the defendant's wrong.

2. Same—Sales of Goods.

Where a consignee of goods wrongfully refuses, at the time of notification of their arrival, to receive such goods on account of excessive charge made for their transportation, *semble*, no demurrage charges are collectible by the carrier, but only reasonable storage charges, until, in the exercise of its rights under the law, it could properly dispose of the goods and thereby be relieved of further charge concerning them.

3. Same—Minimizing Damages—Interstate Commerce—State Statutes.

A carrier at common law was required to resort to the courts to enforce its lien for freight charges, and our statutes, Revisal, secs. 2637, 2638, give this right to the carrier, when the goods are nonperishable, after six months; and being a part and in furtherance of the remedy afforded by the law in such cases, requiring an injured party to do what business prudence requires to minimize the loss, it applies to interstate as well as intrastate shipments, in the absence of any interfering regulation by Congress or of the Interstate Commerce Commission.

4. Same—Enforcing Liens.

Where a consignee promptly refuses to accept a shipment on the ground of excessive freight charges, which are shown to be correct, the carrier is not required to assume the risk of enforcing its lien at once by sale in order to avoid the accumulation of storage charges, for it is required to store and properly care for the goods as warehouseman.

5. Same—Duty of Carrier.

Where a consignee of goods wrongfully refuses to receive them, the carrier is not required to take the risk of immediately enforcing its statutory lien for the freight charges, by sale *inter partes*, for it is entitled to proceed in an orderly way to enforce its right.

6. Carriers of Goods—Refusal by Consignee—Duty of Carrier—Consignor—Notification.

Semble, the carrier should notify the consignor that the consignee had refused the shipment; but the question becomes immaterial when the freight charges for reshipment exceed the value of the goods.

7. Courts—Jurisdiction—Amount Demanded—Good Faith—Carrier of Goods—Freight Demurrage—Charges.

Where a carrier has brought its action in good faith against the consignee of a shipment for the freight and demurrage charges thereon in excess of $200, and is only permitted to recover in a less amount for the freight and storage charges, the jurisdiction of the court is determined by the amount demanded, and that of the Superior Court obtains.

CIVIL ACTION to recover freight charges, together with an account for demurrage and storage of goods, tried before *Whedbee, J.*, and a jury, at May Term, 1916, of CRAVEN.

Plaintiff, having issued summons to Superior Court, filed its complaint and insisted on recovery of $130.50 freight charges (by mistake for $139.50), with demurrage charges, $50, and also storage charges, $219.45, since 29 September, 1909, the date when the consignee was notified in New Bern of arrival of goods and refused to receive same, claiming that the freight charge was erroneous and excessive.

His Honor held that there was no valid claim for demurrage and storage, and plaintiff, having duly excepted, the question as to defendant's liability for the freight was submitted on the following issues:

1. Did the iron beams in question require, on account of their length, two or more cars to transport them? Answer: "Yes."

2. What freight is plaintiff entitled to recover on account of transportation of the iron beams in question? Answer: $130.50, with interest."

3. Is the plaintiff entitled to recover of defendant storage and demurrage, as alleged? Answer: "Nothing."

Judgment on the verdict for plaintiff as to amount of freight charges, and plaintiff appealed, assigning for error the ruling of the court that no recovery could be had for demurrage and storage.

Moore & Dunn and W. B. Rodman for plaintiff.
W. D. McIver for defendant.

PLAINTIFF'S APPEAL.

HOKE, J. The facts in evidence tended to show that the goods in question, eight iron beams, worth $92, were shipped from Phœnixville, Pa., to New Bern, N. C., consigned to defendant, arriving at destination on 29 September, 1909; that the beams, or most of them, were 46 feet long and over that, and owing to their length, two cars, end to end, were required to properly convey them, and that, under the rules and classification of the Interstate Commerce Commission, the proper freight charge on goods of this character was $139.50; that immediately on arrival of shipment the consignees were duly notified, and declined to receive the goods or pay the freight thereon.

Under various rulings of the Interstate Commerce Commission, also in evidence, it seems that a carrier is required to collect the freight according to established rates and to exhaust all legal remedies to enforce collection of freight and incidental undercharges, this being considered necessary to prevent undue discrimination among shippers, and, on the pertinent facts, we must hold that defendant is responsible for the freight, as indicated, and for the proper demurrage and storage charges reasonably incident and attributable to defendant's wrong.

The consignee having immediately refused to take the goods, there is doubt if any demurrage charges are due as against him, but plaintiff, in our opinion, is entitled to collect reasonable storage charges until, in exercise of its rights under the law, the goods could be properly disposed of and both parties thereby relieved of further charge concerning them.

At common law a carrier was not allowed to enforce its lien for freight and storage charges by act *inter partes*. It was required to resort to the courts. Hutchison on Carriers (3 Ed.), sec. 889. Under our statute, however, Revisal, secs. 2637-38, the right of foreclosure by sale in case of nonperishable freight is given after six months, and while this is a State statute, being, as it is, a part and in furtherance of the remedy afforded by the law in such cases, we see no reason, in the absence of any interfering regulation by Congress or of the Interstate Commerce Commission, why it should not prevail both as to inter- and intrastate shipments; and, under the recognized principle that both in case of tort and breach of contract an injured party is required to do what business prudence requires to minimize the loss, *Tillinghast v. Cotton Mills,* 143 N. C., 268, and *R. R. v. Hardware Co.,* 143 N. C., 54, we think the plaintiff may not recover for the entire time which has elapsed since this shipment was refused, but is restricted to the time when he could have relieved himself of the charge by sale pursuant to statute.

It is urged for defendant that no storage charges should be allowed after defendant had in express terms refused the shipment, as plaintiff could have proceeded immediately to enforce its lien; but the position cannot be approved. The railroad company should not be required to take the risk of such a course, but is entitled to proceed in an orderly way to enforce its right, and the authorities are to the effect that a common carrier is not relieved of all responsibility by refusal of the shipper to receive the freight, but is required to store and properly care for the goods as warehouseman under established rules of law. *Bachanch & Co. v. Chester Freight Line,* 133 Pa. St., 414; *Gregg v. Ill. Cent. R. R.,* 147 Ill., 550. While there is conflicting authority on the subject, we think the better rule is that on refusal of goods by the

consignee the duty is on the carrier to notify the consignor of such refusal, *American Sugar Refining Co.,* 96 Ga., 27; *American Ex. Co. v. R. R.,* 79 Ill., 430; and the obligation is enforced in this State as to intrastate shipments by rule of our State Corporation Commission. But the question is not presented on this appeal, the right of the consignor being in no way involved, and the facts showing that the costs of reshipment is in excess of the value of the goods.

On the record the Court is of opinion that there was error in excluding from the jury the consideration of the storage charges, and plaintiff is entitled to a

New trial.

DEFENDANT'S APPEAL.

Moore & Dunn for plaintiff.
W. D. McIver for defendant.

HOKE, J. Defendant also appealed in this case for the alleged reason that the Superior Court did not have jurisdiction of the cause, the legitimate demand of plaintiff being only for the freight of $130.50, and so recoverable only before a justice of the peace.

We have repeatedly held that the true test of jurisdiction in such cases is the amount demanded in good faith, and when this appears to be over $200, the Superior Court has jurisdiction, though the recovery may be less than that sum. *Tillery v. Benefit Society,* 165 N. C., 262; *Brock v. Scott,* 159 N. C., 516.

On the record, we think the present case comes clearly within the principle of these decisions, and that the objection of defendant was properly overruled.

On appeal of plaintiff, New trial.

On appeal of defendant, Judgment affirmed.

HENRIETTA GARDINER v. J. J. MAY, ADMINISTRATOR OF WALTER GARDINER.

(Filed 11 October, 1916.)

1. Appeal and Error—Judgments—Motion to Set Aside—Findings—Presumptions.

Where the trial judge neither finds the facts nor is requested to do so, upon the motion to set aside a judgment, it will be presumed on appeal that they were sufficient to sustain his denial of the motion, and the Supreme Court will not consider affidavits for the purpose of finding the facts.

2. Same—Consent Judgments—Burden of Proof.

Where the court enters a judgment on its record appearing to have been by the consent of the parties, it cannot thereafter be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court wherein it had been entered, that it was obtained by fraud or mutual mistake, or that consent had not in fact been given, the burden being on the party attacking the judgment to show facts which will entitle him to relief.

3. Judgments—Consent—Effect.

While the terms of a consent judgment are settled by the parties, such judgment has the same force and effect when accepted and sanctioned by the court, and ordered spread upon the records, as if it had been entered in regular course.

4. Same—Findings—Presumptions—Attorney and Client—Burden of Proof.

Where a judgment appears to have been entered by consent of the attorneys of the parties, it will be presumed, *prima facie*, that the attorneys had the necessary authority from their clients to consent thereto in their behalf, with the burden upon the party seeking to set aside the judgment to prove that no such authority actually existed. Where the judge has not stated the facts, not having been requested so to do, it will be presumed that he found such facts as would support his judgment. The general authority conferred by the relation of attorney and client discussed by WALKER, J.

5. Same—Estates—Payment—Executors and Administrators—Remainderman—Rights and Remedies.

Where the trial court refused to set aside a judgment entered by the consent of the attorneys of the parties, without stating the facts upon which the refusal was based, questions presented in this Court as to the effect of payment by the administrator of the deceased of money to the life tenant under the will, without securing it to be paid to the remainderman, a boy 10 years of age, and the administrator's future liability on that account, cannot be considered. The remedies now open to the remainderman discussed by WALKER, J.

CLARK, C. J., dissenting.

GARDINER *v.* MAY.

CIVIL ACTION heard by *Lyon, J.*, at August Term, 1916, of PITT, upon a motion to set aside a judgment, entered in the above entitled cause by consent of the parties, at May Term, 1916, of the same court.

Walter Gardiner died in 1912, leaving the following will:

AYDEN, N. C., 13 August, 1909.

If I, Walter Gardiner, were to die after this date, it is my will that everything I have shall be divided equally between my wife and my mother for their lifetime, and then to go to my son, Wilbur, if he lives; but if he dies, then to my brother, Isaac. This refers to the money that will come to my estate from the Prudential Insurance Company, as well as what property I now have. WALTER GARDINER.

J. J. May, the defendant, qualified as administrator of Walter Gardiner. When the will was produced the said J. J. May qualified as administrator with the will annexed, and allotted to the widow of the testator a year's support. This action was then brought by the plaintiff, mother of the testator, for the half of the personal property bequeathed to her in the will. The cause came on to be heard at May Term, 1916, before *Judge Whedbee,* when the following judgment was entered:

It is now ordered, adjudged, and decreed, that the plaintiff recover of the defendant one-half of the sum of $400, being the year's provision allotted, and one-half of the sum of $75, the excess value of the two horses, to wit, the sum of $237.50, after deducting one-half of the cost of this action; and in addition thereto it is further adjudged that the plaintiff is entitled to the sum of $21.51, which has been paid into the clerk's office.

And it is further ordered that the cost of this action be taxed, one-half against the plaintiff and one-half against the defendant, and after paying said cost the defendant is hereby directed to pay over the recovery herein to the plaintiff, or her attorney.

H. W. WHEDBEE, *Judge Presiding.*

The judgment above set forth was, as appears by the record, entered by consent of the parties, through their attorneys. At August Term, 1916, defendant moved to set aside the judgment upon the ground that neither the parties, nor their attorneys for them, had the power, by consent, to enter a judgment by which the corpus of the personal estate could be turned over to the plaintiff, as owner of one-half of the life estate, without securing the remainderman against loss by any default

or delinquency on her part, from waste or otherwise. There was no allegation of fraud, and none of mistake, except the one that when defendant consented to the judgment he inadvertently overlooked the error in law, which consisted in not providing for the security of the remainderman against loss. This motion was heard by *Judge Lyon* at August Term, 1916, when he denied the motion. No facts were found by *Judge Lyon,* and so far as appears from the record he was not requested to find and state the facts. Defendant appealed.

Harry Skinner and L. G. Cooper for plaintiff.
F. M. Wooten for defendant.

WALKER, J., after stating the case: As the judge was not requested to state the facts, we must assume that he found such facts as would support his judgment, as we do not presume that there was error in the judgment, but the contrary. *McLeod v. Gooch,* 162 N. C., 122; *Pharr v. R. R.,* 132 N. C., 418, 423, and cases therein cited. If the defendant was not alert and careful of his own interests, it was not the fault of the plaintiff, and she should not be made to suffer for his inattention. She denies that there was any mistake of law or fact, and alleges that defendant fully considered the decree after it had been submitted to him and he had time to do so, with the aid of counsel; and further, that he fully and voluntarily agreed thereto after such examination of the judgment and deliberation as to its effect. We must assume that the judge adopted these as the facts, in the absence of a specific finding to the contrary. *Pharr v. R. R., supra; Carter v. Rountree,* 109 N. C., 29; *Albertson v. Terry,* 108 N. C., 75; *Smith v. Whitten,* 117 N. C., 389. It was decided in *Carter v. Rountree, supra,* as appears by the fifth headnote, that "Upon a motion to vacate a judgment it is not required of the court to set forth its finding of the controverted facts upon the record, unless a request to that effect is made by some of the parties to the proceeding, when it would be error to refuse the request." *McLeod v. Gooch, supra.* "We do not consider affidavits for the purpose of finding the facts ourselves in motions of this sort." *Osborn v. Leach,* 133 N. C., 428.

This brings us to the next and last question in the case, as to the nature and legal effect of a consent judgment. Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or that consent was not in fact given, which is practically the same thing, the burden being on the party attacking the judgment to show facts which

will entitle him to relief. *Edney v. Edney,* 81 N. C., 1; *Stump v. Long,* 84 N. C., 616; *Kerchner v. McEachern,* 90 N. C., 179; *Vaughan v. Gooch,* 92 N. C., 527; *Lynch v. Loftin,* 153 N. C., 270; *Simmons v. McCullin,* 163 N. C., 409; and *Harrison v. Dill,* 169 N. C., 542, where the subject is fully considered and the authorities reviewed. *Justice Dillard* said in *Edney v. Edney, supra:* "A decree by consent, as such, must stand and operate as an entirety, or be vacated altogether, unless the parties by a like consent shall agree upon and incorporate into it an alteration or modification. If a clause be stricken out," he adds, "against the will of a party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it." "There can be no doubt that a judgment entered up by the court, upon the agreement of parties, is, to say the least, as conclusive upon them as if judgment is rendered in the ordinary course of proceeding." *Pelton v. Mott,* 11 Vt., 148. While the terms are settled by the parties, the judgment has the same force and effect as if it had been entered by the court in regular course, and, in that sense, it becomes the judgment of the court by virtue of its sanction in receiving it and ordering that it be spread upon its records. *Kerchner v. McEachern,* 90 N. C., 179; *Simmons v. McCullin, supra.* This is the settled law, as shown by many of our decisions. *Vaughan v. Gooch, supra.* If this be so, defendant has no ground upon which to rest his motion. There is no finding that there was fraud or mistake, or want of authority in the attorney, and it is not denied that the judgment as entered, and in form, was by consent.

It is suggested that the burden of proof was upon the plaintiff to establish that the consent judgment was entered by the defendant's attorney with the authority of his client, or, in other words, that he was duly empowered to give the defendant's consent to the judgment. The law is to the contrary.

The general management of a suit is committed to the attorney, and he has a very extensive authority, which springs mainly from his general retainer. He has the free and full control of a case in its ordinary incidents, and as to those incidents is under no obligation to consult his client. In important matters, however, he should do so and take his client's instructions. He is likewise under obligations to render an account when desired. As the client is bound by the attorney's acts, if there is no collusion with the opposing party, the client can have redress in case of injury from the attorney alone.

The attorney may exercise his discretion in all the ordinary occurrences which take place in a cause, and may make stipulations, waive technical advantages, and generally assume the control of the action. Weeks on Attorneys at Law, p. 385 *et seq.*

A judgment entered of record, whether *in invitum* or by consent, is presumed to be regular, and an attorney who consented to it is presumed to have acted in good faith and to have had the necessary authority from his client, and not to have betrayed his confidence or to have sacrificed his right. The law does not presume that a wrong has been done. It would greatly impair the integrity of judgments and destroy the faith of the public in them if the principle were different. The authorities which support this view are very numerous, and, as the question is an important one, we will refer to a few of them.

Speaking of consent and confessed judgments, it is stated by a text-writer that "The prevailing view seems to be that the power of an attorney to confess judgment for his client is implied, though some disinclination to follow this rule has been shown. In every case, however, the record of the judgment would be prima facie evidence that the attorney who confessed it was properly authorized. It has also been held that an attorney may, by virtue of his employment, consent to a decree in behalf of his client." 4 Cyc., 936. As sustaining this prevailing view, he cites, among other authorities, *Hairston v. Garwood,* 123 N. C., 345. The following cases in other States hold that the record of the judgment by consent, although the consent was given by an attorney appearing in the case, is, at least, *prima facie* evidence that the attorney was authorized to do so, and acted with full authority in the premises: *Price v. Ward,* 25 N. J. L., 225; *Merrity v. Clow,* 2 Texas, 582; *Arnold v. Nye,* 23 Mich., 286; *Dobbins v. Dupree,* 39 Ga., 394; *Wilson v. Spring,* 64 Ill., 12; *Jackson v. Brown,* 82 Cal., 275; *Martin v. Judd,* 60 Ill., 78.

Anciently the right to question the attorney's authority was denied, and this is the doctrine, even now, in some courts (*Price v. Ward, supra*), and intimation to that effect was given in *Stump v. Long,* 84 N. C., 616. But we need not go that far in this case, nor express any opinion in regard to the correctness of the view that an attorney has the implied power to consent to a judgment.

In *Stump v. Long, supra,* it was said by the Court, through *Chief Justice Smith:* "It is not denied that the defendant, whether in person or by his attorney, consented to the order. Indeed, we understand his Honor's finding to go to the extent of saying that the defendant himself consented to it. But supposing it to be otherwise, and that he was only committed to it by the consent of his counsel, how then does his case stand? Every agreement of counsel entered on record and coming within the scope of his authority must be binding on the client. To hold otherwise would lend much uncertainty to many of the most important business transactions—so important and so solemnly disposed of that the parties are willing to have their agreements in regard to them enter

into and become a part of the judgments of the court, to be permanently recorded upon the dockets of the court. Neither the courts nor parties can look behind such an act on the part of an attorney to inquire into his authority or the extent and purport of the client's instructions. His acts and his admissions must be taken as those of him whom he represents." As said by *Judge Reade* in *Bradford v. Coit,* 88 N. C., 72: "The negligence of counsel or mismanagement of the case or unfaithfulness are all matters to be settled between client and counsel. No harm must be allowed to befall others on account of it."

If that be a correct statement of the law (and we do not decide that it is, as we need not do so), we are bound to treat the case as if the petitioner had been actually present and given his assent to the order as drawn. He agreed to it, as *Judge Smith* said, because his attorney did. The attorney had the authority, in this case, to appear for the defendant generally, and to act in his behalf, and must be presumed to have had power to consent to the judgment. In view of this fact, the following statement of the law, taken from *Harrill v. R. R.,* 144 N. C., 542, is quite pertinent: "The counsel who signed the case agreed in behalf of the defendant was actually its attorney at the time, and representing it in this case at the term of the court when the case was settled. He had, apparently, all the authority necessary to act in the premises, and because he failed to observe special private instructions as to the manner of defending the suit is no reason, in our opinion, under the circumstances of this case, why the judgment should be set aside, as he appeared to be clothed with general authority to act for the defendant." *Greenlee v. McDowell,* 39 N. C., 485; *Branch v. Walker,* 92 N. C., 89; *Beck v. Bellamy,* 93 N. C., 129; Weeks on Attorneys, sec. 222; *Rogers v. McKenzie,* 81 N. C., 164.

But the only question here is whether prima facie the attorney had authority, and not whether he had such as is incident to the relation of attorney and client. If there was prima facie authority, it follows, of course, that the burden of proving the contrary is upon the defendant, or the client. In *Rogers v. McKenzie, supra,* it is said by the Court: "If the existence of ample authority to act is assumed from the appearance of the attorney, with the sanction of the court (and ordinarily it could not be questioned), all the results must follow as if actual authority had been conferred, and among them the rightfulness of the defendant's payment."

It is the course of the King's Bench, said *Holt, C. J.* (1 Salk. 86), "when an attorney takes upon himself to appear, to look no further, but to proceed as if the attorney had sufficient authority, and to leave the party to his action against him if he has suffered by his default."

Jackson v. Stewart, 6 Johns, 3. And *Chancellor Walworth* said: "As a general rule, when a suit is commenced or defended, or any other proceeding is had therein, by one of the regularly licensed solicitors, it is not the practice of the court to inquire into his authority to appear for his supposed client, nor, of course, to stop and ascertain the extent of his authority." *Insurance Co. v. Oakley,* 9 Paige, 196; Weeks on Attorneys, secs. 198, 199.

The cases we have just cited were approved by this Court in *Rogers v. McKenzie, supra.* We also refer especially to *Morris v. Grier,* 76 N. C., 410, and *Hairston v. Garwood,* 123 N. C., 345.

As said by *Kent, C. J.,* in *Denton v. Noyes,* 6 Johns (N. Y.), 295: "If the attorney for the defendant be not responsible or perfectly competent to answer to his assumed client, the court will relieve the party against the judgment, for otherwise a party might be undone. I am willing to go still further, and, in every such case, let the defendant in to a defense of the suit. To carry the interference further beyond this point would be forgetting that there is another party in the case equally entitled to our protection." This statement of the law was quoted with approval and applied in the recent case of *Ice Co. v. R. R.,* 125 N. C., 17. See, also, *Peregoy v. Bank,* 147 N. C., 295; *Hairston v. Harwood, supra.*

It is said by the *Chief Justice* in *Westhall v. Hoyle,* 141 N. C., 337: "The consent of counsel is stated in the judgment, and is binding upon the defendants in the absence of fraud and collusion," citing *Hairston v. Garwood, supra.* In *Henry v. Hilliard,* 120 N. C., 479, it appeared that an order or judgment was entered by consent and request of counsel, who it was alleged had no authority to act as an attorney for the party he professed to represent, and the Court thus dealt with the matter on motion, as here, to set aside the judgment: "It is not denied that both parties were marked as attorneys of record for the defendants. It seems that one of them has placed himself in a condition that calls for an explanation, and the other is repudiated. The movers in this matter seem to think that these facts are of benefit to them. But we cannot see that they are. Neither of them ever was counsel for the Hilliards (opposite parties), and their action does not fall under *Gooch v. Peebles,* 105 N. C., 411, and *Arrington v. Arrington,* 116 N. C., 170. It is expressly stated in the order that it is made by consent of all the parties. We are bound by the statement as a matter of record. *Woodworking Co. v. Southwick,* 119 N. C., 611. It would be utterly destructive of all our ideas of the verity of records if they could be annulled by some one coming in after court and saying he did not agree that such an order should be made, although his attorney did."

Weeks on Attorneys at Law, after reviewing authorities, thus states the principle: "Confession of judgment by counsel representing the case, with the knowledge of the party, is sufficient, without any special authorization to that effect. In attacking a judgment obtained by confession, especially after a long lapse of time, merits must be shown by the applicant. To justify a court of equity in interfering with a judgment at law on the ground of want of authority to appear, the evidence should show clearly and unequivocally that such judgment was fraudulently and wrongfully obtained without negligence or fault on the part of the judgment defendant. The burden of proof is with the complainant, and before he is entitled to relief he must fully establish what he alleges to be true. And this cannot be done for the first time on review. With this understanding, there seems to be no doubt but that a direct action in equity lies against a judgment obtained by the unauthorized appearance of an attorney. But it should be brought with all possible speed after the judgment is rendered. It has been the practice, sometimes by motion and sometimes in chancery, to relieve parties against judgments so rendered."

Price v. Ward, 25 N. J. L., 225, states the ancient and modern doctrines as follows: "Whether the want of authority in the attorney can be shown in avoidance of a judgment regularly entered, after an appearance or confession of judgment by an attorney of the court in which the judgment is rendered, is a question which has undergone much discussion, and is beset with serious difficulties. The weight of the ancient authorities is against the practice. If the attorney acted without authority the judgment was held, nevertheless, to be regular, and the defendant left to his remedy against the attorney. The appearance entered by the attorney, though not lawfully authorized, was held a good appearance as to the court," citing Keble, 86, 89; 1 Salk., 88; Com. Dig., "Attorney," B, 7; 1 Tidd's Prac., 65; Cro. Jac., 695; *Smith v. Bowditch,* 7 Pick., 137.

In *Denton v. Noyes,* 6 Johns, 305, *Chief Justice Kent,* after an elaborate review of the authorities, said: "The rule appears to me to be settled upon too much authority to be denied, and upon too much principle to be disturbed. Without it there could be neither safety to suitors nor trust in the profession." The action in *Post v. Neafie,* 3 Caine, 26, was brought upon a decree of a court of chancery. The decree, it appeared, was founded upon an agreement between the parties, signed by their attorneys. One of the objections to a recovery, urged by the defendant's counsel, was that the agreement on which the order was made was out of the ordinary course of the power of solicitors, and that no authority appeared for making it. The objec-

tion was not noticed by any member of the court, excepting *Justice Spencer,* who said: "If this had been an action depending in a court of common law in New Jersey, and the attorney had confessed a sum of money due to the adverse party, it could never become a matter of inquiry, in a suit on the judgment, whether the attorney had acted by authority. If in this case the defendant's solicitor was unauthorized to enter into the agreement on which the decree was ultimately founded, it was examinable only in the court having original jurisdiction. It is to be intended that the solicitor acted by the direction of his client and for his benefit." Notwithstanding the weight of these authorities, "the current of recent American decisions," it is said in *Price v. Ward, supra,* "is against the rule, and in favor of admitting the authority of the attorney to be drawn in question. *Osborne v. Bank of U. S.,* 9 Wheaton, 829, and other cases. The record is prima facie evidence that the attorney who appears to the suit or confesses the judgment is duly authorized for that purpose, and, in the absence of contradictory evidence, will be held conclusive. But the authority of the attorney may be drawn in question in pleading, and may be disproved by evidence." To the same effect is *Bank v. McEwen,* 160 N. C., 414.

But as far as we need go, without indorsing all that we have quoted, is to hold that while the want of authority in the attorney may be shown, the burden of showing it is clearly on the party who attacks the consent judgment in a proper proceeding brought for that purpose.

If the parties had no authority to affect injuriously the rights of Wilbur Gardiner, son of the testator and the remainderman, he will not be prejudiced, in a legal sense, by the decree, as he is not a party to the suit. He may, perhaps, be entitled to intervene by motion in the cause or an independent civil action, as he may be advised, and assert his claim, and arrest or stay the payment of the fund to plaintiff by injunction, or restraining order, until his ultimate rights may be determined. But this matter is not before us, and we neither express, nor intimate, any opinion with regard to it, nor will we consider the question whether he has a right, as now contended by defendant, to have the fund preserved in some way for his benefit and enjoyment when the life interest has expired, as, not being a party to this proceeding, he could ask for no such relief, and, besides, the facts as to the attorney's authority have not been stated in the case.

Affirmed.

CLARK, C. J., dissenting: Walter Gardiner died in 1912, leaving an aged mother, one brother, Isaac, a wife and an infant son named Wilbur. By his will he devised his property to "be divided equally between my wife and my mother for their lifetime and then to go to my son, Wilbur,

if he lives; but if he dies, then to my brother, Isaac." The defendant May qualified as administrator, and had the year's provision allotted to the widow, $300, and $100 for the son. His final account showed that the personal estate was $1,222.24, from which the above debts paid and expenses should be deducted.

On 18 December, 1914, the plaintiff, being the mother of the deceased, brought this action against the administrator to surcharge the final account as filed. The plaintiff's counsel and defendant's counsel agreed at May Term, 1916, upon a consent judgment that the net amount due for the plaintiff's half of the estate in the hands of the defendant was $259.01. The plaintiff in July, 1916, caused execution to issue upon said judgment. On 21 August, 1916, the defendant moved to set aside the judgment, which motion being refused, he appealed to this Court.

The defendant does not deny that $259.01 is one-half the estate in his hands, and avers that he is ready to pay the same over to the plaintiff, the mother of the deceased, if the life tenant is entitled to receive the fund. But he avers that the consent judgment was merely intended to fix the amount so due, and that inasmuch as the plaintiff was only entitled to a life estate therein, and is insolvent, that should he pay the corpus of the fund over to her he may be liable at her death to pay the same amount over again to the son, who is now 10 years old, or, if he should die, to the brother of the deceased, who under the will are entitled to the corpus of the fund after the death of the life tenant. He avers his readiness to pay the fund into court, that the interest thereof may be paid to the mother during her lifetime.

The plaintiff's counsel cites authorities in our Court that, there being no trustee interposed under the terms of the will, the administrator will be discharged upon paying over the corpus of the fund to the life tenant; that since the testator has thus seen fit to trust the life tenant, the administrator is not charged with doing more than handing the fund over to her. To this it is objected that if this Court so decrees without the son or the brother of the deceased being made parties, they are not bound by such judgment, and, notwithstanding the judgment of the Court, may bring action against the administrator and subject him to payment again of the fund, if it be that he ought not to pay it over to the life tenant.

In this state of things it is eminently proper that this Court should issue notice to both the remaindermen, the son and the brother of the deceased, that they may be represented. The son, who is now 10 years of age, should be represented by a guardian *ad litem* appointed for that purpose.

The plaintiff is not bound by the prayer of his motion, which was to set aside the judgment. But he is entitled to any relief which the alle-

gations in his complaint or motion, if proven, entitle him to have. *McCulloch v. R. R.*, 146 N. C., 316; *Gilliam v. Ins. Co.*, 121 N. C., 372, and numerous other cases cited in Pell's Revisal under section 467, subsection 3. In this case the above facts are not disputed. To send the case back to the lower court with leave to the infant son to institute proceedings to protect his rights would be in vain, as he would doubtless take no action at this time, but would wait the death of his grandmother, when he can assert his claim, if it is good, against the defendant, who in such case would be compelled to pay it over to him. The administrator would thus be compelled by this Court to pay the corpus of the fund to the grandmother, the life tenant, and would be helpless to protect himself on the death of the life tenant against an action by the son or brother of the deceased, as the case may be.

Besides, such multiplicity of suits would probably eat up the entire fund, which would go to lawyers' fees and court costs, which was the result oftentimes under the old system in which a judgment was permitted at law and then an injunction was brought on the equity side of the docket to prevent the collection of the judgment, to the great vexation and expense of the parties entitled to the fund and to the great profit of lawyers and court officials, whose fees often absorbed the entire fund.

In this enlightened age we have well passed that state of things, and to prevent its repetition it has been provided by statute that even on appeal to this Court the Court can "amend by making proper parties to any case where the Court may deem it necessary and proper for the purposes of justice, and on such terms as the Court may prescribe." Revisal, 1545. This statute was passed for the very purpose of such case as is now before us, to avoid multiplicity of actions and the absorption of the fund in unnecessary counsel fees and court costs. It has been repeatedly acted on in this Court. See citations to that section in Pell's Revisal, 1545.

Justice surely requires that a simple notice should issue under Revisal, 1545, from this Court to the remaindermen, the son and brother of the deceased, that they may be heard here. In that case there will be small cost or delay; and if the court is of opinion that the administrator will be protected by paying over the fund to the life tenant, such judgment will be a protection to defendant against future litigation upon the death of the life tenant. But if the court should be of the opinion that the fund cannot be paid over to the life tenant, an order can be made directing the fund to be paid to the clerk's office and invested and interest thereon to be paid to the life tenant during her life.

The defendant and his counsel both aver that there was no authority given to said counsel to bind the administrator to pay over the fund to

the life tenant and thereby subject the administrator to payment of the fund again to the remaindermen, and that the whole object of the consent judgment was to ascertain the amount of the fund in which the plaintiff as a life tenant is interested, which was a fact that could be agreed on. The burden was upon the plaintiff to show that defendant's counsel had authority from his client to bind him by consent judgment to do what the plaintiff claims, which is a matter of law, and this authority has not been shown. The presumption is that the amount due by the defendant only was ascertained by the consent judgment. He should not be required to pay over the corpus of the fund to the life tenant unless she is entitled to receive the same as a matter of law. That was a matter of law, and not of fact, and should be adjudicated in this action, the remaindermen being made parties.

Any judgment which requires the administrator to pay over the fund to the life tenant unless the remaindermen are made parties would unjustly subject him to future litigation at the will of the remaindermen. The notice to the remaindermen could issue under Revisal, 1545, at the discretion of the court, and should be made returnable during this term on a day named, and the entire matter thus finally disposed of without appreciable costs or expense. Surely, the interests of justice and the intention of Revisal, 1545, require that this should be done. The spirit of the age as evidenced by the action of the American and State Bar Associations and by legislation in this State and everywhere else requires that we should thus simplify the administration of justice and not follow the antiquated and obsolete practice of a ruder age, the result of which was to delay justice, accumulate costs, and "lengthen simple justice into trade."

LEE J. TAYLOR, ADMINISTRATOR OF EARL N. TAYLOR, v. J. W. STEWART AND JAMES STEWART.

(Filed 11 October, 1916.)

1. Negligence—Automobiles—Minors—Statutes.

Where a person within the age prohibited by the statute runs an automobile upon and injures a pedestrian, the violation of the statute is negligence *per se*, and a charge by the court that it is a circumstance from which the jury could infer negligence is reversible error.

2. Same—Proximate Cause—Questions for Jury—Burden of Proof—Trials.

While it is negligence *per se* for one within the prohibited age to run an automobile, it is necessary that such negligence proximately cause the injury for damages to be recovered on that account, with the burden of proof on the plaintiff to show it by the preponderance of the evidence.

3. Same—Evidence.

It is when the facts are admitted and only one inference may be drawn therefrom that the courts will declare whether a negligent act was the proximate cause of a personal injury; and it is *Held*, in this case, that it is for the jury to determine whether a competent and careful chauffeur of maturer years could have avoided the injury under the circumstances, or whether it was due to the fact that a lad within the prohibited age was running it at the time.

4. Negligence—Parent and Child—Torts—Minors—Consent of Parent—Consent Implied—Automobiles.

While ordinarily a father is not held responsible in damages for the negligent acts of his minor son done without his knowledge and consent, such may be inferred, as where the father constantly permitted his 13-year-old son to run his automobile, had ridden with him, and upon the present occasion the son, in the absence of his father, had taken the operation of the car from his father's chauffeur and inflicted the injury complained of.

WALKER, J., dissenting.

CIVIL ACTION tried at May Term, 1916, of CRAVEN, before *Whedbee, J.*, upon the usual issues of negligence, contributory negligence, and damages. The jury answered the issues in favor of the defendants. The plaintiff appealed.

W. D. McIver, E. M. Green, Charles L. Abernethy for plaintiff.
D. L. Ward, A. D. Ward, Moore & Dunn for defendant.

BROWN, J. The plaintiff sues to recover for the death of his child, who was run over and killed by an automobile belonging to the defendant J. W. Stewart. At the time the car was being operated by James Stewart, the son of the said J. W. Stewart, a lad of 13 years of age. A colored chauffeur, who had been sent out with the car by the owner, was sitting beside the lad.

His Honor charged the jury that under the laws of North Carolina it was a misdemeanor for a person under the age of 16 to drive an automobile upon any highway or public street, and that it is a circumstance from which the jury may infer negligence, and that it does not necessarily follow that the jury shall conclude it was negligence, but that it is a circumstance to go to the jury. In this his Honor erred. He should have instructed the jury that it is negligence *per se* for the defendant James Stewart to have driven the machine in violation of the statute law of the State. *Zogier v. Southern Express Co.*, 89 S. E., 44; *Paul v. R. R.*, 170 N. C., 231; *Ledbetter v. English*, 166 N. C., 125.

It does not follow, however, that the defendant is liable in damages, for the plaintiff must go further and satisfy the jury by a preponderance

of the evidence of the fact that such negligence was the proximate cause of the death of the child. This question of proximate cause has been much debated, and a very helpful and enlightening opinion upon the subject has been written by *Mr. Justice Allen* in *Paul v. R. R., supra.*

Where the facts are all admitted, and only one inference may be drawn from them, the Court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case, and, as is said by *Mr. Justice Strong* in *R. R. v. Kellogg,* 94 U. S., 469: "What is proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it."

It is impossible, upon the evidence in this case, to say as a matter of law that the fact that the defendant James Stewart was driving the automobile in violation of law was or was not the proximate cause of the intestate's death. The circumstances surrounding the injury are such as to forbid it.

It is contended and there is evidence that the defendant James was driving the automobile at a rapid rate of speed and in violation of the city ordinance at the time he turned the corner. There is also evidence from which a jury may infer that a competent and careful chauffeur of maturer years might have seen the child before the machine struck it and in time to stop. The evidence shows that the defendant James did not see the child until his attention was called to it by the colored chauffeur, and that then the machine was practically on the child, for he was between the guard and the wheel.

Taking all of these circumstances into consideration, the question of proximate cause must be submitted to the jury. If they should find that death of the plaintiff's intestate was an unavoidable accident, which a prudent chauffeur, authorized by law to run a machine, could not by the exercise of reasonable care have avoided, then the defendants were not liable; but if they should find from all the evidence that the proximate cause of the intestate's death was the fast driving and lack of attention and due care upon the part of the 13-year-old boy, driving the machine in violation of law, then he would be liable.

We come now to consider the liability of the defendant J. W. Stewart, the father of James.

A parent is not ordinarily liable for the torts of his minor son done without his knowledge and consent. We, therefore, held in *Linville v. Nissen,* 162 N. C., 96, that the parent was not liable in that case, because all the evidence showed that his son took the machine out of the garage without the father's consent, but against his express instructions. In that case, however, this Court said: "We would not be understood,

however, as holding that the father would not be liable if he should place his automobile in charge of a child of tender years any more than if he would intrust an unruly horse to him. But in such case the liability arises from the father's negligence, and not from the imputed negligence of the child. This is too well settled to need discussion."

There is evidence in this case which tends to prove that the defendant J. W. Stewart, father of James, habitually permitted his son to operate his automobiles since the latter was 10 years of age; that the father had ridden with the son repeatedly and permitted him to carry other members of the family out in the machine. It is true that on this occasion he sent a colored chauffeur with the machine to execute a certain commission, and that the son got in the machine en route and the chauffeur turned over the operation of it to him.

The chauffeur had a right to assume that the father approved of this; it was the latter's habit to allow his son to run his machine in direct violation of the statute of the State, which has been in force since 1 April, 1913. This was negligence upon the part of the father, and from these facts the jury may well infer that on the occasion when the plaintiff's intestate was killed the son was driving the machine with the consent of the father.

A somewhat similar case has been decided in South Carolina, where it is held that a person who provided an automobile for the pleasure of his family, which his son was authorized by him to operate, such person is held liable for his son's negligence when driving the car for the pleasure of himself and his friends. *Davis v. Littlefield,* 97 S. C., 171.

It is generally held where a master unknowingly retains incompetent servants in his employ and to do his bidding, he becomes liable for their negligence. *Haines v. Parkersburg Ry. Co.,* 84 S. E., 923. Upon the same principle, where a father permits his minor child to operate his automobile upon the highways and public streets in violation of the statute it is negligence upon the part of the father, and he becomes responsible for those injuries which are the result of such violation of law.

New trial.

WALKER, J., dissenting, as to defendant J. W. Stewart: My opinion is that the case was properly submitted to the jury as to the father, J. W. Stewart, who is codefendant of his son. There is no evidence in the record that he authorized or permitted his son to drive the automobile on this occasion, nor did he know that the son had usurped the chauffeur's place until after this unfortunate accident. The case of *Davis v. Littlefield,* 97 S. C., 171, has no application, as the facts of the two cases are materially unlike. Nor is this a case where the

master has knowingly or unknowingly retained an incompetent servant in his employ to do his bidding, because the defendant J. W. Stewart had not authorized his son to drive the automobile, but, on the contrary, had placed another person, who was an adult, in charge of it, with directions as to what should be done with it. The fact that the father had permitted the son to drive the car on other occasions, even several times, did not deprive him of the right to change this course of action and employ another driver. The question is not whether this employee supposed that the father would approve, if he deserted his post and transferred the control of the car to the son, but whether the father had actually authorized the son to drive the machine at the time, and of this there is no legal evidence. I take a very different view of *Linville v. Nissen,* 162 N. C., 95, from that stated in the Court's opinion. It was there held, upon the authority of many cases reviewed by the *Chief Justice,* that an automobile is not *per se* a dangerous machine, and that negligence in its use or management must be shown before liability for an injury will attach. "It is well known," says the Court, "that they are being devoted to and used for the purposes of traffic, and as conveyances for the pleasure and convenience of all classes of persons, and without menace to the safety of those using them or to others upon the same highway, when they are operated with reasonable care. The defendant cannot, therefore, be held liable upon the ground that the automobile is a dangerous contrivance. *Steffen v. McNaughton,* (Wis.) 26 L. R. A., 382, which further states that this principle has been adopted in *Slater v. Thresher Co.,* 97 Minn., 305; *McIntyre v. Orner,* (Ind.) 4 L. R. A. (N. S.), 1130; *Lewis v. Amarous,* 3 Ga. App., 50; *Jones v. Hoge,* (Wash.) 14 L. R. A. (N. S.), 216; *Cunningham v. Castle,* 111 N. Y. Sup., 1057. There are many other cases to the same effect, among them, *Vincent v. Crandall,* 115 N. Y. Sup., 600; *Danforth v. Fisher,* 75 N. H., 3; *Freibaum v. Brady,* 143 App. Div. (N. Y.), 220." And again: "A parent is not liable for the torts of his minor son. The relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he has approved such acts or that the child was his servant or agent. *Johnson v. Glidden,* 74 Am. St., 795, which cites a large number of cases. This is quoted and approved in *Brittingham v. Stadiem,* 151 N. C., 300, this Court adding: 'Wherever the principles of the common law prevail, this is a well established doctrine.' It is there said that where the son is acting of his own will and for his own purposes, and not as his father's agent *pro hac vice,* the latter is not liable for his son's acts, even if negligent, and he cites for this, *Way v.*

Powers, 57 Vt., 135, where it appeared that a son who was living as a hired man on his father's farm took his horse without his permission, though he would have given permission if asked, and drove to the railroad station for one of his friends. He there tied the horse, which broke loose and ran into the plaintiff's team and injured him. It was held that though the son was negligent, the father was not liable. The case of *Reynolds v. Buck,* 127 Iowa, 60, was also cited with approval, where it was said that 'the owner of an automobile is not liable from injury resulting from the negligent operation of the machine by a son, without the father's knowledge and consent, and not at the time in his employ or about his business.'" But the case of *Doran v. Thomsen,* 76 N. J. L., 754, which is also approved and greatly relied on in *Linville v. Nissen,* is exactly in point. I will state in the language of this Court what it decided: "Where a father was in possession of an automobile which he kept upon his premises, and his daughter, about 19 years of age, was accustomed to drive it, and did so whenever she felt like it, asking permission to use it, when the father was at home, but when not at home taking it sometimes without permission, it was held that when she used the machine for her own pleasure, and negligently injured a person on the highway, there was no proof sufficient to constitute her the servant or agent of the master, and that her father was not responsible. This case is thoroughly discussed and cites numerous authorities which sustain the proposition that 'the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of wrong, at the time and in respect to the very transaction out of which the injury arose.' It also cites numerous authorities to the other well settled principle that 'the mere fact of the relation of parent and child does not make the child the servant of the defendant' in actions for tort."

It seems to me that *Linville v. Nissen* strongly sustains the view I take of this case. It results that the son was not the servant of the father at the time of this accident, and the latter, therefore, is not responsible for acts so as to be affected by the provision of the statute as to certain minors driving automobiles, nor by the principle last quoted by the Court in its opinion in this case, from *Linville v. Nissen,* in regard to the father's liability for negligence in placing a dangerous machine or implement in the hands of his child of tender years, which causes injury to another.

But there may be some evidence in this case of negligence, not original, but imputable to the father, which if it proximately caused the injury would be actionable. The car was in the custody and charge of the

chauffeur who had been employed by the father, and, therefore, was his servant. It is the duty of an agent to obey his principal and to be loyal and faithful to his interests, and there is another equally binding duty to exercise care, skill, and diligence in performing the task assigned to him. If he fails in this respect while acting within the scope of his employment, and thereby injures another, the master becomes liable for his act to the one who is damaged. 31 Cyc., 1582 *et seq.* So in this case, if the servant in charge of the car relinquished his control of it to the owner's son, who was young and inexperienced, and by reason thereof the son carelessly and negligently ran over the child and caused its death, the father would be liable, provided the chauffeur was at the time acting within the scope of his authority. But it appears that the court substantially submitted this feature of the case to the jury, telling them that there was evidence of negligence. There was evidence that the son was an experienced chauffeur, and as in the view herein taken the statute as to minors does not apply, it is more than likely that the jury concluded that there was no negligence in turning over the control of the car to the son, who was an expert chauffeur, or that if there was, it was not the proximate cause of the injury, and that the lamentable death of the child was the result of an unavoidable accident. My conclusion is that the judgment as to J. W. Stewart should be affirmed, as there was no reversible error as to him committed at the trial.

J. H. DAVIS v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 11 October, 1916.)

1. Carriers of Goods—Contracts of Shipment—Bills of Lading—Evidence.

While a bill of lading is the usual evidence of a contract of shipment between a consignor of goods and a common carrier by rail, and the carrier is usually required to issue one on demand, it is not essential to such contract that a bill of lading therefor should have been issued by the carrier.

2. Same—Interstate Commerce Acts—Amendment.

The act of Congress amending section 20, Interstate Commerce Act, 34 U. S. Statutes, ch. 3591, sec. 7, requiring the issuance of a bill of lading by the carrier to the consignor of a shipment, is not inhibitive in its terms or purpose; and the statute, being enacted chiefly for the purpose of imposing on the initial carrier responsibility for the entire carriage of an interstate shipment, does not relieve the carrier from liability under a contract of shipment entered into without it.

DAVIS *v.* R. R.

CIVIL ACTION tried on appeal from court of justice of peace, before *Devin, J.*, and a jury, at June Term, 1916, of CARTERET.

The action was to recover the value of two bales of cotton destroyed by fire on the platform or in the warehouse of defendant company at New Bern, N. C., in October, 1910.

Defendant denied having received the cotton for shipment; claimed it was only with defendant as warehouseman, as bailee, for plaintiff's accommodation, and, if so, there was no evidence of default on part of defendant. On issues submitted there was verdict for plaintiff, judgment on verdict, and defendant excepted and appealed.

W. R. Wheatley and Abernethy & Davis for plaintiff.
J. F. Duncan, Moore & Dunn, and C. M. Bain for defendant.

HOKE, J. On the trial the question of liability between these parties was made to depend upon whether the cotton had been received and held by defendant company under a contract of shipment or whether it had been left on defendant's platform with a view of being shipped at a later date. Under the charge of his Honor, the issue was submitted to the jury as a question of fact. They have accepted plaintiff's version of the transaction, and we find no reason for disturbing the result.

The evidence of plaintiff tended to show that the cotton had been left on defendant's platform and was received and held by defendant under a contract of shipment, but the witness stated that no bill of lading had been issued by the company at the time; that the company's agent gave the witness who acted for plaintiff in the matter two tags with plaintiff's name on them, with instructions to put same on the bales, and it was chiefly urged for error that since the Carmack Amendment and rules of Interstate Commerce Commission applicable there could be no valid contract by a common carrier for interstate shipment without the issuance of a written bill of lading; but the position is without merit.

While a bill of lading is the usual evidence of a contract of shipment with a common carrier by rail, and such carrier is usually required to issue one on demand, it has never been considered an essential of such a contract. *Berry v. R. R.*, 122 N. C., 1002; 1 Hutchison on Carriers (3 Ed.), sec. 152; 6 Cyc., pp. 416-417.

In Hutchison it is said: "No receipt or bill of lading or writing of any kind is required to subject the common carrier to the duties and responsibilities of an insurer of goods. As soon as they are delivered to him for present carriage, and nothing necessary to their being forwarded remains to be done by the owner, the law imposes upon him all the risks of their safe custody as well as the duty to carry as directed," etc. And,

in the citation to Cyc., *supra,* p. 417: "An instrument issued by the carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination, is a bill of lading. Of course, it is not essential that a bill of lading be issued, for, in the absence of any such instrument, the rights of the shipper and the duties of the carrier are to be determined by the common law." The act of Congress amending section 20, Interstate Commerce Act, approved 29 June, 1906, and appearing in 34 U. S. Statutes, ch. 3591, sec. 7, was enacted chiefly for the purpose of imposing on the initial carrier responsibility for the entire carriage of an interstate shipment, and while it requires the issuance of a bill of lading in evidence of such contract and responsibility, there is nothing inhibitive in its terms or purpose. The requirement for a bill of lading is imposed primarily for the benefit of the shipper, and, in our opinion, it does not and was not intended to relieve the carrier from liability who may have entered into a contract of shipment without it. A position not dissimilar has been approved and applied with us in several cases against insurance companies where a policy issued in violation of some requirement, established for the protection of the policyholder only, was held a binding obligation on the company, and recovery thereon was sustained. *Morgan v. Fraternal Assn.,* 170 N. C., pp. 75 and 80; *Robinson v. Life Ins. Co.,* 163 N. C., 415.

We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

RAWLS & TINGLE v. NORFOLK SOUTHERN RAILROAD.

(Filed 11 October, 1916.)

1. Justice's Court—Appeal—Irregularities—Waiver—Conduct of Appellee.

While an appellant from a justice's judgment must see that his appeal is docketed in the Superior Court within the statutory time, his failure to have done so is an irregularity which the conduct of the appellee may waive; as when the appellant fails to pay the clerk for docketing the case until after the expiration of the time, the case remains on the docket for a year and a half, has several times been set for trial, both parties have taken the deposition of a witness, and then the appellee moves to dismiss for a failure of the appellant to have paid the clerk's fee in time.

2. Appeal and Error—Instructions—Objections and Exceptions.

Exceptions to the charge of the court must be duly noted of record, or they will not be considered in the Supreme Court on appeal.

3. Appeal and Error—Unanswered Questions—Objections and Exceptions.

Where the refusal of the trial judge to permit a witness to answer a question is excepted to, the record must indicate what the answer of the witness would have been, or it will not be considered in the Supreme Court on appeal.

CIVIL ACTION tried before *Whedbee, J.*, at May Term, of PAMLICO.

This is an action to recover damages for the loss of 125 crates of cabbage, tried in the Superior Court on appeal by defendant from a judgment of a justice of the peace.

When the case was called for trial at May Term, 1916, the plaintiff moved to dismiss the appeal because it was not docketed at the next term after the trial before the justice. The motion was denied, and the plaintiff excepted.

The court found the following facts in reference to the appeal:

That the case was tried 18 August, 1914, before I. W. Miller, J. P., judgment rendered in favor of plaintiff; defendant in open court gave notice of appeal and paid the justice for making his return, and also 50 cents to cover cost of docketing same in the Superior Court. Before the next term of court the justice mailed the return in this case to the then clerk of the court, but did not transmit to him the fee of 50 cents for docketing same; the clerk held same until 5 December, 1914; it was then after the next term of court, when counsel for defendant, learning of the reason why the clerk did not docket same, paid him the 50 cents on 5 December, 1914, and had same placed on the docket for trial; that this case has been set for trial several times; this is the first time this motion was made.

It also appears from the record that both plaintiff and defendant took the depositions of nonresident witnesses preparatory to the trial.

There are other exceptions which will be referred to in the opinion.

There was a verdict and judgment in favor of the plaintiff, but for less than the amount claimed by him, and he appealed.

Z. V. Rawls for plaintiff.
Moore & Dunn for defendant.

ALLEN, J. The authorities fully sustain the position of the plaintiff that it is the duty of one who appeals from a judgment of a justice of the peace to see that his appeal is docketed at the next term of the Superior Court (*Abel v. Power Co.*, 159 N. C., 348); but as was said in *Love v. Huffines*, 151 N. C., 380: "It does not follow that the appellee, by whom the judgment before the justice was obtained, could not waive his right to object to any irregularities in the procedure by which the case was carried into the Superior Court, by his own laches or by such

conduct as would be tantamount to an admission on his part that the irregularities had worked no harm to him, and therefore he was willing to accept the jurisdiction of the higher court, as derived from the lower court, and try the case in the former court upon its merits. This is not a case wherein there is any inherent lack of jurisdiction, in the magistrate or the Superior Court, of the cause of action or the person. . . . If they intended to take advantage of any technical delay of the defendant in carrying his case to the higher court, it was simple justice, and even fairness, that they should have said so before they entered upon the trial of the case, having accepted a jury in the Superior Court, and thereby expressed their willingness in the most emphatic way that the case should be heard in that court upon its real and legal merits. Litigants may waive their rights, and even their constitutional rights."

The evidence of waiver is clear. The appeal was on the docket of the Superior Court one and a half years with no notice from the plaintiff that he intended to take advantage of any irregularity in the appeal; it was set for trial several times and the parties incurred the expense of taking depositions preparatory to a hearing on the merits.

We have examined the charge, and find nothing of which the plaintiff can justly complain; but if it were otherwise we could not consider the error, because there is no exception to the charge in the case on appeal.

As was pointed out in *Worley v. Logging Co.*, 157 N. C., 499, "The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal; and if there is an assignment of error not supported by an exception, it will be disregarded."

The exception to the refusal of the court to permit a witness to answer a question as to market value is also without merit, as the record does not indicate what the answer of the witness would have been.

No error.

HENRY HOLMES AND WIFE v. F. L. CARR ET ALS.

(Filed 11 October, 1916.)

1. Limitation of Actions—Adverse Possession—Coverture—Statutes.

Adverse possession of lands against a married woman before 13 February, 1899, shall not be counted, Revisal, sec. 363; and in order to claim title against her by twenty years adverse possession it is necessary to show that the statute had commenced to run before her coverture.

2. Same—Trials—Evidence—Questions for Jury.

Where the plaintiff pleads coverture in an action to recover lands against the defendant's claim of title under twenty years continuous adverse possession of himself and predecessors, and there is evidence tending to show that such possession commenced against a predecessor in the plaintiff's chain of paper title, the question of the defendant's title by sufficient adverse possession is one for the jury; for if the statute is once put in motion the supervening disability of coverture will not stop it.

3. Same—Sufficient Possession.

In this action to recover lands it appears that two-thirds thereof was woodland; and in behalf of the defendant, claiming title by twenty years adverse possession, that he had built a house on the cleared land, had cultivated it, made tobacco beds thereon, and had cut wood and used straw from the woodlands. *Held*, sufficient on the question of defendant's title by adverse possession to be submitted to the jury. *Locklear v. Savage*, 159 N. C., 237, cited and applied.

4. Appeal and Error—Harmless Error—Evidence—Declarations.

Where declarations as to the dividing line between lands in dispute in the action are admitted, over objection, the error, if any, committed by the trial court in this respect becomes harmless when the same witness is permitted to testify that he knew the line, and it was the same as the one pointed out to him.

CIVIL ACTION tried before *Devin, J.*, at June Term, 1916, of GREENE.

This is a processioning proceeding to establish a line between the plaintiffs and the defendants, both parties claiming title to the land in controversy.

The evidence tends to prove that the plaintiff, Sarah Holmes, has a paper title covering the land, and while defendants claim to be purchasers, and that a deed under which they claim has been lost or destroyed, they have to rely upon an adverse possession for twenty years without color.

The plaintiffs contend that the possession relied on by the defendants was not adverse to the plaintiff Sarah Holmes, because of her coverture, and also that the evidence itself was not sufficient to establish an adverse possession.

There was a verdict and judgment for the defendants, and the plaintiffs appealed.

Charles L. Abernethy for plaintiffs.
J. Paul Frizzelle for defendants.

ALLEN, J. The plaintiff Sarah Holmes, who claims the land in controversy under the will of Richard Jones, intermarried with the plaintiff Henry Holmes, in October, 1872, and has been under coverture since

that time, and it follows, as twenty years have not elapsed since the act of 1899 (Revisal, sec. 363), which removes the disability of coverture, but provides that in determining the defense of adverse possession against a married woman no possession prior to 13 February, 1899, shall be counted, that the claim of the defendants of title by adverse possession of twenty years cannot be maintained unless the defendants can show that the adverse possession began prior to the marriage of the plaintiff.

If, however, there is evidence of adverse possession begun prior to that time, and the statute was once put in motion, the supervening disability of coverture did not stop it. *Seawell v. Bunch,* 51 N. C., 195; *Chancey v. Powell,* 103 N. C., 159; *Dobbins v. Dobbins,* 141 N. C., 219.

Sidney Shepherd, a witness for the defendants, testified: "I know when Richard Jones died; at that time Mr. Ephraim Shepherd was in possession of this land in dispute. He and Mr. Shepherd had changed that piece of land down by the tobacco yard, and Ephraim Shepherd was in possession, and when he went in possession Uncle Dick Jones was in possession of the piece on the otherwise, and he was in possession of it at the time of his death. The piece of land I am talking about is not only the piece Ephraim was living on; I am talking about all of it. After I married he carried me around the land. I knew about this land before I was married—from the road. I only lived a few miles from it. At the time I was married Eph. Shepherd was in possession of the land, and at the time Richard Jones died."

This evidence, if true—and it was for the jury and is not for us to pass on its credibility—establishes a possession under a claim of right against Richard Jones, under whom the plaintiff claims, and who died in 1872 prior to the time the title of the plaintiff accrued, and is sufficient to put the statute of limitations in operation.

The defendants also introduced evidence tending to prove that Ephraim Shepherd remained in possession of the land until he sold it to the ancestor of the defendants; that he remained in possession until his death, and that the defendants, who are his heirs, have been in possession since that time. It is true that about two-thirds of the land in dispute—5 acres—is woodland, but the witnesses testify to possession of the whole, and, in addition to testifying to cultivating the cleared land and building a house on it, that tobacco beds were made on the land in controversy, and that the defendants and those under whom they claim cut wood and used straw from the woodland.

This evidence of adverse possession for the necessary statutory period is much more satisfactory than was held sufficient to be submitted to the jury in *Locklear v. Savage,* 159 N. C., 237, and falls within the rule

there laid down, as follows: "It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

There was, therefore, no error in leaving the question of adverse possession to the jury, which was done in a charge free from objection.

The other exception upon which the plaintiff chiefly relies is that a witness was permitted to testify that Henry Holmes, husband of the *feme* plaintiff, acknowledged that the line claimed by the defendants was the true line; but the admission of this declaration, if erroneous, was harmless, because the same witness testified without objection: "I know where the present line is, as contended for by Mr. Carr; that line was pointed out to me by Henry Holmes as the true line between him and Carr."

We have carefully considered the exceptions raised, and find

No error.

Z. V. RAWLS v. OTTO HENRIES AND MARY REEL.

(Filed 11 October, 1916.)

1. Judicial Sales—Infants—Parties—Decrees—Record — Irregularities—Evidence—Innocent Purchasers.

Where the testator has died in 1878, leaving a remainder in an estate to plaintiff's grantor, with life estate to the widow, who has since died, in 1914, the deed under which the plaintiff claims being executed in 1913, and it appears that proceedings were had by the executor of the testator in 1878 to sell the lands to pay his debts, the entries of record showing issuance and service of summons, order and report of sale, and final decree in 1878; that plaintiff's grantee was then a minor about 18 years of age, with evidence tending to show that he had filed answer by his general guardian, or guardian *ad litem*, which disappeared from the court and could not be found after due and diligent search: *Semble*, the proceedings for the sale of the lands were in all respects regular, and *Held*, the courts will not disturb them as against the grantee of an innocent purchaser for value holding under a deed executed in 1879, without question of title.

2. Judicial Sales—Infants—Parties—Summons—Service—Irregularities—Motions in Cause.

Where an infant party to an action has not been personally served with summons, and it is shown that his general guardian or guardian *ad litem* appeared and filed an answer for him: *Held*, the failure to serve the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause, and then only upon a show of merits and where the complaining party has proceeded with proper diligence.

CIVIL ACTION tried before *Whedbee, J.*, at May Term, 1916, of PAMLICO, a jury trial having been formally waived.

On the facts as found by the court there was judgment for defendants, and plaintiff excepted and appealed.

Moore & Dunn, D. L. Ward, and A. D. Ward for plaintiff.
C. L. Abernethy for defendant.

HOKE, J. The land was owned by Thomas Holton, who died on or before 1878, leaving a last will and testament in which he devised the land to his wife for life, remainder to A. D. Holton, his nephew. The widow died in 1914. The plaintiff claimed the land under a deed from A. D. Holton, devisee, executed in 1913. Defendants claimed as heirs at law of L. D. Henries, who held same under a deed from Josephus Linton and wife, Josephine, dated in June, 1879, and offered evidence tending to show that defendants and those under whom they claimed had since been in possession, asserting ownership under said deed.

It appeared that Josephus Linton held under a deed from Charles H. Fowler, bearing date in February, 1879. Fowler had bought at a judicial sale, in which the land was sold under a decree of Superior Court of Pamlico County, before clerk and on petition duly filed by Josephus Linton, executor of Thomas Holton, and Emeline and A. D. Holton, his heirs at law, to make assets to pay the debt of said Thomas Holton, and in which the special proceedings docket showed entries as follows:

"Summons issued 4 April, 1878.
Summons served 15 April; 1878.
Order of sale 20 April, 1878.
Report of sale 18 July, 1878.
Final decree approved 19 November, 1878."

And these proceedings approved by the judge of the Superior Court in term.

The summons in the cause showed return as follows: "Received 12 April, 1878. Served 15 April, 1878."

There were also facts in evidence tending to show that an answer for the said A. D. Holton, then 17 or 18 years of age, was duly filed by one

Hooker, as guardian *ad litem* for said A. D. Holton, or by W. D. Hooker, his general guardian; that same had disappeared from the court proceedings and could not be found after due and diligent search. It was further shown that W. R. Hooker had qualified as general guardian of A. D. Hooker, and, on a settlement, had paid him a small amount of money, a residue from proceeds of land sale.

On part of plaintiff there was evidence tending to show that defendant's actual occupation of the land had not been more than five or six years, and, further, that the summons had not been personally served on A. D. Holton, the minor.

Upon these, the facts chiefly relevant, his Honor was clearly right in his judgment that plaintiff was not entitled to recover.

The facts in evidence strongly tend to show that the proceedings were in all respects regular and that defendant's title has never been open to question; but were it otherwise, and by reason of the fact that summons was not personally served on the minor, our authorities are very uniformly to the effect that the interest of the minor having been presented and an answer having been filed by his general guardian or guardian *ad litem,* the failure to serve on the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause. *Harris v. Bennett,* 160 N. C., 339; *Glisson v. Glisson,* 153 N. C., 185; *Rackley v. Roberts,* 147 N. C., 201; *Carraway v. Lassater,* 139 N. C., 145; *Carter v. Rountree,* 109 N. C., 29; *Matthews v. Joyce,* 85 N. C., 258. And these authorities are to the effect that, even when properly applied for, an irregular judgment is not to be set aside as a conclusion of law because of the irregularity, but only on a show of merits and when the complaining party has proceeded with proper diligence.

Speaking to the question, in *Becton v. Dunn,* 137 N. C., pp. 559-62, the Court said: "The authorities are all to the effect that an irregular judgment may be set aside at a subsequent time independent of section 274 of The Code, citing *Wolfe v. Davis,* 74 N. C., 597. This is not done as a matter of absolute right in the party litigant, but rests in the sound legal discretion of the court. It is always required that the complaining party should show that some substantial right has been prejudiced, and he must proceed with proper diligence and in a reasonable time." And on the facts of this record, no court would disturb this proceeding to the prejudice of an innocent purchaser who has now held the land under his deed since June, 1879, and without question as to title so far as appears. *Harris v. Bennett, supra; Glisson v. Glisson, supra.*

There is no error, and the judgment of his Honor is

Affirmed.

L. H. BRADSHAW v. HILTON LUMBER COMPANY.

(Filed 11 October, 1916.)

1. Reference—Exceptions—Trial by Jury—Waiver.

Where the court of its own motion orders a reference of a cause, to which a party excepts at the time, and also excepts to the referee's report, and tenders issues of fact upon which he demands a trial by jury, nothing else appearing, he has preserved his right to a jury trial, and cannot be held to have waived it.

2. Reference—Courts—Trials—Statement of Referee—Evidence.

It is not error for the court to refuse to permit a party to a reference to introduce a written statement of the referee attached to the testimony of a witness, though it would be competent to introduce the referee as a witness to prove the statement, thus affording the opposing party the opportunity to cross-examine him.

3. Same—Witness—Record—Report.

It is incompetent for a party to a compulsory reference to prove by the referee what he had proposed to prove by a witness, for the evidence is transcribed and is a part of the report of the case heard before him.

4. Reference—Courts—Trial by Jury—Report—Conclusions—Evidence.

The findings of fact of the referee and his conclusions of law are not a part of the evidence which the jury may consider in passing upon the issues submitted to them, and are properly disallowed for such purpose.

5. Instructions—Timber Deeds—Measurements of Timber—Appeal and Error—Harmless Error.

Where the plaintiff had conveyed to the defendant timber on certain lands that measured 12 inches and up in diameter at the time of the conveyance, a charge of the court, in an action for damages for cutting smaller trees than conveyed, that the measurement of the trees could be made at any height from the ground, cannot be considered as prejudicial to the defendant, if erroneous. *Semble*, the trees should be measured 12 inches from the ground, or according to the prevailing custom.

6. Timber Deeds—Measurements—Exceptions—Burden of Proof.

Where in an action for damages brought against the grantee of a timber deed for cutting timber of smaller size than that specified, the defendant claims that the trees thus cut came within an exception in the deed permitting it to be done for certain particular purposes, he having peculiar knowledge of the facts, has the burden of showing that they were cut and used for the purposes specified.

THIS is a civil action, tried at January Term, 1916, of DUPLIN, before *Allen, J.*, upon these issues:

1. Did the defendant wrongfully and unlawfully cut and remove timber from the lands of the plaintiff, as alleged in the complaint? Answer: "Yes."

2. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: "$725."

From the judgment rendered, defendant appealed.

Stevens & Beasley for plaintiff.
E. K. Bryan, H. D. Williams for defendant.

BROWN, J. The plaintiff seeks to recover damages for cutting pine timber on his lands of a size smaller than 12 inches in diameter. The plaintiff conveyed to defendant all the short-leaf pine timber on certain lands that measured 12 inches and up in diameter at date of conveyance, 14 August, 1899. The cause was referred to a referee *ex mero motu* by the court, over plaintiff's objection.

The referee heard the cause and made his report and findings of fact and law. Within the time allowed by the court plaintiff filed exceptions to the report and demanded a jury trial upon the issues, which was granted. Defendant excepted, at the same time moving to confirm the report.

1. The plaintiff preserved his right to a trial by jury by entering his exception of record at the time the order of reference was made. He did not waive such right, but maintained it intact by repeating at the end of his exceptions his demand and tendering with his exceptions the issues he proposed. This, we think, is in accord with the decisions. *Driller Co. v. Worth,* 117 N. C., 515; *Ogden v. Land Co.,* 146 N. C., 443.

2. The contention that the court erred in not permitting the defendant to offer in evidence a certain statement of the referee attached to the written evidence of the witnesses is untenable. It was no part of the evidence, was not under oath, and not subject to cross-examination. The defendant had the right to put the referee on the stand as a witness if he saw fit to do so.

3. The further contention that the court erred in refusing to allow the defendant to put the referee on the witness stand and prove by him what the plaintiff proposed to prove on the trial before the referee is likewise untenable. Whatever the referee admitted as evidence was taken down and reported to the court. What the defendant proposed to prove on such trial and which was excluded is no part of the evidence, and, therefore, it is incompetent to prove by the referee such proposal.

4. The contention that the court erred in excluding from the jury the report of the referee, together with his findings of law and fact, is equally untenable. While the statute, Revisal, sec. 519, provides that the testimony of all the witnesses on both sides shall be reduced to writing by the referee and signed by the witnesses, and filed in the cause, it nowhere provides that the findings of the referee, himself,

or any conclusions of law which he may arrive at, shall be submitted for the consideration of the jury. They constitute no part of the evidence, but are mere deductions from the evidence. If such contention could be maintained, the province of the jury would be invaded and their right to draw their own conclusions would be entrenched upon.

5. The defendant excepts to the charge of the court as follows: "Now, as I have said before, 12 inches in diameter, I charge you, means 12 inches at any part of the tree from the ground up. You would not be bound by the referee's conclusions, but you would be governed by the charge I give you. So I charge you that 12 inches in diameter means 12 inches anywhere above the ground."

The finding of the referee is to the effect that inasmuch as the deed does not fix the place on the tree at which the diameter is to be taken, the customary place to take the measurement is 12 inches above the ground. We think that this ruling of the referee was substantially correct. As the circumstances under which the deed was made showed conclusively that the timber was to be cut for market, or manufacture, therefore, the timber should be severed at the height from the ground where it is usual to cut such timber. The case was tried exclusively upon the testimony taken before the referee and reduced to writing, and no other evidence was offered.

Therefore, we conclude that the referee's method of ascertaining the diameter was possibly followed by the jury. But whether it was, or not, the defendant has no right to complain of the charge of the judge, because the effect of such charge was to give to the defendant every tree which measures 12 inches in diameter at any part of the tree, either at the ground or at the top, so that if a tree measured 12 inches at any part of it, that tree is conveyed to the defendant within the terms of the deed.

6. The defendant contends that the court erred in refusing to give the defendant's fourth prayer for special instruction as follows: "The timber deed made by the plaintiff having given the right to the defendant to use and cut trees undersize in the building and constructing of roads and tramroads, and the plaintiff having failed to prove that the trees so cut undersize were not used for such purposes, the plaintiff cannot recover, and the jury should answer the first issue 'No' and the second issue 'Nothing.'"

The charge of the court in regard to the timber cut under 12 inches in pursuance of the terms of the deed is very clear, and follows the well established rules of evidence. It was conclusively within the knowledge of the defendant as to how much timber it cut for the purposes of construction, tramways, and repairs. The defendant claims

the right to cut this undersized timber for such purposes by virtue of an exception contained in the deed, and it was the defendant's duty to bring itself within the exception by showing that the undersized timber so cut was for the purposes therein provided for. It is an elementary rule of evidence set forth by all the text-writers that where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party the averment is taken as true, unless disproved by that party. *Great Western R. R. Co. v. Bacon,* 83 Amer. Decisions, 199; *King v. Turner,* 5 Maule and S., 206; Greenleaf on Evidence, sec. 79; *U. S. v. Demer and R. G. R. R. Co.,* 191 U. S., 91.

Upon a review of the entire record, we find

No error.

S. L. BRADSHAW, ADMINISTRATOR, v. HILTON LUMBER COMPANY.

(Filed 11 October, 1916.)

Appeal and Error—Reference—Interest—Findings—Verdict.

Where upon trial by jury after reference of the cause, the jury has allowed interest on the amount of damages assessed for cutting timber under the size conveyed by the deed, and the referee had allowed the interest, upon his finding, which was not excepted to, a judgment in conformity with the verdict will not be disturbed on appeal.

CIVIL ACTION tried at January Term, 1916, of DUPLIN, before *Allen, J.,* upon these issues:

1. Did the defendant wrongfully and unlawfully cut and remove the timber from the land of the plaintiff, as alleged? Answer: "Yes."

2. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: "$500 and interest from time cut until present date."

From the judgment rendered defendant appealed.

Stevens & Beasley for defendant.

E. K. Bryan and H. D. Williams for defendant.

BROWN, J. This case involves the same matters as are presented in the case of *L. H. Bradshaw v. Hilton Lumber Company, ante,* 219, except that the deed fixes 1 foot above the ground as the point where the timber is to be measured. The only other assignment of error relates to the judgment giving interest from 1907. The jury allowed interest as a part of the damage from the time when the timber was cut, as appears in their verdict. It is alleged in the complaint that the cutting was done

from month to month during the year 1907 up to and including the month of October. The cutting was denied by the defendant, but the referee found against the defendant and that the cutting was done in 1907. The defendant did not except to this finding of the referee and his Honor adopted the finding of the referee as to the date when the cutting was done. We see no error in this.

No error.

J. H. MYROSE v. NANNIE SWAIN ET ALS.

(Filed 11 October, 1916.)

1. Appeal and Error—Reference—Findings of Fact.

The findings of fact under a consent reference, and approved by the trial judge, are conclusive on appeal when there is evidence to support them.

2. Appeal and Error—Assignments of Error—Rules of Court.

Assignments of error must be clearly and intelligently stated so that the Court will not have to look at exceptions therein referred to in order that they may be understood; for otherwise they will not be considered on appeal. *Thompson v. R. R.*, 147 N. C., 412, cited and applied.

3. Same—Objections and Exceptions—Judgments.

Where a judgment, based upon findings of fact by a referee, and approved by the court, is assigned for error on appeal, and the facts so found are conclusive, the assignment, so far as it relates to the facts, is scarcely more than formal, the judgment being a conclusion of law thereon.

HOKE, J., dissenting.

APPEAL by defendants from *Bond, J.*, at April Term, 1916, of ONSLOW.

Rodolph Duffy, E. M. Koonce, and G. V. Cowper for plaintiff.
J. F. Wooten and Woodus Kellum for defendants.

CLARK, C. J. This is an action to recover damages for breach of contract. A counterclaim was filed by the defendants. By consent, the cause was referred to Frank Thompson, referee, who duly filed his report, to which the defendants filed ten exceptions to the findings of fact, but none of them on the ground that there was no evidence, and one exception to the conclusion of law, which was to the amount of the

award in favor of the plaintiff, which was based upon the findings of fact. The court overruled all the exceptions and affirmed the judgment of the referee. The findings of fact are, therefore, conclusive, as the findings of a jury would be. There was a nonsuit as to Atlantic Coast Line Railroad Company.

On this appeal the defendant makes twelve assignments of error, all of which are in the following form: (1) "The court committed error in overruling the first exception as set out under the first exception," and the following eleven exceptions are in the same form. These assignments are wholly insufficient. The matter was fully discussed by *Hoke, J.*, in *Thompson v. R. R.*, 147 N. C., 412, where the Court held that exactly the same method of assignment was insufficient because it "would give no information whatever to the Court, for it would necessitate turning back to the record to see what the exception was. What the Court desires, and, indeed, the least that any appellate court requires, is that the exceptions which are *bona fide* presented to the Court for decision, as the points determinative of the appeal, shall be stated clearly and intelligibly by the assignment of errors, and not by referring to the record, and therewith shall be set out so much of the evidence or the charge, or other matter or circumstance (as the case may be), as shall be necessary to present clearly the matter to be debated."

This ruling has been followed impartially ever since, and has been reviewed and reaffirmed at this term in *Rogers v. Jones,* citing many of these cases. For this reason, and because, also, that all the other assignments are to findings of fact, the only valid assignment of error is the thirteenth, "That the court committed an error in signing the judgment which was filed in this cause." This, however, is scarcely more than a formal assignment, since the findings of fact are conclusive, as they have been approved by the judge, and there is evidence to sustain them. The judgment is a matter of law, and upon such findings of fact is correct.

The plaintiff had taken in charge a sawmill and its equipment from the defendants Swain and wife, with an agreement to saw the timber of the defendant into shingles of a certain size and description for the sum of $2 per thousand, agreeing to keep the property in good order and return it in the same condition, less the usual wear and tear; said sum to be paid out of the returns from the sale of the shingles, which was to be made by the defendants. The plaintiff claimed that he performed his part of the contract, but that the defendants had failed to make the payments of $2 per thousand, and brought this action to recover for the same and for the loss of time and other expenses caused plaintiff, who was thereby hindered in running the plant. The defendants counter-

claimed upon the ground that the property had not been kept in good condition. The referee found that the defendants failed to pay the plaintiff, as stipulated, as soon as the returns were received from the sale of the shingles, causing the plaintiff the incidental damage of $100, and that the sawmill and plant had not been kept in as good condition as agreed, and allowed the defendants' counterclaim for $100; that the defendants were indebted to the plaintiff on account of sawing the shingles $568.18 and $36.71 for failure of defendants to furnish logs necessary to keep the tramroad in repair, and rendered judgment for the sum of $604.87.

Upon the findings of fact the judgment rendered was correct.

Affirmed.

HOKE, J., dissenting.

JOHN D. HINES v. NEW ENGLAND CASUALTY COMPANY.

(Filed 11 October, 1916.)

1. Insurance, Health—Application—False Representations—Hernia — Sound Health—Trials—Evidence—Questions for Jury.

Statements made in an application for a policy of health insurance are representations and not warranties, Revisal, sec. 4808; and where the insured had hernia at the time of his application, and, without specific question as to this, stated he was in sound physical and mental condition, "no exceptions," and there is evidence tending to show that the hernia did not affect the soundness of his health, it was for the jury to determine whether his representation was false and material, upon an appropriate issue and correct instructions from the court, with the burden of proof on the plaintiff in his action on the policy.

2. Insurance, Health—Policies—Restrictions—"Confined."

Where recovery upon a policy of health insurance is restricted to the duration of time the insured is "confined to his home" or "confined in a hospital," the restriction does not preclude a recovery if the insured, acting on the advice of his physician, and as a part of his treatment, should go beyond the confines of the designated places.

BROWN, J., dissenting; WALKER, J., concurring in dissent.

APPEAL by defendant from *Connor, J.*, at February Term, 1916, of FRANKLIN.

W. H. Yarborough, Jr., and Ben T. Holden for plaintiff.

William H. Ruffin for defendant.

CLARK, C. J. This is an action to recover on a health insurance policy which contained promised indemnity for partial disability; con-

finement to the house, accompanied by disability, and confinement in a hospital, accompanied by disability. Each of these was at a different rate, and the claims made under the three classes of indemnity aggregated $382.14.

The defense was that the insured had a disease at the time of application which he did not disclose; and that the defendant was not liable under the indemnity either for confinement at the house or confinement in the hospital, for that it was not such as entitled the plaintiff to indemnity therefor, but only to partial indemnity.

The exceptions, seventeen in number, may be grouped under two heads: those which relate to the refusal of the motion to nonsuit and those which relate to the construction of the words, "within a house" and "within a hospital." As to the first exception, the plaintiff had, as it appears, at the time of the application, a slight attack of hernia. He was not asked if he had that disease. If so, his answer in the negative would have violated the contract, because the defendant company had a right to make any disease material, and if the defendant had answered untruly this would have been a misrepresentation. The statement in the application on which the defendant relies is the following: "I have never had fits or disorders of the brain. My habits of life are correct and temperate, and I am in sound condition, mentally and physically, except as follows: No exceptions."

Few people are absolutely exempt from some variation from a perfect condition, and unless such variation is specifically asked about in the application and denied, it is not matter vitiating the policy, unless the variation was serious enough to affect his "soundness" so that any one who knew the facts would say, "He is not a sound man."

The plaintiff testified that he had hernia, but that he did not suffer from it at all. Dr. Perry testified as an expert that he had examined the plaintiff two years later, in August, 1914; that he then made a physical examination of the plaintiff for life insurance; that he examined the indications of hernia and recommended the plaintiff for insurance in another company as a sound man. He further testified: "I was of the opinion that he was a sound man. . . . I would not think that the hernia would affect Mr. Hines' health to any degree." Hernia, sometimes, is a most serious defect, making the sufferer an unsound man. In other cases it is simply a slight imperfection which would not render him unsound in any respect, according to the testimony in this case. Therefore the court properly submitted to the jury the issue whether the defendant's answer, as above set out, was false or not, or whether at the time he made the application he was, in the ordinary acceptation of the words, "a sound man." It is not every ailment or indisposition or

imperfection that makes one an unsound man. There must be such a condition that there is a material departure from a sound condition. The issue was left fully and fairly to the jury as an issue of fact, and they found with the plaintiff.

The defendant has not contended that the plaintiff's representations were fraudulently made, but insists that the insurer should not be the judge of the materiality of such representations; but neither could the defendant be sole judge. The question is not whether the plaintiff had hernia, for this is not denied, but whether it was of such nature as to have rendered him an unsound man at the time of the application. The jury is the only tribunal which can settle the disputed facts, for this is an issue of fact and not a matter of law. The illness from which the plaintiff suffered subsequently, and for which he seeks to recover was an attack of rheumatism, which had no connection with, nor was there any evidence to show that it was in any way traceable to, hernia.

Revisal, 4808, provides that all statements in an application for insurance shall be held merely representations, and not warranties; and that no representations, unless fraudulent or materially affecting a risk, shall prevent a recovery. This matter was properly submitted to the jury, and they found that "the plaintiff was of sound physical condition at the time he signed the application, notwithstanding such hernia; and that his representations at the time he applied for the policy were not false and were not material to the defendant in determining whether it would issue the policy." The court instructed the jury that whether he was in sound health or not was a matter for the jury to determine upon the evidence, depending upon whether the extent of the hernia he had was such as to render him unsound or not.

The second proposition involved is whether the plaintiff has brought his case, upon the evidence, within the conditions which entitle him to recover because "confined within a house or within a hospital." The court instructed the jury that the words "confined in his home" do not mean that he must be actually confined within the four walls of his house, but it means that he was entitled to indemnity while kept in his home on account of sickness and unable to leave for any purpose not connected with his sickness. If during such illness he was able to visit friends or his place of business, he would not have been "confined." But if, acting under the directions of the physician, he called at his doctor's office, or the mere fact that he walked out under his directions, as a part of the treatment the physician was giving him, this would not require the jury to find that he was not confined in his home.

The court also instructed the jury that within the meaning of this policy a man would be "confined within a hospital" during such time

as he was therein and subject to its rules and regulations, although at times walking or driving in the grounds of the hospital, or even outside the grounds, provided such walking or driving was taken under the rules and regulations of the hospital physician as a part of the treatment; but if during that time the plaintiff was able to leave the hospital, or left it for social purposes, or for business reasons, then he would not have been "confined" within the meaning of the policy.

The court instructed the jury that the burden was on the plaintiff to satisfy them by the greater weight of the evidence that, notwithstanding the hernia, he was not suffering therefrom at the time of the application for the policy, and was in fact a sound man at that time; and, also, that the burden was upon the plaintiff to satisfy the jury that he was confined in his home and in the hospital in the manner already charged, and the burden was upon him to show the length of time; that the burden was upon the defendant to satisfy the jury that from the nature of the hernia it would have prevented it from issuing the policy if it had been informed thereof.

The charge is very full, and the jury must have understood the matters of fact left to them. We find no error of law committed during the trial.

No error.

BROWN, J., dissenting: I am of opinion that the motion to nonsuit should have been sustained, because upon the plaintiff's own testimony he is not entitled to recover. The admitted facts are that the plaintiff filed a written application with the defendant for a Plymouth Rock health policy, and in that application he represented that he had not been exposed to any contagious or infectious disease, and that at the time of the application, nor for a year past, had he had any local or other disease, except as follows: "No exceptions."

It is admitted that at the time that the plaintiff filed this application and made this representation he suffered from a disease or infirmity called "Inguinal hernia." It is a matter of common knowledge that hernia is an infirmity and a disease of which the sufferer is bound to have personal knowledge. When he made out the application for the policy of insurance, in answer to the question, he said he had no disease and no infirmity, and the space where he was expected to write the exception was filled in, "No exceptions." The defendant company had a right to assume from this application that the plaintiff was in every respect sound.

It is proven by the testimony of plaintiff's own experts, as well as the defendant's, that hernia can only be cured by an operation, and that its tendency is to grow worse and impair the health.

Medical books declare that hernia consists of a protusion, generally of the bowels, which has escaped from its natural cavity, and projects through some natural or accidental opening of the walls of the latter; as hernia of the brain, of the bowels, or of the lungs. Hernia of the abdominal viscera is a common disease or infirmity, and is commonly called rupture. The disease of which the plaintiff suffered is called "Inguinal hernia" because it is in the region of the inguen or groin.

I am of opinion that his Honor should have instructed the jury that the disease from which the plaintiff suffered, or the infirmity, whichever it is called, was such as would prevent a recovery in this action, for it is manifestly a physical unsoundness. It was error to leave the effect of the disease to the jury to determine. It was substantially permitting the jury to act as medical experts and determine whether the defendant should have made such contract. The effect of the hernia in determining the nature of the risk assumed, as well as fixing the rate of the insurance, was a matter solely for the judgment of the insurer before it entered into the contract at all. It had the right to have the facts truthfully disclosed so that its officials could determine whether the risk was one proper to be taken. It was obviously the intent of the defendant in making inquiries to learn the nature and character of any and all diseases and unsoundness that might exist, so as to decide for itself whether the plaintiff was a proper subject for insurance. It is not necessary for the plaintiff to have acted fraudulently; it is only necessary to show that he acted erroneously and stated the fact untruly.

While section 4808 of the Revisal of 1905 of North Carolina declares that all statements in an application for insurance are mere representations, and not warranties, and that no representation, unless material or fraudulent, shall prevent a recovery, yet a material misrepresentation will avoid a policy if it is calculated to influence the insurer in making the contract. *Gardner v. Ins. Co.*, 163 N. C., 367; 79 S. E., 806; *Fishblate v. Fidelity Co.*, 140 N. C., 589; 53 S. E., 354.

"Every fact which is untruly stated or wrongfully suppressed in an application for insurance must be regarded as material, if it would influence the insurer into making or refusing to make the contract."

"A false representation avoids the policy, when material, wholly without reference to its intent, unless otherwise provided by statute." And we have no statute to the contrary. *Fishblate v. Fidelity Co., supra.*

"If the company was imposed upon (whether fraudulently or not is immaterial) by such representations, and induced to enter into the contract, assuming that both parties acted in the utmost good faith, justice would require that the contract be canceled and the premiums returned." *Alexander v. Ins. Co.*, 150 N. C., 536; S. E., 432.

Under all the authorities, the suppression of the true facts, whether fraudulently or not, avoids the policy. *Bryant v. Ins. Co.,* 147 N. C., 181; *Schass v. Ins. Society,* 166 N. C., 555; Vance on Insurance, pp. 267-269.

We find a case very similar to this in 42 N. Y. Supplement, 288, *Hannah v. Life Assn.,* quoted in Kerr on Insurance, page 341, in which a warranty against local injury or infirmity is held to be broken if the insured at the time was suffering from a stricture. While hernia is not a serious illness, it is nevertheless a physical infirmity, an unsoundness, and the failure to make it known in the application voids the policy.

MR. JUSTICE WALKER concurs in this opinion.

POWHATAN MATTHEWS v. W. A. MYATT ET AL.

(Filed 11 October, 1916.)

1. Instructions—Deeds and Conveyances—Limitation of Actions—Adverse Possession—Appeal and Error—Reversible Error.

Where the controversy over lands depends upon the true location of the disputed boundary line between adjoining owners, the plaintiff claiming both under a perfect paper title and by adverse possession to a certain marked line, and there is evidence to sustain them, both of these contentions are material, and should be properly passed on by the jury; and it is reversible error for the judge in his charge to confine the inquiry as to his adverse possession to the location of the boundary given in his deed.

2. Instructions—Contentions—Appeal and Error—Reversible Error.

Where the trial judge correctly states the contention of a party upon a material phase of the controversy upon which he is entitled to an instruction, but fails to charge the jury in accordance therewith, it may leave them under the impression that the contention was not a correct one, and constitutes reversible error.

3. Limitations of Actions—Deeds and Conveyances—Adverse Possession—Different Boundaries—One Lot.

Where the location of the true dividing line between adjoining owners is in dispute, the *locus in quo* lying between the lines contended for by the parties to the action respectively, and the plaintiff claims under his deed and also by adverse possession to a certain marked line, the plaintiff may treat the disputed and undisputed parts of the land as one lot, and upon proving sufficient adverse possession thereof, as a whole, it will ripen his title thereto.

MATTHEWS *v.* MYATT.

CIVIL ACTION tried before *Connor, J.,* and a jury, at April Term, 1916, of WAKE.

The action was brought to recover a small strip of land about 5 feet wide, fronting on McDowell Street in the city of Raleigh.

The plaintiff claimed the land upon two grounds: First, that it was covered by a deed of James J. Litchford, administrator of John O'Rourke, the owner thereof, to Jonas Matthews, his ancestor, dated 11 November, 1868, and prior deeds connected therewith; and, second, that if the land was not conveyed by the said deeds, he has acquired title to it by the adverse possession of himself and those under whom he claims. The defendants denied the plaintiff's ownership of the land, and the *feme* defendant specially alleged ownership in herself by inheritance from her father, L. S. Perry, who, she says, was the owner of it at the time of his death. With respect to the claim of adverse possession set up by the plaintiff, the court charged the jury as follows: "The plaintiff says, further, that without regard as to how the lines may be located, or the corners may be located, according to maps, that he and those under whom he claims have been in the open, notorious, visible, exclusive, adverse possession of the strip of land for many years; that is, for many years, since 1868, and for years prior thereto; and he contends, gentlemen of the jury, that you ought to find that Jonas Matthews, when he took possession of this property under his deed in 1868, took possession of and held possession of the lot up to the fence which he contends that you should find was on this land; and that even if there had been an error in locating this line according to the maps, that he and those under whom he claims by adverse possession gained title, secured title to this strip." And again: "I instruct you, further, gentlemen of the jury, if you are satisfied by the greater weight of the evidence in this case that a deed was made to Jonas Matthews for this lot in 1868, that Jonas Matthews entered into possession of the lot described in this deed, that the lot described in the deed is the identical lot referred to in the pleadings and evidence in this cause, if you find from the evidence in the case that Dr. Perry was then living, and that he lived until 1872, and that Jonas Matthews continued in possession, and that at his death in 1912 the plaintiff here, Powhatan Matthews, as the devisee named in his will, went into possession of this lot, then I instruct you that your answer to this issue should be, "Yes; all."

The jury returned the following verdict:

1. Is the plaintiff the owner and in the possession of the lot of land included within the red lines on the map made by R. B. Seawell, engineer, dated 20 April, 1916? Answer: "Yes; but not of 5-foot strip shown on map."

2. If so, did defendant trespass on said lot of land, as alleged in the complaint? Answer: "No."

3. If so, what sum, if any, is plaintiff entitled to recover of the defendants as damages for such trespass? No answer.

From the judgment rendered, plaintiff appealed.

Peele & Maynard and Lauchlin McNeill for plaintiff.
R. N. Simms for defendants.

WALKER, J., after stating the facts: The strip of land in dispute lies between two lines shown on the court map, which are 5 feet apart, the northern one of these lines being the line claimed by Mrs. Myatt as the true line dividing the lots of the parties from each, and the southern line of the two being the one claimed by Mr. Matthews as the true dividing line, according to their respective deeds. But Mr. Matthews contends that, even if he is mistaken as to the location of the dividing line, he and those under whom he claims have occupied adversely the disputed land, which was inclosed by a fence, for more than twenty years before this suit was commenced, and since the year 1868, when his father, who died in 1912, received the deed from Mr. Litchford. There was evidence of adverse possession according to the plaintiff's claim. The *locus in quo* is a part of a parcel of land fronting on North McDowell Street, which is owned by the parties to this suit, the plaintiff being the owner of the northern part and the defendant of the southern, with the dividing line in controversy.

If the court erred as to the location of the dividing line or as to the adverse possession, the plaintiff is entitled to another trial.

We are of the opinion that there was error in the charge as to adverse possession. The court correctly stated the contention of the plaintiff as to this feature of the case, but failed to charge the jury in accordance therewith, leaving them naturally under the impression that the contention was not a correct one. But we think there was error in the charge which was given and set out in the statement of the facts. It was too restrictive as to the possession, as it confined it to the lot described in the deed of 1868 by the words, "if the lot described in the deed is the identical lot referred to in the pleadings and evidence in this cause." If the jury found that plaintiff's lot was correctly described in the deeds and in the complaint, and the location of the dividing line should be according to his contention, there was no use in considering the adverse possession at all, because he would recover the land under his deed alone. The question of adverse possession became material only if the deed to plaintiff's father did not embrace the disputed land, and the line was located as claimed by the defendant. In

such event the plaintiff would necessarily lose, unless he could show an adverse possession of the disputed land, independent of any deed, sufficient to give him title. The jury have found that the dividing line is located as claimed by the defendant, and, therefore, an adverse possession by plaintiff of the land described in the deed to his father would not extend to the land in dispute, and plaintiff was therefore left without any instruction upon the legal effect of the adverse possession of the *locus in quo,* which, of course, excluded one of his two main contentions from the consideration of the jury, for they were instructed to consider only the possession of the lot as described in the Litchford deed of 1868, and not merely the possession of the part not covered by that deed, and claimed by the plaintiff because of the adverse possession of it for twenty years and more.

The charge as to adverse possession should have been given without reference to the deeds, as plaintiff did not claim under color, and the instruction as to adverse possession should, therefore, have been strictly confined to the disputed land. Of course, if the plaintiff had adverse possession of all, as one lot—both the disputed and undisputed parts—under known and visible boundaries for the requisite period, he would acquire title to the *locus in quo,* the same as if the adverse possession had been of the *locus in quo* alone; for he could merge all into one lot and his actual adverse possession could then be extended to all. But here the jury were told that they should confine their inquiry to the adverse possession of land described in the deed. It follows that if the deed did not cover the *locus in quo,* and the jury so found, the possession of the disputed land was not considered at all. This was an affirmative error. While the court charged upon adverse possession, it so narrowed the instruction that the proper view of the question was excluded, and the jury thereby left in ignorance as to the law upon this phase of the case. By instructing the jury that the adverse possession, to be available to plaintiff, must have been of the land covered by the deed—when the jury might have found, as they afterwards did find, that the deed did not cover the disputed land, and when there was evidence of the adverse possession of the disputed land itself—the court laid out of consideration material proof upon which the plaintiff relied, and this had a tendency to mislead the jury, and doubtless they were misled by it. We have held that such an instruction is prejudicial and reversible error. "A judge cannot so affirmatively charge the jury as to exclude from their consideration important evidence of either side bearing upon the material issue between the parties. When he fails to charge as to any particular phase of the case, his attention must be directed to the omission by a prayer for special instructions upon the matter thus over-

looked, or his failure to charge cannot afterwards be assigned as error; but when he so charges as to eliminate from the case a substantial part of it, which would necessarily prejudice one of the parties, it will be reversible error." *Rumbough v. Sackett,* 141 N. C., 495. The materiality of the error will be seen when an admission in the answer is taken into account. Answering the fourth paragraph of the complaint, defendant admitted that "the defendant W. A. Myatt was advised by his attorney that there were serious questions as to whether the statute of limitations had or had not barred the right of possession to a certain part of the land inherited by his wife, Columbia Myatt, his codefendant." The further fact, that the jury found against the plaintiff upon the question of the location as described in the deed, made the question of adverse possession, as to the *locus in quo,* an important one to him. The instruction as given was, no doubt, an inadvertence on the part of the learned judge, but it was just as harmful as if it had not been, and exception was duly taken to it by the plaintiff.

It is unnecessary to consider the other numerous exceptions of the plaintiff, as the error in the charge, as indicated above, entitles him to another jury.

New trial.

GEORGIA SANDERLIN ET ALS. v. PETER CROSS ET ALS.

(Filed 18 October, 1916.)

1. Mortgages—Trusts—Powers of Sale—Interest—Default.

A deed in trust to lands to secure the payment of notes given by the *cestui que trust* authorizing a sale upon failure to pay interest thereon as same may thereafter become due, etc., and directing the trustee, after deducting his commissions for making the sale, to apply so much of the residue as may be necessary to pay off and discharge the said notes and all accrued interest then due, etc., confers upon the trustee the power to sell the lands thereunder before the maturity of the notes, upon default in the payment of the interest thereon at the time stated, without reference, in the absence of fraud, to any hardship it might then impose upon the *cestui que trust.*

2. Mortgages — Trusts — Foreclosure Sales — Suppression of Bids—Trials—Evidence.

Where lands have been duly advertised and fairly and openly sold to the last and highest bidder under the terms of a deed of trust given to secure money loaned, evidence that the trustor had agreed with a third person to take the lands and the other timber thereon, each at a separate price, is not sufficient proof of a combination to suppress the bidding and cause the lands to bring an inadequate price at the sale.

3. Mortgages—Trusts—Actions—Accounting—Limitation of Actions.

A suit brought to set aside a deed given to a purchaser of lands at a foreclosure sale under a deed of trust to secure money loaned and for an accounting, falls within the meaning of an action to redeem, and is barred after ten years.

4. Limitation of Actions—Mortgages—Trusts—Fraud—Notice—Knowledge—Burden of Proof.

Where the plaintiffs, as heirs at law of their mother, bring suit to set aside for fraud a foreclosure sale of her lands made in her lifetime, and claim that their action is not barred by reason of the fact that the fraud was not discovered until within three years next before the commencement of their action, the burden is on them to show that not only they, but their mother in her lifetime, had not known of the impeaching fact, or would not have discovered it in the exercise of reasonable business prudence.

5. Limitation of Actions—Fraud—Deeds and Conveyances—Registration—Notice.

Where a foreclosure sale of lands is attacked for fraud upon the ground that the trustee sold the timber on the land separate from the land and made deeds to each to separate parties, which were duly recorded, the record itself gives notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claim, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and bar their recovery after three years. Revisal, sec. 395 (9).

6. Limitation of Actions—Fraud—Evidence—Notice—Conflicting Statements—Questions for Jury.

Where to defeat the bar of the statute, Revisal, sec. 395 (9), the plaintiffs contend that they had no knowledge of the fraud relied upon to set aside a foreclosure sale of their mother's land made in her lifetime, and also that their mother had no knowledge thereof, there is direct testimony that their mother had no such knowledge, with further testimony in explanation that they had not heard their mother mention it, the testimony is not considered as contradictory, requiring that the jury determine the fact.

CIVIL ACTION tried before *Bond, J.*, at January Term, 1916, of PASQUOTANK.

This action was instituted by the plaintiffs, who are the heirs at law of George W. Sanderlin and his wife, E. W. Sanderlin, for the purpose of setting aside sales of a tract of land and the timber thereon, situated in the county of Pasquotank, which sales were made by E. F. Aydlett, trustee, to James Parker and J. D. Parker, the trustee claiming the right to do so by virtue of a deed of trust, and asking that the plaintiffs be declared the owners of the land, subject only to such amount upon an accounting as may be found due on the debt secured in the deed of

trust. The defendants, heirs at law of James and J. D. Parker, claim title to said lands under said sales by said Aydlett, trustee, and also rely upon the statutes of limitations.

The evidence introduced by the parties supports the following facts:

1. That on 6 August, 1894, E. W. Sanderlin and her husband, George W. Sanderlin, ancestors of the plaintiffs, executed to E. F. Aydlett, trustee, party of the second part, and James Parker and J. D. Parker, ancestors of the defendants, of the third part, the deed of trust set out in the record, to secure the sum of $8,987.27, an indebtedness recited to be due the said James Parker and J. D. Parker by the said E. W. Sanderlin and George W. Sanderlin, the indebtedness therein recited being payable six, seven, eight, nine, and ten years after date, with interest thereon from date until paid at the rate of 6 per cent per annum, payable semiannually, which deed of trust conveyed the tract of land in controversy in this action, and on which the timber mentioned in the pleadings stood, the tract containing 1,744 acres.

2. That the following provision in reference to sale is in said deed of trust:

"If the said E. W. Sanderlin shall fail or neglect to pay interest on said bonds as the same may hereafter become due, or both principal and interest at the maturity of the bond, or any part of either, then, on application of said James or John Parker, his assignee, or other person who may be entitled to the moneys due thereon, it shall be lawful and the duty of the said E. F. Aydlett to advertise in three or more public places in Pasquotank County aforesaid for a time not less than thirty days, therein appointing a day and place of sale, and at such time and place to expose said land at public sale to the highest bidder for cash, and upon such sale to convey title to the purchaser. And the said Aydlett first retaining 5 per centum commissions on the sale of the whole of said land sold as a compensation for making such sale out of the proceeds of such sale, and apply so much of the residue as may be necessary to pay off and discharge said bond and all interest then accrued and due thereon, both those due and not due, and shall pay the surplus, if any remain, to said E. W. Sanderlin."

3. That on 4 November, 1899, the said E. F. Aydlett, trustee, assuming to act under said deed of trust, sold said land at public sale and executed and delivered to the Elizabeth City Lumber Company, a corporation, the deed set out in the record, which deed purports to convey the pine timber 14 inches and more in diameter, or that may reach that size during five years, on the tract of land set out in the deed of trust, the deed from said Aydlett, trustee, reciting that the said Elizabeth City Lumber Company, grantee, "bid for the same the sum of

$5,000, which was the last and highest bid, and the said Elizabeth City Lumber Company was declared the purchaser," and granting unto said Elizabeth City Lumber Company five additional years, if necessary, to cut and remove the timber, upon the payment to James Parker and J. D. Parker of 6 per cent interest on the $5,000 from the end of five years from date, and further granting rights of way over said lands.

4. That on the same day as the conveyance by said Aydlett, trustee, of the timber to said Elizabeth City Lumber Company, as set forth in the next preceding paragraph, the said E. F. Aydlett, trustee, executed and delivered a deed to James Parker and J. D. Parker for the tract of land mentioned in said deed of trust, excepting therefrom the pine timber described in the said conveyance from said Aydlett, trustee, to said Elizabeth City Lumber Company. The consideration expressed in said deed to James Parker and J. D. Parker is $7,460, and, as recited in said deed from said Aydlett, trustee, "did not include the pine timber of 14 inches in diameter or more which was sold to the Elizabeth City Lumber Company at the same time and immediately before the sale of the property hereinafter described, with the understanding that the said Elizabeth City Lumber Company should have five years within which to cut and remove the said timber; and whereas the said bid was the last and highest, and best bid, the said James and J. D. Parker were declared the purchasers."

5. That at the time of said sale on 4 November, 1899, neither installment of said indebtedness had fallen due, the first installment as provided in the bond and deed of trust maturing on 8 August, 1900, nine months and two days subsequent to the said sale to the said Elizabeth City Lumber Company and the said James and J. D. Parker, but that one or more semiannual payments of interest were past due and unpaid.

6. That at the time of the execution of the said deed of trust to E. F. Aydlett, trustee, on 6 August, 1894, George W. Sanderlin and wife, E. W. Sanderlin, with their family, were living in the city of Washington, District of Columbia.

7. That George W. Sanderlin died in Enoch Pratt's Hospital, near Baltimore, Md., on 6 November, 1899, two days subsequent to the sale and conveyance of the land and timber by E. F. Aydlett, trustee, to James and J. D. Parker and Elizabeth City Lumber Company, respectively.

8. That George W. Sanderlin, at the time of his commitment to the Enoch Pratt Hospital, was mentally incompetent, and from the time he was committed to said hospital until his death, embracing a period of about three years, and for a year prior to his committal, he was not capable of transacting business; that he was mentally incompetent for four years before he died.

9. That about a month before the death of George W. Sanderlin he fell and broke his hip, his physical and mental condition thenceforth requiring the frequent attention of his wife, the said E. W. Sanderlin, at his bedside.

10. That James and J. D. Parker, the *cestuis que trustent,* were on 4 November, before the sale, made acquainted with the condition of George W. Sanderlin, and were shown a letter received by the trustee Aydlett requesting a postponement of the sale; that the matter of postponing the sale was considered by the trustee and the *cestuis que trustent,* and after talking it over with them, the trustee sold the land and timber upon demand of the creditors and executed the conveyances referred to in the record.

11. That the expense of maintaining George W. Sanderlin at the Enoch Pratt Hospital was more than $100 a month, and that E. W. Sanderlin had to keep boarders in order to enable the expense to be borne, and that it was necessary for three or four of the family to occupy one room in order to help, out of the rents received from the other portions of the house, to defray the hospital expenses and to keep their children, girls, four in number, at school; and that because of the burdens incident to the hospital expense and caring for the family, they were living in straitened circumstances; and that this financial embarrassment and the causes thereof were at the time of said attempted sale well known to the said trustee, Aydlett, and to the *cestuis que trustent,* James and J. D. Parker.

12. That on the said day of the sale and prior thereto a representative of the Elizabeth City Lumber Company met James and J. D. Parker in the rear room of the law offices of the trustee, E. F. Aydlett, and it was then and there agreed that the Elizabeth City Lumber Company would take the timber on said lands at the sum of $5,000, and that the Parkers would take the land at $7,460. The trustee was not present, however, and knew nothing of this agreement until after the sale.

13. That Mrs. E. W. Sanderlin had an offer from a person living in Philadelphia, who was negotiating a short time prior to the foreclosure for the purchase of the land at the price of $15,000, and the land and timber were sold for $12,460.

14. That the trustee, E. F. Aydlett, was the attorney for Elizabeth City Lumber Company.

15. That the trustee, E. F. Aydlett, was the general counsel for James and J. D. Parker, representing them in their business in his section.

16. That the defendants and their ancestors, James and J. D. Parker, have been in possession of the lands from about November, 1899, and that Mrs. E. W. Sanderlin died in 1912.

Several of the plaintiffs testified that their mother did not know the land and timber were sold separately by the trustee; but they also said they never heard their mother speak of it.

The defendants offered seven or eight witnesses who were present at the sale who testified that the land and timber were not sold separately, but as a whole, and the only evidence to the contrary is the recitals in the deeds executed by the trustee.

They also offered evidence of several witnesses that the land sold for its value at the sale, and the only evidence to the contrary is the offer of the party from Philadelphia to buy for $15,000.

The plaintiffs asked that the deeds be set aside and that they be allowed to redeem the land for the reason, as alleged by them, (1) that the trustee on 4 November, 1899, in violation of the terms of the trust, sold the land separate and apart from the timber; (2) that none of the conditions which give to the trustee the right to sell existed, and (3) that there was collusion between the Parkers and prospective bidders, which suppressed and depressed the sale.

The defendants denied that the land and timber were sold separately, averred that they were sold together and in accordance with the terms of the trust, and that the deeds last above referred to were made for convenience only; averred that what was done at the sale was done with the full knowledge and ratification of Eliza W. Sanderlin, and pleaded the three, seven, and ten years statutes of limitations.

At the conclusion of the evidence his Honor, on motion of the defendants, entered judgment of nonsuit, and the plaintiffs excepted and appealed.

Pruden & Pruden and Rouse & Land for plaintiffs.

Charles Whedbee, Aydlett & Simpson, and Ward & Thompson for defendants.

ALLEN, J. The cause of the plaintiffs has been presented with zeal and ability, and circumstances have been called to our attention which, from the viewpoint of the plaintiffs, are calculated to excite sympathy and to arouse indignation; but we can give no weight to these matters except in so far as they relate to the legal questions involved in the appeal.

The exercise of the power of sale by the trustee upon the demand of the secured creditors at a time when the wife, who was the owner of the property, was at the bedside of a dying husband was a harsh exercise of a power which is not favored and is jealously guarded at all times; but we must keep in mind the admonition of our predecessors, that "Hard cases are the quicksands of the law."

The plaintiffs' cause of action, as stated in the complaint, is for the purpose of redeeming the tract of land sold under the power in the trust deed on 4 November, 1899, upon the grounds (1) that none of the conditions existed at that time which gave the trustee the right to sell; (2) that at the sale there was collusion for the purpose of suppressing bidding; (3) that the trustee, in violation of the terms of the deed of trust, sold the land and timber separately when he was only authorized to sell the land with the timber on it.

The trust deed secures a note payable in six, seven, eight, nine, and ten years after date, with interest from date, payable semiannually, and it authorizes a sale upon failure "to pay interest on said bond as the same may hereafter become due, or both principal and interest at the maturity of the bond, or any part of either"; and it directs the trustee, after the payment of his commissions, to "apply so much of the residue as may be necessary to pay off and discharge said bond and all interest then accrued and due thereon, both those due and not due."

This provision clearly contemplates a sale before the maturity of the bond, and upon failure to pay any installment of interest, and as interest was due and unpaid at the time of the sale, the trustee had the right to sell. *Capehart v. Dettrick,* 91 N. C., 344; *Gore v. Davis,* 124 N. C., 234.

In the last case cited the terms of the mortgage were very much like those in the trust deed before us, and it was held that the mortgagee could foreclose before the maturity of the bond upon failure to pay interest; and if he could foreclose by decree, he could sell under the power.

The Court said: "The note sued on was dated 19 October, 1897, and payable three years after date, but the interest was made 'due and payable semiannually.' The mortgage to secure the note specified, 'If default shall be made in payment of said bond or the interest on the same, or any part of either at maturity,' the creditor could proceed to sell the land and out of proceeds of sale 'pay said bond and interest on the same.' The defendant failed to pay the interest which fell due 19 April, 1898. By the conditions of the mortgage the principal and interest became due. The demurrer of the defendant, that this action for judgment on the note and foreclosure of the mortgage was premature, was properly overruled."

Nor do we find any evidence in the record of combination to suppress bidding at the sale. There is evidence that the purchasers, James Parker and J. D. Parker, and the manager of the Elizabeth City Lumber Company entered into an agreement on the day of the sale that in the event the Parkers bought, the lumber company would take the

timber on the land for $5,000; but this, according to the evidence, was not made known at the sale, and instead of decreasing, would have a tendency to increase the amount bid.

The sale was duly advertised, was conducted openly, and opportunity was given to any one who desired to buy to do so.

This leaves remaining, as a sole ground upon which the plaintiffs can demand relief, that the trustee exceeded his power in selling the timber and land separately instead of selling the land with the timber on it as a whole; and for this reason they ask that the sale be set aside and that an accounting be had, which brings the action within the meaning of an action to redeem; and, if so, it is barred after ten years (*Edwards v. Tipton*, 85 N. C., 479; *Bernhardt v. Hagaman*, 144 N. C., 526), as it is not denied that the defendants and those under whom they claim have been in the open, notorious possession of the land since 1900.

In the *Bernhardt case* this statute of limitations was applied to a deed of trust.

The plaintiffs, however, contend that the ten years statute has no application, and that the action is controlled by Revisal, sec. 395, subsec. 9, which says that in an action for relief on the ground of fraud or mistake, the cause of action shall not be deemed to have accrued until the discovery of the aggrieved party of the facts constituting such fraud or mistake, and that the action of the trustee in selling the land and timber separately was a fraud upon their rights which they did not discover until January, 1913, less than three years from the commencement of the action.

Conceding that there was evidence of fraud, the plaintiffs have failed to bring themselves within the language or spirit of the statute.

The burden was upon them to prove not only that they had not discovered the fraud, which consisted of selling the land and timber separately, but also that their mother, who lived until 1912, about thirteen years after the sale, did not know the facts; and when we examine the evidence, we find that although they testify that their mother did not know it, and we do not question their credibility, they explain this statement by saying that they have come to this conclusion because they never heard their mother say anything about it, and that their mother never told them whether she knew how the sale was conducted or not.

This does not come within the rule of contradictory statements, which must be submitted to the jury; but the latter statements of the witnesses are explanatory of the first, and when considered as a whole, simply amount to saying that the witnesses never heard their mother refer to the matter.

To illustrate, we give an excerpt from the examination of the principal witness for the plaintiffs:

Q. "Where did you get the information that she did not know that the timber and land were sold separately?" A. "Because she never mentioned it in our conversation."

Q. "That is the only way you know it?" A. "That is the only way I know it."

If, however, there was evidence that the mother did not know how the sale was conducted, this would not conclude the matter, for, "under authoritative decisions here and elsewhere construing this and similar statutes, it has been very generally held that these words, 'the action not to be deemed to have accrued until the discovery of the facts constituting the fraud,' etc., by correct interpretation mean until the impeaching facts were known or should have been discovered in the exercise of reasonable business prudence." *Ewbank v. Lyman,* 170 N. C., 508.

"A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case a man's failure to note facts of this character should be imputed to him for knowledge, and in the absence of any active or continued effort to conceal a fraud or mistake, or some essential facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action will be deemed to have accrued from the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary diligence." *Peacock v. Barnes,* 142 N. C., 218.

The sale was made in 1899, and two deeds were immediately executed, one conveying the land to James and J. D. Parker and the other conveying the timber to the Elizabeth City Lumber Company, and these deeds were placed upon the record within two weeks.

The mother of the plaintiffs knew that the sale had been made, and the purchasers of the land were in the open possession thereof, claiming it as their own, and it is a fair presumption that the timber was cut eight or nine years before this action was commenced, as the timber deed only gave five years for cutting, with an extension clause of five years.

Under these circumstances, ordinary prudence would require some investigation, and the slightest examination of the record would have disclosed that the deeds recited that the land and timber were sold separately.

It is true that in several of the cases, such as *Modlin v. R. R.*, 145 N. C., 226; *Tuttle v. Tuttle,* 146 N. C., 493, and others, it is said that the registration of a deed is not sufficient to put a party on notice that a fraud has been committed; but in those cases the action was based on fraudulent representations in procuring a deed, and the record did not disclose any fraud or violation of trust, while in this case the record shows all of the facts for which the plaintiffs contend, and, in addition, there is the circumstance of possession.

In the *Tuttle case* the distinction is inferentially drawn when the Court says: "The fact that the commissioner made a deed to the Corpenings on 22 December, 1902, if registered, would not even put the plaintiffs upon inquiry, much less fix them with the notice that a fraud had been committed, as there is no evidence of that upon the face of the deed."

Why say this if it was not intended to convey the idea that if the facts appeared on the face of the deed it would be notice?

The case of *Dunn v. Beaman,* 126 N. C., 771, is strong authority for the position that when the facts appear on the record, the party is affected with notice. In that case a valuable tract of land was devised in 1844 to the children of John R. Beaman. The father qualified as guardian for the children and filed an *ex parte* petition for a sale of the land for partition, and the land was sold and the sale confirmed, and the guardian received the purchase money. The children of Mr. Beaman did not know until within three years prior to the institution of their action that any land had ever been devised to them or that their father was their guardian, or that the land had been sold. They presented their claim against the estate for the purchase money of the land, and having been made parties to a creditors' bill, one of the creditors pleaded the statute of limitations to the claim, and the children, while disavowing any charge of intentional fraud upon the part of their father, replied that they had discovered the facts within three years. The contention was not sustained, and it was held that their cause of action was barred.

The Court said: "The children had legal notice of the facts. The will of Carraway, under which their title accrued, was probated and recorded in 1844, and the land devised to them was sold for partition in 1861 at the courthouse door after due advertisement under a decree in equity; the proceedings in equity were duly recorded, to which three of the children, who were adults, together with their husbands, were parties praying the sale, and the decree of confirmation was properly enrolled. The deed from the clerk and master to the purchaser was duly recorded in the register's office, and was notice to the children as well

as to all the world, and they were put on notice by the recitals therein contained."

We have thus far dealt with the question assuming that the land and timber were sold separately, and there is evidence of this fact growing out of the recitals in the deeds; but on the trial the defendants introduced eight or ten witnesses who testified that the land was put up for sale and sold as a whole without any reference to the timber, and that the deeds were afterwards made separately for the land and the timber for the convenience of the parties.

There was also evidence offered by the defendants that the price paid for the land, $12,460, was its full value at that time, and the only evidence to the contrary was that the mother of the plaintiffs had been offered $15,000 for the land about the time of the sale by a party living in Philadelphia.

We have carefully considered the case, and being of opinion that in any aspect of the evidence the cause of action of the plaintiffs is barred by the statute of limitations, the judgment of nonsuit is

Affirmed.

T. A. POWELL ET AL., CAVEATORS, v. ANNIE MAY WATKINS, PRINCIPAL DEVISEE, AND JOHN ARNOLD, EXECUTOR OF N. C. POWELL, DECEASED.

(Filed 18 October, 1916.)

1. Removal of Causes—Wills—Probate—Federal Courts—Collateral Attack.

The Federal statutes for the removal of "any suit of a civil nature, at law or in equity, from the State to the Federal courts" does not extend to or include causes concerning the probate of a will, and where a will has been admitted to probate in a State court having jurisdiction, its validity may not be further questioned in independent or collateral suits in the Federal courts, unless the adjudication of probate may be so assailed in the courts of the State.

2. Same—State Procedure—Caveat.

The statutory requirements as to probating a will before the clerk, and transferring it to the civil-issue docket upon filing a caveat thereto, does not affect the exclusive jurisdiction of our State courts, having obtained it, or the position that the cause may not be removed to the Federal court under the Federal statutes, for the issue and its determination in the State court is only a part of the procedure to establish the validity of the will.

3. Wills—Probate—Caveat—Proceedings in Rem — Collateral Attack — State Courts.

In this State the proceeding for probate of a will is not an adversary suit *inter partes*, but a proceeding *in rem* in which the jurisdiction of

the court, in the exercise of probate powers, is exclusive; and an adjudication of probate or an issue involved therein may not be assailed or questioned in any independent or collateral proceeding.

4. Removal of Causes—Petition—Amendments—Power of Courts.

After a proper petition and bond for the removal of a cause from the State to the Federal court, for diversity of citizenship, has been filed in the State court, the judge is without authority to permit the plaintiff to amend, and then demand a less amount than formerly claimed by him; but though this has erroneously been done, if not appealed from, it is conclusive in the State courts.

5. Removal of Cause—Appeal and Error—Objections and Exceptions—Exceptional Cases—Merits.

Held, the question of the removal of this cause from the State to the Federal court is not open to the appellant, who had not excepted to a former order made at a prior term of the court, refusing to remove it; but this Court passed upon its merits, as it may do when it considers the case as exceptional.

CAUSE heard on caveat to will of N. C. Powell and motion to remove cause to Federal court before *Peebles, J.*, at February Term, 1916, of HERTFORD, and again before *Winston, J.*, at July Term, 1916.

It appears that propounders, who are nonresidents of this State, offered for probate the will of N. C. Powell, who died resident in Hertford County, N. C., and T. A. Powell *et al.* filed a caveat to proof of will on the ground of mental incapacity, fraud and undue influence, etc. In this caveat allegation was made that the property involved in the controversy and disposed of by the will was over $4,000. At said February term propounders filed their petition for removal and bond, on account of diversity of citizenship, and his Honor, on application of caveators, allowed them to amend their averment as to value, and they then alleged that the property was worth not more than $2,500. His Honor, thereupon, denied the motion to remove the cause.

At a subsequent term of the court, July, 1916, propounders again made application to remove for diversity of citizenship, accompanied by proper bond, and his Honor, Francis D. Winston, presiding, denied the motion on the ground that the court had refused a similar motion at the February term preceding. Propounders, having duly excepted, appealed.

John E. Vann and Winborne & Winborne for plaintiff.
R. C. Bridger for defendant.

HOKE, J. The acts of Congress now controlling the matter, chapter 231, Laws 1911, United States Statutes at Large, vol. 36, part 1, p. 1087 *et seq.*, in section 28 provides for removal from the State courts

of "any suit of a civil nature, at law or in equity, arising under the Constitution and laws of the United States or treaties made," etc., and any other suit "of a civil nature, at law or in equity, of which the district courts are given jurisdiction by this title." And section 24 of the same act confers jurisdiction on the district courts, among many other causes, of "all suits of a civil nature, at common law or in equity, where the matter in controversy exceeds, exclusive of interest and cost, the sum or value of $3,000, and is between citizens of different States," etc.

The Federal legislation formerly applicable will be found in United States Statutes at Large, vol. 25, p. 433, being chapter 866, Laws 1888.

Comparing the two acts, it will be noted that the statute first mentioned, and which now prevails, confers jurisdiction on the district instead of the circuit courts, the latter being abolished by the act, section 289, and raises the jurisdictional amount to $3,000, but the general descriptive terms as to the character of the causes for removal are the same in each: "Any suit of a civil nature, at law or in equity," and the decisions construing and dependent upon the proper meaning of these terms should have the same significance now as under the former statute.

In construing this legislation, it has been established by many authoritative decisions that in these acts conferring jurisdiction the term "any suit of a civil nature, at law or in equity," does not extend to or include causes concerning the probate of a will, and, by consequence, causes of this nature are not, as a rule, under the act; and these cases further hold that where a will has been admitted to probate in a State court having jurisdiction, its validity may not be further questioned in collateral or independent suits in the Federal courts unless the adjudication of probate may be so assailed in the State courts where the probate was had. The question was recently presented to the Supreme Court of the United States in *Farrell v. O'Brien,* 199 U. S., 89, and, after a very full discussion of the subject by *Chief Justice White,* it was held as follows: "As the authority to make wills is derived from the State, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

Where a State law, statutory or customary, gives to the citizens of the State, in an action or suit *inter partes,* the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies. The action or suit *inter partes,* however, must relate to independent controversies and not

to mere controversies which may arise on an application to probate or a mere method of procedure ancillary to the original procedure."

The same general principle has been recognized and upheld in former cases in the Supreme Court, as in *Ellis v. Davis,* 109 U. S., 485; *In re Broderick's Will,* 88 U. S., 503, and the lower Federal courts have rendered many decisions to the same effect and in which the ruling was sustained in opinions of great force and learning. *Wahl v. Franz,* 100 Fed., 680, reported also in 49 L. R. A. at page 62; *In re Aspinwall's Estate,* 83 Fed., 851; *In re Cilly,* 58 Fed., 977.

The position is not affected by the fact that, on caveat filed and issue joined, the cause is transferred for decision to a court of general jurisdiction, where, as in this State, the issue and its determination in such court is only a part of the probate procedure required to establish the validity of the will. *Farrell v. O'Brien, supra,* and *Copeland v. Bunning,* 72 Fed., 5.

In North Carolina the proceeding for probate of a will is not regarded as an adversary suit *inter partes*, but is a proceeding *in rem,* in which the jurisdiction of the court, in the exercise of probate powers, is exclusive, and an adjudication of probate may not be assailed or questioned in any collateral or independent proceedings. *Collins v. Collins,* 125 N. C., 98; *McClure v. Spivey,* 123 N. C., 678; *Varner v. Johnston,* 112 N. C., 570; *McCormick v. Jernigan,* 110 N. C., 406; *Hutson v. Sawyer,* 104 N. C., 1. In this State, therefore, such a proceeding comes clearly within the principle sustained and applied in the *Ferrall case* and others, *supra,* holding that a case concerning the probate of a will or an issue involved therein is not a removable cause within the meaning of the Federal legislation of the subject.

While we have considered and decided the propounders' motion on its merits—a course sometimes pursued by us in exceptional cases, *Gilbert v. Shingle Co.,* 167 N. C., pp. 286-290, the question does not seem to be open to appellant on this record by reason of the adverse decision of Judge Peebles rendered at February Term, 1916, and from which propounders did not appeal. If this were a removable cause, his Honor had no right to allow an amendment reducing an averment as to value involved in the suit after petition filed, accompanied by proper and sufficient bond. *Winslow v. Collins,* 110 N. C., 119; Moon on Removal of Causes, sec. 88. But his order to this effect, though erroneous, was conclusive so far as the State court was concerned, and Judge Winston, at the July term, was right in denying propounders' further application on that ground. *Herndon v. Ins. Co.,* 108 N. C., 648.

We find no error in the record, and the judgment denying application for removal is

Affirmed.

BOGERT & HOPPER v. HENDERSON MANUFACTURING COMPANY.

(Filed 18 October, 1916.)

Accord and Satisfaction—Compromise—Disputed Account—Consideration—Statutes.

Where the debtor contracted for goods to be delivered to him at stated intervals, and after a part had been delivered, for which payment had become due, he requested the creditor to cancel the balance of the contract and sent a check in full, and there is no dispute about the amount due for either the part of the goods received or the balance obligated for by the purchaser, by accepting the check the seller had the right to assume that it was in full for only the amount then due him, and it was without consideration as to the balance of the goods then to be furnished, and was not a compromise within the meaning of the Revisal, sec, 859.

APPEAL from a justice of the peace, tried before *Stacy, J.*, May Term, 1916, of VANCE, upon the following issue:

Is the defendant indebted to the plaintiff? Answer: "No."

From the judgment rendered, the plaintiff appealed.

J. H. Bridgers for plaintiff.

A. C. and J. P. Zollicoffer for defendant.

BROWN, J. The undisputed facts in this case are as follows: The defendant was a manufacturer of buggy bodies in the town of Henderson, N. C. It purchased from the plaintiffs 100,000 white birch spindles, to be shipped 10,000 per month at $2.40 per thousand. In pursuance of this contract, the spindles were manufactured by the plaintiffs and $64.44 worth of them at contract price were shipped to the defendant.

About 15 September, 1914, the plant of the defendant was destroyed by fire, and it notified the plaintiffs and asked to be released from the obligation to take the remainder of the spindles, all of which had then been manufactured except 6,350. The plaintiffs declined to release the defendant, and on 1 December, 1914, demanded payment for those spindles which had been shipped, amounting to $64.44, and also those which had been then manufactured on plaintiffs' order.

On 9 December, 1914, defendant wrote the plaintiffs a letter in reply to an account which the plaintiffs had rendered the defendant for the $64.44, as well as $170.64 for the spindles which the plaintiff had completed and offered to deliver, and from the payment of which the defendant asked to be released.

In this letter defendant said, among other things "After business opens again, you will have no trouble disposing of the spindles, we trust,

and see no reason why you should. Check inclosed for $64.44, which is for all account in full to date; no receipt necessary." The check was as follows, with the indorsement:

HENDERSON, N. C., 9 December, 1914.

THE CITIZENS BANK OF HENDERSON (66-141)

Pay to the order of BOGERT & HOPPER.....($64.44) sixty-four and 44/100 dollars.

HENDERSON MANUFACTURING COMPANY,

For account in full.
In full account to date.

N. B. POWELL,
Secretary and General Manager.

Pay to the order of
Closter National Bank.
Bogert & Hopper.

We are of opinion that upon all the evidence the court should have instructed the jury that the plaintiffs were entitled to recover. The cases relied upon by the defendant, based upon our statute, Revisal, sec. 859, do not warrant the contention that the check sent by the defendant to the plaintiff was intended by the parties to be in full compromise of settlement of the entire transaction. The check was for the exact amount of the spindles which the defendant had received, and was bound to pay for. It was not in settlement of any part of the spindles which had been manufactured for the defendant but which had not been delivered. The plaintiffs, when they accepted this check, had a right to suppose that it was sent in settlement of the debt which the defendant admitted it owed. If the check had been made out for a larger sum than $64.44, there might be some plausibility in the defendant's contention that the check was in compromise and settlement of the entire transaction; but inasmuch as it paid nothing more than the defendant admitted it owed at the time it sent the check, it furnished no consideration whatever for a release from the debt of $170.64 which the defendant owed for the remaining spindles.

Our statute, Revisal 1908, p. 858, sec. 859, declares that, "In all claims, or money demands of whatever kind, and howsoever due, where an agreement shall have been or shall be made and accepted for a less amount than that demanded or claimed to be due in satisfaction thereof, the payment of such less amount according to any such agreement in compromise of the whole shall be full and complete discharge of the same."

When the defendant remitted a check for the exact amount which it admitted it owed and which it was compelled to pay, the plaintiffs

had a right to suppose that it was intended to be in full of that debt. It could not reasonably be said that it was in compromise of anything. When a creditor receives and collects a check sent by a debtor upon condition that it shall be in full for a disputed account, he may not thereafter repudiate the condition annexed to the acceptance. That principle is well settled. But where the facts are that there are two independent items of account, both of which the defendant admits he owes, and seeks a release from one of them, which the creditor refuses and he sends a check in full for the exact amount of the other, the creditor has a right to infer that it is in settlement of that item, and not of the other.

The principle of law applicable to this case is that laid down in *Rosser v. Bynum,* 168 N. C., 340, viz.: "A check given and received by the creditor which purports to be in full of account to date does not conclude the creditor, accepting it, from showing that in fact it was not in full; unless, under the principles of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account."

It is true, plaintiffs did not request the court to charge that upon all the evidence plaintiffs are entitled to recover, but they did except to parts of the charge wherein the court left the matter for the jury to determine as to how the check was received. That was erroneous. Instead, the court should have instructed the jury that the check was not sent or received in settlement of a *disputed* account.

None of the account was disputed, and no offer of compromise was made or accepted. The defendant had only paid for the spindles he had received, and asked to be released from payment for the remainder, which request plaintiffs had refused.

New trial.

JOHN M. FLEMING ET ALS. v. C. H. SEXTON ET ALS.

(Filed 18 October, 1916.)

1. Pleadings—Issues—Tenant by the Curtesy.

Where the defendant is in possession of lands of his deceased wife, which the plaintiff claims in his action alleging title, which is denied, it is competent for the defendant, without specially pleading it, to show that issue had been born alive of the marriage, capable of inheriting it, and that he was tenant by the curtesy, and as such held the legal title thereto for his life, with the right of possession.

2. Tenant by the Curtesy—Evidence—Issue Born Alive—Interest.

Where the defendant is in possession of the lands in dispute, claiming the right thereto as tenant by the curtesy, it is competent for him to testify directly to the fact that issue of the marriage had been born alive, notwithstanding his interest in the result of the action, which goes to its weight and not to his competency to testify thereto.

3. Tenant by the Curtesy—Issue Born Alive—Instructions—Appeal and Error.

As to whether it is necessary for the child to have an independent life from its mother after the severance of the umbilical cord in order for the husband to be tenant by the curtesy consummate in his wife's land, after her death, *quære*. But when there is evidence that the child existed independently of the mother, for a while, a charge to the jury that they must so find in order that the defendant should establish his right as tenant by the curtesy, if erroneous, is not error prejudicial to the plaintiff.

4. Tenant by the Curtesy—Issue Born Alive—Wife's Declarations—Evidence.

Where the defendant claims title and possession of his wife's land after her death, as tenant by the curtesy, declarations of the deceased wife that the child was not born alive are incompetent as evidence, if not shown to have been made *ante litem motam*.

5. Estates—Life Tenants—Waste—Cutting Timber—Improvements.

The cutting of standing timber on lands used for erecting buildings and making other improvements thereon, or such as had reached its highest development and begun to deteriorate, and similar acts which tend to increase rather than diminish the value of the inheritance, are not acts of waste when done by the life tenant, that will deprive him of his estate, under the modern doctrine now obtaining here.

6. Judgments—Non Obstante—When Allowed.

Judgments *non obstante veredicto* will not be allowed except where the plea confesses a cause of action and sets up new matter in avoidance which is insufficient, although true, to constitute a defense or a bar to the action.

CIVIL ACTION tried before *Lyon, J.*, at February Term, 1916, of HARNETT.

This is an action to recover possession of the tract of land described in the complaint, the rents and profits thereof during its occupancy by the defendants, and damages for the cutting and sale of certain timber.

The plaintiffs allege that they are the owners in fee of the land and that the defendants are in the wrongful possession thereof, and these allegations are denied by the defendants.

It was admitted that the plaintiffs, claiming by inheritance through Irene McCoy, who intermarried with the defendant Sexton, were the owners in fee of said land unless a child was born alive of the marriage of said Irene McCoy and the defendant Sexton, and that if a

child was born alive, that the defendant Sexton was entitled to a life estate in said land as tenant by curtesy.

There was evidence of the birth of issue alive, and the jury so found.

It was admitted by defendant Sexton that he sold the timber from said land of the value of $1,100, but he contended that this was not waste, and offered evidence tending to prove that the timber which he sold had reached its full growth and was deteriorating; that he sold the timber for the purpose of making permanent improvements on the land, and so used the proceeds, and that the inheritance had been increased in value.

The evidence offered by the defendants to prove the birth of issue alive was objected to by the plaintiffs upon the ground that the issue was not raised by the pleadings, and that the evidence itself was incompetent.

The plaintiffs also objected to the evidence offered by the defendants to prove that the land had increased in value, that the timber was cut and sold for the purpose of making improvements on the land, that it was so used, and that the inheritance had increased in value.

There was a verdict and judgment for the defendants, and the plaintiffs appealed.

B. C. Beckwith and Baggett & Baggett for plaintiffs.
Clifford & Townsend for defendants.

ALLEN, J. This action was commenced to recover possession of the land described in the complaint, rents and profits during occupancy by the defendants, and damages for trespass in cutting and selling timber from the land.

The plaintiffs proceed upon the theory that they are the owners in fee of the land through inheritance from Irene McCoy, who was the owner in fee and intermarried with the defendant Sexton, and that the possession of the defendants is wrongful.

The defendant filed answer denying the title of the plaintiffs, and on the trial offered evidence tending to prove that during his marriage with the said Irene McCoy a child was born alive of said marriage capable of inheriting, and, therefore, contended that he was the owner of a life estate in said land as tenant by curtesy.

If, therefore, the evidence offered by the defendant to prove the birth of issue was competent and sufficient to be submitted to the jury, it follows, as the four requisites to an estate by curtesy—marriage, seizin of wife, birth of issue capable of inheriting, and death of the wife—would be present, that the plaintiffs would not be entitled to recover the possession of the land nor would they be entitled to the rents and profits.

The words "capable of inheriting" are taken from the common law, and mean simply that the child shall be in the line of inheritance, and if the inheritance is in tail male the birth of a female child would not be sufficient to create the estate, and *vice versa.*

This would leave open for investigation only the question of the liability of the defendant, as life tenant, for waste.

It must be kept in mind, however, that when the evidence was offered by the defendant as to the condition of the land and the improvements made, that the question of the birth of issue was then pending before the jury and had not been settled, and if the evidence was competent either upon the theory that the plaintiffs were the owners in fee absolute or in remainder, there would be no error in admitting it.

Let us, then, see if any evidence of the birth of a child alive was admissible on the issue raised by the pleadings, and whether the evidence offered was competent, and of sufficient probative force to be submitted to the jury.

The plaintiffs allege that they are the owners in fee, and entitled to immediate possession of the land described in the complaint, and the defendant denies both of these allegations.

This raised an issue of title and of the right to possession, and under it the defendant had the right to offer evidence tending to prove a legal as distinguished from an equitable defense (*Farrior v. Houston,* 95 N. C., 580; *Locklear v. Bullard,* 133 N. C., 263), and the facts showing an estate by curtesy are legal and require no aid from a court of equity.

The case from New York, relied on by the plaintiffs, holding that a defendant cannot offer evidence of adverse possession under a general denial, is contrary to our decisions. *Farrior v. Houston,* 95 N. C., 578; *Mfg. Co. v. Brooks,* 106 N. C., 112; *Cheatham v. Young,* 113 N. C., 161; *Shelton v. Wilson,* 131 N. C., 501.

It has also been held, under certain conditions, that evidence of an estoppel may be offered by the defendant without pleading it (*Weeks v. McPhail,* 129 N. C., 73), and that it is competent, under a general denial, to show that any deed in the chain of title of the plaintiff is void because made contrary to statute, or by a grantor mentally incapable, or for fraud in the factum. *Mobley v. Griffin,* 104 N. C., 116; *Averitt v. Elliott,* 109 N. C., 564.

This rule prevails because the pleadings are general in actions to try title to land. The plaintiff alleges ownership and under this allegation is permitted to establish his title in any legitimate way, by a connected chain of title or by adverse possession with or without color, by proof of tenancy, etc.; and the same latitude is allowed the defendant in making his defense.

"Under the plea of the general issue the plaintiff is required to prove a present right to the premises in dispute. And, consequently, whatever will operate as a bar to the plaintiff's right of possession will cause him to fail in his proof, and entitle the defendant to a verdict upon the general issue. . . . So in those States which have adopted the code system it is usually held that the defendant may under the general denial prove any fact which will defeat the plaintiff's cause of action." 9 R. C. L., 897-898.

The plaintiff carries the burden of proving his legal right to possession, and the defendant is permitted to prove facts which show that his possession is lawful.

The witnesses who testified to the birth were the defendant and the nurse, both of whom were present and purported to testify to facts within their knowledge, and as neither was testifying to a transaction with a deceased person, there was no disqualification to either except interest, which goes to the weight of the evidence, and not to the competency of the witness to testify.

The defendant, who was corroborated by the nurse, testified: "During my married life there was a child born to me and my wife. That child was living at the time of its birth. I was present in the room with my wife at the time of the birth of the child. The midwife, Sue Williams, was also present. She is here today. There was no one else there at the time of the birth but we three. The evidence of the new-born child, a little groan or noise, and some little blubber from nose and mouth and pulsation of the heart. I observed the little muscular tremor, blubber of the nostrils or mouth, pulsation of the heart, and a little noise, but not exactly a cry. I could not state exactly how long after birth the child lived. The pulsation of the heart continued for some minutes. After the birth of the child it was given by me to the midwife, Sue Williams. The child was born on the morning of the 15th, I believe, and the mother died on the 17th."

There was no evidence that the child was born prematurely, and the presumption that all persons are normal so far as the natural functions of the body or organs are concerned (10 R. C. L., 879; *Harris v. Laundry Co.*, Anno. Cases, 1913 E. 99), was corroborated by the direct evidence of the defendant, who testified: "As to my wife's lying-in condition, that was normal." Was this evidence sufficient to be submitted to the jury?

All of the authorities agree that if alive for only a moment of time the law is satisfied, but there is some disagreement as to whether this life in the child must be independent of the mother after the cord is severed, or can exist before. The rule and the various views are stated

in 8 R. C. L., 393, as follows: "It will be observed that it is required that the issue be born alive, and whether this condition has been fulfilled is sometimes a difficult question to decide, although there are particular signs which all agree show the fact indubitably one way or the other. 'Born,' as ordinarily understood, means 'brought forth,' and a child is completely born, according to some authorities, when it has been delivered or expelled from and has become external of the mother, whether the umbilical cord has been cut or not, though it has also been insisted that a child is not completely born until it lives by respiration independent of its mother. The burden of proving that the child was born alive rests on him who claims an estate by the curtesy dependent on such birth. Respiration or breathing is certainly evidence of life, but it is not necessary to prove the fact of respiration from actual observation. It has been held that life may exist in a newly born child without proof that the child was observed to have breathed; indeed, it has been held that life may exist for a time without respiration. This is only one of the signs which manifest the existence of life. There are other signs or indications, among which the beating of the heart and the pulsation of the arteries may be considered satisfactory evidence of life in the child. . . . The husband is not disqualified because of interest to testify relative to whether a child was born alive."

His Honor applied the rule most favorable to the plaintiffs by holding that life in the child must be independent of the mother, and charged the jury in accordance with the law as declared by the courts of Delaware. "'Alive,' as used in defining an element of an estate by curtesy requiring that a child should be born alive, means that it should be alive and have an independent life of its own for some period after delivery. There is no legal presumption in such a case in favor of the separate life of a newly born child, and while respiration or breath is evidence of such life and existence, proof of respiration from actual observation is not necessary to establish the fact. Other indications of life, such as the beating of the heart, and the pulsation of the arteries after the separation of the child from the body of the mother, may be satisfactory evidence of it, because they show the fact that circulation has been established and is maintained and carried on in the body of the child independently of the mother, and proof of such fact sufficiently establishes independent life of the child for the purpose of curtesy. *Cannon v. Killen.* (Del.), 5 Houst., 14." 1 Words and Phrases, 844.

This evidence was accepted by the jury, and was sufficient to sustain a verdict, as the witnesses not only swear the child was born alive, but they also testify to facts, such as the struggle, the noise made, and the pulsation of the heart, which tend to prove life.

The plaintiffs further contend that if there was evidence which ought to have been submitted to the jury upon the question of birth of issue alive, his Honor committed error in refusing to allow a witness offered by the plaintiffs to testify to the declaration of Mrs. Leonora McCoy, mother of the wife of the defendant, who is now dead, that the child was not born alive; but this evidence was properly excluded, because the plaintiffs did not show that the declaration was made *ante litem motam.* 16 Cyc., 1230; Chamberlayne on Evidence, vol. 4, sec. 2919; *Hodges v. Hodges,* 106 N. C., 374.

Declarations of deceased persons are frequently competent on questions of pedigree, but, as stated by *Shepherd, J.,* in the last case, "It is well settled that as preliminary to their admission it must be affirmatively shown that they were made *ante litem motam.*"

We must, therefore, deal with the question of the right of the plaintiffs to recover damages for the cutting of timber upon the assumption that the defendant has a life estate in the land in controversy, and determine whether the cutting of the timber under the facts and circumstances in evidence amounted to waste.

Waste at common law was any permanent injury, done or permitted by the tenant of an estate less than a fee, to the inheritance. Mod. Am. L., vol. 5, sec. 323. "A spoil or destruction done or permitted with respect to lands, houses, gardens, trees, or other corporeal hereditaments, by the tenant thereof, to the prejudice of him in reversion or remainder, or, in other words, to the lasting injury of the inheritance." *Norris v. Laws,* 150 N. C., 604. But, "In this country there is a strong inclination to amplify the privileges of the life tenant. As there are in this country such vast tracts of unimproved land which would otherwise be dormant in the hands of the life tenant, public policy required that the doctrine of waste should be liberally construed." Mod. Am. L., vol. 5, p. 324.

As a result of the difference in conditions in England and America, there is less inclination here to attach importance to the changes made in the inheritance, as from woodland to meadow or cultivated land, and the effect upon the inheritance, the purpose and intent with which the act was done, and whether the owner of the estate less than a fee has acted as a prudent owner of a fee would have done, are regarded as better and safer tests of the liability for waste.

In *Thomas v. Thomas,* 166 N. C., 628, *Hoke, J.,* in a valuable and learned opinion, reviews the authorities, and he says, after giving several accepted definitions of waste: "While these definitions are still regarded as sufficiently descriptive, as shown in the decisions referred to and others of like kind here and elsewhere, in adapting the general

principle to conditions existent in this country, the acts which constitute waste have been variously modified until it has come to be established that a tenant, as a general rule, may do what is required for the proper enjoyment of his estate to the extent that his acts and management are sanctioned by good husbandry in the locality where the land is situated, having regard, also, to its condition, and which do not cause a substantial injury to the inheritance."

He then states that the general rule is that standing timber growing on land is considered a part of the inheritance, and that a tenant is never allowed to cut and sell timber merely for his own profit, but there is clear intimation that the tenant for life is not liable for waste in the cutting and sale of timber if done with a present view of making needed repairs, and the proceeds are honestly expended for that purpose and no substantial injury to the inheritance has been caused; and his Honor charged the jury according to this principle.

The evidence offered by the defendant brings him within the rule. He testified: "I have sold some timber from the place. It was mostly old field timber. It had reached its highest development and began to deteriorate. My purpose in having the timber cut was that of making improvements on the buildings, building up fences and tenant houses. The making of these improvements was necessarily for the good of the place at that time. I applied the timber and the proceeds of its sale to the improvement of the buildings, building fences, repairing the old houses, and built some new tenant houses. During my entire occupancy of the place I think there have been built five new houses. These are ordinarily tenant houses that I am speaking of—two and four rooms. Also, some stables and other outhouses have been built during the period of my occupancy."

He also offered the evidence of other witnesses tending to show that the general condition of the land was improved, that the buildings which were placed upon the land were needed for the enjoyment of the inheritance, and that the value of the land was increased by cutting the timber and putting the proceeds in improvements.

This evidence was objected to by the plaintiffs, but was competent unless the cutting and sale of the timber is within itself waste, without regard to the purpose for which it was done, the use made of the proceeds, and whether it was the act of a prudent husbandman, and, as we have seen, the act itself is not determinative of the question.

The plaintiffs also moved for judgment *non obstante veredicto*, but this motion cannot be allowed except where the plea confesses a cause of action and sets up matter in avoidance which is insufficient, although

true, to constitute a defense or a bar to the action (*Baxter v. Irvin,* 158 N. C., 279), and here the defendant, instead of confessing the cause of action alleged by the plaintiffs, denies it.

We find

No error.

POCOMOKE GUANO COMPANY v. THE CITY OF NEW BERN ET AL.

(Filed 18 October, 1916.)

1. Taxation—Tax List—Personalty Omitted—Back Taxes—County Commissioners.

Where specific property has been omitted from the tax list by the owner or person required by law to list it, the county commissioners shall enter the same on the duplicate of the next succeeding year in which it shall have escaped taxation; and the aldermen of a city shall do likewise. Revisal, sec. 5232.

2. Taxation—Uniformity—Constitutional Law — Equalization—Statutes—Excessive Valuation.

Our Constitution requires that all taxes, whether levied by State, county, city, or town, shall be laid by a uniform rule, which can only be done, as to property, by providing for one valuation; and by statute creating a county board of equalization, with authority to hear and determine complaints as to proper valuation and excessive rates, etc., Revisal, secs. 5234, 5235, 5236, the county board is given exclusive original jurisdiction to grant relief against excessive valuation, and the valuation thus determined by it is binding upon cities and towns and must be adopted by them.

3. Same—Pleadings—Demurrer.

The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained.

THIS action is brought to recover certain alleged excessive taxes paid to defendant by plaintiff on fertilizing material stored in defendant's warehouses in the city of New Bern during years 1907, 8, 9, and 10. The cause was heard by *Devin, J.,* at April Term, 1916, of CRAVEN, upon the pleadings, and a demurrer *ore tenus* sustained upon the ground that the complaint failed to state a cause of action. No amendment to complaint was asked. From the judgment dismissing the action, the plaintiff appealed.

Moore & Dunn for plaintiffs.

R. A. Nunn for defendants.

BROWN, J. The plaintiff alleges that defendant placed its fertilizer upon the tax lists for the years named and valued it at an excessive valuation, refusing to hear evidence as to its actual value, as requested by defendant.

The plaintiff paid the taxes upon such assessed valuation to defendant, and sues to recover back the taxes upon the difference between what plaintiff alleges is the actual value of the fertilizer on hand during those years and the taxes as assessed. Plaintiff admits that it failed to list said fertilizer or any part of it for taxation during those years.

The plaintiff is a Virginia corporation, and claimed that its manufactured fertilizer stored in New Bern during those years for sale was not subject to local *ad valorem* taxation, and sought to enjoin the county authorities from placing the fertilizer upon the tax books for those years and from collecting the taxes which they had assessed thereon.

The case was appealed to this Court, and it was held that while the State may not levy an *ad valorem* or other tax on personal property in transit in the course of interstate commerce, the principle does not apply to property stored within the State by a nonresident for purposes of sale and distribution. 158 N. C., 212.

Under that decision we assume that the county of Craven collected the taxes upon plaintiff's fertilizer stored in New Bern during that period.

The defendants contend that the plaintiff is not entitled to recover anything by this action, unless it is alleged and proven that the valuation of its property upon the tax books in the hands of the city tax collector is greater than that fixed upon it by the proper authorities, viz., the board of commissioners for the county of Craven, or that the tax which it has been forced to pay on the property was greater than it would have been if correctly computed at the legal rate on the adjudged valuation.

Our laws provide that the board of county commissioners and the chairman of the board of list takers and assessors of the several townships and wards of cities and towns shall contitute a board of equalization for the county (Revisal, sec. 5234); to such board the returns of the list takers and assessors are made. It is provided that the board of commissioners of the county shall hear all persons objecting to the valuation of their property or the amount of tax charged against them; that such board shall ascertain the valuation of property by examination of witnesses or otherwise, and insert it in the abstract (sec. 5235); and it is further provided that taxpayers may complain to the board of commissioners of the county if their property has been improperly valued, or if the taxpayer is charged with an excessive tax, etc. (sec. 5236).

In all cases where any specific property shall have been omitted from the tax list by the owner or person required by law to list the same, the board of commissioners shall enter the same on the duplicate of the next succeeding year, and shall add to the taxes of the current year the simple taxes of such preceding year, not exceeding five years, in which such personal property shall have escaped taxation, and the board of commissioners shall value and assess the personal property for those years; and the board of aldermen of the city shall do likewise (sec. 5232).

Our Constitution requires that all taxes, whether levied by State, county, city, or town, shall be laid by a uniform rule, and this can only be done by providing for one valuation only upon property. *Kyle v. Comrs.*, 75 N. C., 445.

This valuation is made by the county authorities, who have exclusive original jurisdiction to grant relief against excessive valuation. Their valuation is binding upon the cities and towns, and must be adopted by them. When the county authorities reduce such valuation, the other municipal authorities must do likewise. *Wade v. Comrs.*, 74 N. C., 81.

The valuation upon personal property is made by the taxpayer when he lists his property, and is binding upon the list taker, but it may be corrected by the county commissioners or board of equalization *at the date fixed by the statute,* upon due notice to the taxpayer.

It follows, therefore, that "excessive valuation" as used in the various Machinery Acts means a valuation exceeding that which is fixed by the county authorities, and the "excessive tax" that may be recovered back by the taxpayer is a tax exceeding what the tax would be if correctly calculated at the legal rate on the valuation as finally fixed by the county authorities.

It is, therefore, incumbent upon the plaintiff, in order to set out a good cause of action, to allege that the tax it seeks to recover was levied upon a valuation greater than that fixed by the county authorities; that is to say, that the tax plaintiff has been forced to pay was greater than it would have been if correctly computed at the legal rate on the adjudged valuation. It is the difference that plaintiff would be entitled to recover. *Pickens v. Comrs.*, 112 N. C., 699.

Lumber Co. v. Smith, 146 N. C., 199, cited by plaintiff, has no relation to the question presented by this appeal. In that case this Court held that the county authorities have no right to place solvent credits or other personal property upon the tax lists and assess taxes thereon, although the taxpayer may have omitted such property from his tax list, unless they give the taxpayer due notice and an opportunity to be heard. An injunction was granted prohibiting the collection of such tax.

It is true, the plaintiff avers that the city aldermen refused to hear plaintiff upon the application to reduce the valuation of the fertilizer, but *cui bono?* A hearing would have been fruitless, since the aldermen had no jurisdiction to change such valuation.

Affirmed.

B. F. POWELL v. WILLIE S. DAIL ET AL.

(Filed 18 October, 1916.)

1. Actions—Parties—Principal and Agent—Fraud—Judgment—Estoppel.

Where the seller and his agent in the sale of lands are sued by the purchaser upon the ground of fraud in the negotiations for the purchase, in representing the title to be good and preventing the plaintiff from investigating before buying, and it appears that the deed to the seller had been set aside in an action wherein it was determined that his grantor was without sufficient mental capacity to make it, but the agent was not made a party to that action, it is *Held*, that the agent is not affected by the former judgment and may defend, in the present action, as to the mental capacity, and that his principal was an innocent purchaser for value, etc.

2. Same—Defenses—Deeds and Conveyances—Innocent Purchaser.

Where the purchaser of lands sues the seller and his agent for fraud in procuring the sale, for that the seller's deed was void for want of mental capacity of his grantor, but the plaintiff claims to be an innocent purchaser for value, without notice, if his contention in this respect is established no actionable wrong has been committed against him; and while he may be concluded by a former judgment declaring his deed void, this does not extend to his agent in making the sale, who was not a party to that action.

3. Pleadings—Complaint—Lis Pendens—Statutes—Innocent Purchaser.

A complaint in an action involving the title to lands has the effect of notice of the plaintiff's claim to the land as therein set forth, when the party to be affected therewith resides within the county, and summons has been issued in the cause; and where such party lives in a different county of the State, and claims as a bona fide purchaser, to affect him with notice of *lis pendens* the requirements of the statute must be strictly followed; among other things, that it be served within sixty days after its filing. Revisal, sec. 461.

4. Same—Record Entries—Alias Summons—Presumptions—Rebuttals.

In an action involving the title to lands there was entered on the summons docket, "Case continued. Time to file pleadings." Thereafter an alias summons was issued. *Held*, the issuance of the alias sum-

mons presupposes that the court had not obtained jurisdiction up to that time, and would rebut the presumption, had it arisen under the former entries, that the defendant, claiming to be an innocent purchaser of the lands, had constructive notice of the complaint filed in the action as *lis pendens*.

5. Same—Appeal and Error—Trials—Questions for Jury.

Entries in this case on the summons docket, that it had been continued, with time allowed both parties to plead, being rebutted by a subsequent order for an alias summons, and it being necessary to determine the date on which the defendant in that action, the plaintiff in this one, had been served with summons, upon the question as to whether the complaint would operate as a *lis pendens*, the cause is remanded to the Superior Court, that the fact be determined by a jury under the general or special issues, with the right of either party to offer evidence thereon.

CIVIL ACTION tried before *Bond, J.*, at March Term, 1916, of SAMPSON.

This is an action to recover damages upon the ground of fraud in the sale of a tract of land.

Minnie Sabra Vann was the owner of the land, and on 12 January, 1912, she conveyed the same to the defendant Dail for the recited consideration of $129, and on 13 December, 1912, the said Dail sold and conveyed said land to the plaintiff Powell for $200, the defendant Williamson acting as the agent of Dail in making the sale; and it is in this last sale to the plaintiff the fraud is alleged to have occurred in representing the title to the land to be good, and in preventing the plaintiff from investigating the title before buying.

On 6 September, 1912, the heirs of Minnie Sabra Vann, she being dead at that time, commenced an action in the Superior Court of Sampson County against the defendant Dail for the purpose of setting aside the deed executed to him on 12 January, 1912, upon the ground that the said Minnie Sabra Vann did not at that time have sufficient mental capacity to make a deed, and that there was nothing paid for the deed.

The complaint was filed on 6 September, 1912, describing the land and stating the purpose of the action.

The original summons is not in the papers, and there is no entry on the docket of service, or of an appearance by the defendant in person or by attorney. The summons issued to Wayne County, where the defendant Dail and his agent Williamson lived.

At October term of court, 1912 (October 26), the following entry appears on the summons docket: "Case continued. Time to file pleadings."

On 16 November, 1912, an alias summons was issued in said action which was served on the defendant Dail on 9 January, 1913.

The plaintiff in this action, Powell, bought the land on 13 December, 1912, for value and without notice, unless the filing of the complaint is a *lis pendens*.

He was afterwards made a party to the action of *Vann v. Dail,* which was tried, resulting in a finding by the jury that Minnie Sabra Vann did not have sufficient mind to make the deed to Dail and adjudging the deed from Dail to Powell to be void.

No issue was submitted to the jury as to whether Powell was a purchaser for value without notice.

The defendant in this action, Williamson, was not a party to the action of *Vann v. Dail.*

His Honor held, on these facts, that the entry at October term of court, "Case continued. Time to file pleadings," raised a presumption of an appearance or service, and as matter of law that the filing of the complaint was a *lis pendens.*

The defendants excepted. The plaintiffs offered evidence tending to establish his cause of action, and there was evidence to the contrary by the defendants.

There was a verdict and judgment in favor of the plaintiff, and the defendants appealed.

Fowler & Crumpler, H. E. Faison, and I. C. Wright for plaintiff.
Butler & Herring and Langston, Allen & Taylor for defendants.

ALLEN, J. The principal defendant, H. G. Williamson, was not a party to the former action of *Vann v. Dail;* he has never had title to the land in controversy in that action, nor does he claim under any one who has had title or who was a party to the action.

He is, therefore, not only not concluded by the verdict and judgment rendered, but they have no legal effect so far as he is concerned, and he has the right in this action to try anew all questions litigated therein.

He can contest the question of the mental capacity of the grantor in the deed to Dail, and he is not precluded from showing that the plaintiff Powell was a purchaser for value without notice, although Powell lost the land in the former action.

This is true because only parties and privies are bound by judgments, and to hold otherwise would be to condemn without a hearing and without notice, which is contrary to the law of the land, and a taking without due process of law.

It then becomes of the first importance to determine correctly in this action the status of Powell, because if he is a purchaser for value without notice, he has the title as between him and Williamson, and no fraud has been perpetrated on him, and he has suffered no actionable injury.

He says that he is a purchaser for value, and that he had no actual notice of any fraud in procuring the deed to Dail, and his action is based on this allegation; but he contends that without fault on his part

he is affected with legal notice of the pendency of the action of *Vann v. Dail,* and that this constitutes the defects in his title.

The question, therefore, determinative of this phase of the case is whether the former action was pending at the time he bought, on 12 December, 1912, and whether the filing of the complaint therein on 6 September, 1912, is a *lis pendens.*

When the action is brought in the county where the land is situate it is not necessary to file a formal *lis pendens,* the filing of the complaint, describing the property and stating the purpose of the action, being held sufficient; but there is "but one rule of *lis pendens* in North Carolina," and the filing of the complaint "puts in operation all of the provisions of the statute." *Collingwood v. Brown,* 106 N. C., 367.

It is also held that, "The rule *lis pendens,* while founded upon principles of public policy and absolutely necessary to give effect to the decrees of the courts, is nevertheless, in many instances, very harsh in its operation; and one who relies upon it to defeat a *bona fide* purchaser must understand that his case is *strictissimi juris.*"

When we turn to the statute we find it is provided in section 461 of the Revisal that, "The notice of *lis pendens* shall be of no avail unless it shall be followed by the first publication of notice of the summons, or by an order therefor, or by the personal service on the defendant within sixty days after such filing."

There was no publication of the notice of the summons and no order therefor, because the defendant in the former action was a resident of the State, and the part of the statute that is material is, "The notice of *lis pendens* shall be of no avail unless it shall be followed by personal service on the defendant within sixty days after such filing."

The complaint, which is relied on as a *lis pendens,* was filed on 6 September, 1912, and the question is, Was the summons in the action served on the defendant within sixty days of that time, as, otherwise, in the language of the statute, the notice is of no avail.

His Honor held that the entry on the summons docket at October Term, 1912, "Case continued. Time to file pleadings," was conclusive of an appearance or service prior to that time, and decided as matter of law that the plaintiff bought with notice of the former action.

There is no entry on the docket of an appearance by the defendant in person or by attorney, and no evidence of a request made to the court or counsel for an extension of time to answer. The entry is "time to file pleadings" not "time to answer," and it is at least ambiguous, indicating the usual entries made by clerks when the action for any reason is not ready to be heard.

There was no evidence of service or appearance except the entry, and if this is evidence of the fact, or if it goes further and raises a pre-

sumption in favor of the plaintiff, it is rebutted by the action of the court in issuing an alias summons on 16 November, 1912, which was not served until 9 January, 1913.

An alias summons cannot issue except when the original has *not* been served (Revisal, sec. 437), and it presupposes that the court has not up to that time obtained jurisdiction of the defendant by appearance or service, as otherwise the court would be doing a vain and useless thing to issue the alias writ.

"The general presumption is that public officers perform their official duty and that their official acts are regular, and, where some preceding act or preëxisting fact is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive proof of such preceding act or preëxisting fact." 22 A. and E. Ency., 1267.

"It will be presumed that public officers have been duly elected, and that they have qualified; that their official acts are properly performed, and, in general, that everything in connection with the official act was legally done, whether prior to the act, as giving notice, serving process, or determining the existence of conditions prescribed as a prerequisite to legal action." 16 Cyc., 1078.

"It is a rule of very general application that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it the presumption of the due performance of the prior act." *Knox County v. Bank,* 147 U. S., 91.

These authorities were cited and approved in *Howell v. Hurley,* 170 N. C., 403.

If, therefore, his Honor's view is correct, that the entry at October term raises a presumption of service, and this is favorable to the plaintiff, the issuance of an alias on 16 November would raise a presumption of a want of service at that time, more than sixty days after the filing of the complaint, with the burden on the plaintiff; and the most he could ask would be that the time of service be found as a fact.

We are, therefore, of opinion there was error in holding as matter of law that the filing of the complaint operated as a *lis pendens,* and as the effect upon the right of action of the plaintiff depends on the time of the service of the summons, this fact, like other material facts, must on this record be submitted to the jury under separate issue, or under the general issues raised by the pleadings, with the right in each party to offer any available evidence tending to show service or the want of it.

Of course, this does not affect the principle that when the action is in the county where the land is located, and the summons has already

been served, that the doctrine of *lis pendens* is put in operation by the filing of the complaint.

There are other exceptions relied on by the defendants, but it is not necessary to consider them, as they are not likely to arise on another trial.

New trial.

J. M. F. MILLS v. ATLANTIC COAST LINE RAILROAD COMPANY AND GEORGE WOOTEN.

(Filed 18 October, 1916.)

1. Carriers of Passengers—Safety of Passengers—Negligence—Insurers.

While a railroad company, as a common carrier, is held to a high degree of care to protect its passengers, and its conductors and station agents are made special policemen by statute to better enable it to perform this duty, it is not held liable as insurers for injuries to their passengers, which, in the exercise of such care, their conductors, employees, agents, etc., could not have reasonably foreseen and prevented.

2. Same—Trials—Evidence—Nonsuit.

Where a passenger, while intoxicated on a passenger train, assaults another passenger while the conductor is in another coach attending to his duties, and though in an intoxicated condition the aggressor had given no indication to the conductor that he was quarrelsome or unruly, but, to the contrary, had been courteous and polite to him, offering to pay him for some of his eggs he had stumbled over in the baggage car, and had peaceably left this car at the conductor's request; and the conductor had no intimation that this passenger was either intoxicated or likely to commit the assault; and, thereafter, as soon as he heard of the assault, arrested the aggressor, who went peaceably to destination, where he turned him over to the police of the city: *Held*, no evidence of actionable negligence which would render the company liable in damages for assault.

CIVIL ACTION tried before *Devin, J.*, and a jury, at July Term, 1916, of ONSLOW.

The action, by a passenger on defendant's train in August, 1916, was to recover damages of defendant company for failure to exercise proper care in protecting plaintiff from an assault and battery by another passenger, George Wooten. On denial of liability, there was verdict for plaintiff, and defendant excepted and appealed.

D. E. Henderson and Duffy & Day for plaintiff.

Thomas W. Davis, George Rountree, and Frank Thompson for defendant.

HOKE, J. Railroad companies, in the exercise of their franchise as common carriers of passengers, are held to a high degree of care in looking after the safety of passengers upon their trains. In furtherance of this obligation their conductors and station agents are constituted, by the State statutes, special policemen to enable them the better to perform their duty, and the company is responsible for assaults and actionable wrongs committed upon them by other passengers or third persons which could have been provided against or prevented by the utmost vigilance and foresight. *Stanley v. R. R.,* 160 N. C., 323; *Carpenter v. R. R.,* 124 N. Y., 53; *Kuhlen v. R. R.,* 193 Mass., 341; *Spohn v. R. R.,* 82 Mo. App., 74.

While this is the standard of care imposed in such cases, it is also well recognized here and elsewhere that these companies are not insurers of the safety of passengers and are not liable for injuries which, in the exercise of such care, their conductors, employees, agents, etc., could not have reasonably foreseen and prevented. *Pruett v. R. R.,* 164 N. C., 3; *Ry. Co. v. Hinds,* 53 Pa. St., 512; 2 Hutchison on Carriers (3 Ed.), sec. 981.

In application of these principles, and on careful consideration of the facts presented in the record, the Court is of opinion that the plaintiff has shown no right to recover in this case and that defendant's motion for nonsuit should have been allowed. From these facts it appears that in August, 1916, plaintiff, a passenger on defendant's train, from Wilmington to New Bern, was assaulted by another passenger, one George Wooten, and, according to plaintiff's version, received painful injuries. It further appeared that plaintiff and four or five others on the train had placed their baggage in one of the coaches, and this the conductor had removed to the baggage car; that some time after leaving New Bern Wooten, who had been drinking, on going into this car to look for his valise, stumbled over a basket of eggs belonging to the conductor; that the said Wooten was very apologetic about it, and insisted on paying for the eggs, and, on being told that he was not allowed to ride in the baggage car, went back and took his seat in the coach. There was nothing in the condition or conduct of George Wooten, when in the presence of the conductor or when he could reasonably have noted it, to give indication that he was at all quarrelsome or unruly, and this was all the notice the conductor had that Wooten was under the influence of whiskey; that, some time after—an hour or more, so far as we can ascertain from the testimony—when the train was nearing Wilmington and the conductor was in another car making up his reports, plaintiff, who was also drinking, had an altercation with Wooten, and the fight ensued; that as soon as the conductor heard of it

he went immediately into the car where the fight took place, sat down by Wooten, who was then behaving quietly, and, on arrival at Wilmington, at the request or suggestion of plaintiff, turned him over to the local officers. Speaking to this phase of the matter, the conductor said: "I was getting off my report, and some one said that there was a scrap going on, and I went immediately, and Mr. Mills said that this man had beat him up, and his nose was scratched, and I said, 'So you want him prosecuted?' and he said, 'I do,' and I took Mr. Wooten and sat down by him from the time I got to the place where the trouble occurred until I got to Wilmington, and there I turned him over to the officers. When he was sitting with me he was absolutely quiet as he could be. I did not see Mr. Wooten walking on the train either before or after the difficulty, and could not see him staggering. I did not see him from the time he was in the baggage car looking after his baggage, and I told him it was not safe in there; to go and take his seat; that we did not allow people to ride in there; and that was the last time I remember seeing him, and there was nothing to call my attention to his being on the train at all."

On this, the testimony chiefly relevant, we are of opinion that no breach of duty has been established against the company or its employees, and that a judgment of nonsuit should be entered.

Reversed.

RALEIGH BANKING AND TRUST COMPANY v. W. D. CLARK.

(Filed 18 October, 1916.)

1. Bills and Notes—Trials—Evidence—Prima Facie Case—Defects—Burden of Proof.

Where a holder of a promissory note sues thereon, he makes out a *prima facie* case which will entitle him to a verdict, by introducing the note and proving same and the indorsement thereon, if he is not the payee; but where defects and irregularities are set up by the defendant sufficient to avoid the note, with evidence tending to prove them, the burden is upon the plaintiff to show that he acquired the note before its maturity and without notice, as a holder in due course; and if this is so found by the jury, he is entitled to a verdict, though the defendant has established, with the burden on him, that the note was, in fact, defective.

2. Same—Issues—Judgments.

Where in an action by an indorsee of a promissory note the defendant pleads defects therein, and offers evidence that its validity depends upon a loan to be secured by the original payee, which was not done, an issue

answered in defendant's favor, that plaintiff was not a purchaser for value, without notice, before maturity, is not sufficient to sustain the judgment, the requisites as to the burden of proof being lacking in the case.

CIVIL ACTION tried at April Term, 1916, of WAKE, before *Connor, J.*, upon these issues:

1. Is the plaintiff a corporation, duly authorized to conduct a banking business in the State of North Carolina, as alleged in the complaint? Answer: "Yes."

2. Is the plaintiff purchaser for value without notice, and before maturity, of the note set out in the complaint? Answer: "No."

3. In what sum, if any, is defendant indebted to plaintiff on note set out in complaint? Answer:

Upon the findings the court adjudged that plaintiff was entitled to recover nothing. Plaintiff appealed.

Willis Smith for plaintiff.
S. Brown Shepherd for defendant.

BROWN, J. This action is brought to recover on a note for $596.80, alleged to have been executed by defendant to John M. Hammer, dated 22 December, 1913, due six months after date and indorsed by Hammer to plaintiff 20 March, 1914.

In his answer defendant alleges that the note sued on was given to said Hammer as premium upon a policy of life insurance to be issued by the New York Life Insurance Company, of which said Hammer was agent; that the note was executed upon condition that said Hammer would arrange to make defendant a loan of money through said insurance company, based upon said policy, otherwise the note was not to be paid; that the insurance company failed to make said loan, and required a medical examination, and thereon defendant wrote at once and canceled the application for insurance; that the loan was never made and the policy of insurance was never accepted by defendant. Upon these pleadings the court submitted the three issues above set out, the third of which was never answered.

Upon those findings the court erred in rendering judgment for defendant, as the issues submitted and answered are not determinative of the case. *Bryant v. Ins. Co.*, 147 N. C., 181.

The law bearing upon negotiable instruments, as to when a holder of a note is one in "due course," has been well settled by the leading case of *Bank v. Fountain*, 148 N. C., 590, in a well considered opinion by *Mr. Justice Hoke*, which has been frequently cited and approved. In that case it is held: "When it is shown that a negotiable instrument

sued on has been procured by fraud, or there is evidence tending to establish it, it is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he acquired the title (1) before maturity; (2) in good faith for value; (3) without notice of any infirmity or defect in the title of the person negotiating it. Revisal, secs. 2201, 2208."

When plaintiff put in evidence the note sued on and proved its execution and indorsement, a *prima facie* case was made out which, if believed, entitled plaintiff to verdict and judgment. It was then "up to defendant," as the phrase goes, to introduce evidence tending to establish the defense to the note set up in his answer. When this was done, the burden of proof rested on plaintiff to offer evidence and to satisfy the jury that plaintiff acquired the note in due course, that is to say, before maturity, for value and without notice of the defect or equities set up against it. The plaintiff is required to satisfy the jury as to these essentials of a holder in due course because they are matters within the exclusive knowledge of its officers. But plaintiff is not required to do this until the defendant has offered evidence tending to establish the allegations of his answer setting up fraud, want of consideration, or other defect in the note.

The defendant was not entitled to judgment upon the issues submitted and answered, because no issue has been submitted and answered establishing the defect in the note averred in his answer.

If defendant fails to establish his allegations, plaintiff would be entitled to judgment upon the note without further proof than that necessary to make out the prima facie case referred to. If defendant establishes his defense by proof satisfactory to the jury, the plaintiff may nevertheless recover by likewise satisfying the jury that it took the note in due course, that is, before maturity, for value, and without notice of the defect.

New trial.

IN RE ACCOUNT OF J. W. WINSTON ET ALS., EXECUTORS OF OCTAVIA H. DUKE, DECEASED.

(Filed 18 October, 1916.)

1. Wills—Costs—Court's Discretion—Appeal and Error.

Where the will of the testator has been caveated and the will sustained, and it appears that the estate consisted of lands, the costs of the proceedings are not considered as debts owed by the decedent, under the general rule that residuary legatees are first to be paid; and the taxing

of such costs against the estate proportioned among the devisees is a matter within the discretion of the trial judge, which will not be disturbed on appeal. Revisal, sec. 1268.

2. Wills—Caveat—Surveys—Costs—Executors and Administrators.

Where certain land contiguous to the lands of other devisees are devised, without direction in the will for a survey or partition or for perfecting the title, the cost of survey and registration of deeds should be borne by the devisees of the lands, and it is not a proper charge against the estate to be paid by the executor.

PROCEEDING in the Superior Court of FRANKLIN for settlement of the final account of the above named executors. The cause came before *Bond, J.*, at chambers upon exceptions heard upon appeal from the clerk. From the judgment rendered, August Term, 1916, the executors of Mrs. Octavia H. Duke, J. W. Winston and J. W. Woodlief, and Joseph W. Winston individually, appealed.

W. H. Ruffin, W. H. Yarborough, Ben. T. Holden for appellants.
T. T. Hicks for Harris heirs, appellees.

BROWN, J. The items excepted to are:

First. To the rate of commissions allowed the executors.

Second. To the allowance of the expense of caveat to the will of J. W. Duke, aggregating $1,780.41.

Third. To the allowance of $108 for survey of Vance County Duke tract of land and cutting off parts of same as by the will of Mrs. O. H. Duke directed.

His Honor overruled the first exception, as to rate of commissions, to which there is no exception. He sustained the exception to the allowance of costs of caveat to will of J. W. Duke as against the estate of Mrs. O. H. Duke, and ordered the clerk to reform the account, find the values of the property of the estate of J. W. Duke, apportion the expense of caveat upon the same, and charge the same upon the estate of J. W. Duke in the hands of the devisees of Octavia Duke. The executors and J. W. Winston excepted. His Honor sustained the exception as to allowance of costs of survey of the Sam. L. Duke tract and ordered that the same be charged against J. W. Winston, devisee. The executors and J. W. Winston excepted and appealed.

J. W. Duke died in December, 1910, devising his entire estate to his wife, Octavia. He owned real estate and very little personal property. All of it went into the hands of his widow. A caveat was filed to his will by his heirs at law, his nephews and nieces. The cause was tried and the will sustained. The court adjudged that all the costs be paid

by the estate of J. W. Duke. These costs amount to $1,780.41. The decree of Judge Bond adjudges that these costs are a charge upon the estate of J. W. Duke. There is no evidence or finding of any personal property now in existence belonging to said estate. J. W. Duke died in 1910, devising all his property, real and personal, to his wife, Octavia, and what little personal estate he owned was received and doubtless consumed in its use by her.

We think his Honor properly held that said costs are a charge upon the different portions of the estate of J. W. Duke received by the different devisees of Octavia Duke.

The costs and expenses of the caveat proceeding are not in any legal sense a debt of J. W. Duke, and the general rule that residuary legacies are to be taken first for payment of debts and then general or pecuniary legacies has no application.

Upon the termination of an issue of *devisavit vel non,* raised by a caveat to a will, the trial judge has a discretion as to taxing costs. He may direct that all the costs be paid by the estate of the testator. Revisal, sec. 1268. *Mayo v. Jones,* 78 N. C., 406.

This expenditure was incident to the probate of the will in solemn form, and is in no sense a debt created by the testator. It was incurred for "salvage of the cargo," in which all were interested. Therefore, the judge correctly ruled that every part of the estate of J. W. Duke must bear its proper and proportionate part of these costs.

The third exception is to the allowance to the executors of $108.50 expended in surveying the land devised by Mrs. Octavia Duke to J. W. Winston and recording title deeds relating to said land.

The will of Mrs. Duke devises the Samuel L. Duke tract of land to Joseph W. Winston, viz.: "All the land contained in said tract except the strip of land between Henry Vaughan and the road and 4 acres adjoining the farm of Robert Vaughan."

There are also devises of contiguous lands to Henry and Robert Vaughan. There is no direction in the will for a survey for partition or for perfecting the title. It was the duty of the devisees to record the deeds and to have the survey made if desired at their own expense. No authority is given the executors to incur such expenditure on behalf of the estate.

Affirmed.

JOHN H. BOUSHALL, RECEIVER, v. W. B. STRONACH.

(Filed 18 October, 1916.)

1. Corporations—Subscriptions — Consideration — Written Contracts — Parol Evidence.

A subscription to shares of stock in a proposed corporation is upon a sufficient consideration; and when the corporation has accordingly been formed and becomes insolvent, the subscriber, at the suit of the receiver, may not vary its written terms by parol evidence tending to show that, at the time, it was agreed that he would not be required to pay it.

2. Corporations—Subscriptions—Secret Limitations—Good Faith.

One may not avoid liability on his subscription to stock in a proposed corporation on the ground of a secret agreement that his subscription was given only for the purpose of inducing others to subscribe, and that he should not incur any liability thereunder, for this would be in violation of the law requiring good faith and fair dealing among subscribers, and a secret limitation of liability for the benefit of one to the disadvantage of the others of them and to the corporation's creditors.

CIVIL ACTION tried by *Cooke, J.*, at May Term, 1916, of WAKE.

This is an action by the receiver of an insolvent corporation to recover upon a subscription to the stock of the corporation.

The defendant admits the subscription to the stock and alleges the following as a defense: "But the defendant alleges that in signing his name to said paper he was not aware that he was binding himself to pay any shares of stock in said corporation or making himself liable therefor, and that he, the said defendant, did not knowingly or intentionally contract or agree to take three shares or any other number of shares of stock in said corporation; that he, the defendant, was induced, persuaded, and misled to sign said paper by false statements and representations made by the said C. R. Towles, promoter of said corporation, that he, the said Towles, was engaged in promoting or organizing a corporation to manufacture and sell shirts in the city of Raleigh, and that he was getting up a list of good, responsible people of Raleigh to sign their names to assist him in getting other people to take stock, and that it was not intended, nor his purpose, that the defendant should pay any money or take any stock or assume any financial obligation by reason of his signing said paper, and that the defendant was not required to take any stock or pay for any stock, and that the signing of said paper did not bind him to do so; that the defendant was induced by said representations to sign his name to the paper which was presented to defendant, without reading or examining the same, and merely as an accommodation, as defendant was not interested in a proposition

to manufacture shirts, knew nothing of the financial possibilities of the scheme, and had no money to invest in such ventures, defendant being engaged in the railway business as a train conductor and being thereby kept away from home and deprived of the time and opportunity to keep in touch with such enterprises; that the said representations and statements made by the said C. R. Towles were false and were made with a knowledge of their falsity, and were calculated and intended by the maker thereof to deceive the defendant, and that the defendant relied upon said statements and representations and was deceived thereby, and was induced thereby to sign his name to the said paper without reading the same; that the defendant did not discover said fraud, so practiced upon him, until after the financial failure of the said corporation and the appointment of a receiver thereof by the court; that no demand or notice to pay for any stock in the said corporation had ever been made upon defendant, and defendant had received no notice or information that he was considered a subscriber for said stock or liable therefor until the failure aforesaid and the appointment of said receiver, whereupon defendant promptly refused to pay any money on account of his alleged subscription for stock, and disaffirmed the same; and defendant hereby pleads said fraud in disaffirmation and repudiation of the alleged contract of subscription and in bar of the plaintiff's right to recover thereon."

His Honor held that the matters alleged in the answer were not a defense, and rendered judgment on the pleadings in favor of the plaintiff, and the defendant excepted and appealed.

W. H. Pace and S. Brown Shepherd for plaintiff.
William B. Snow for defendant.

ALLEN, J. A fair construction of the answer of the defendant is that he subscribed for three shares of stock, not intending to pay for them, and that he was induced to make the subscription by the statement of the promoter that he would not be required to pay; that he wanted his name on the subscription list, as one of the good, responsible people of Raleigh, to assist him in getting other people to take stock; and, as thus understood, the facts alleged do not constitute a defense.

In the first place, the subscription list is a contract in writing, supported by a valuable consideration, and comes within the principle that a written contract cannot be impaired or changed by parol, and the facts alleged are in substance that the defendant subscribed for the stock upon the agreement that he would not be required to pay for it.

The question is considered in *Rousseau v. Call,* 169 N. C., 176, where the Court says: "It is held in this jurisdiction that when persons mutually subscribe a stated sum for a definite and lawful object, the subscription of one may be regarded as a proper consideration for that of the other (*University v. Borden,* 132 N. C., pp. 477-491); and it is very generally recognized that when work has been done or expenditures made or debts incurred on the faith of such a subscription, it then becomes a binding obligation (*Pipkin v. Robinson,* 48 N. C., 152, and 37 Cyc., p. 486); and, when or to the extent that it has been expressed in writing, it comes under the principle obtaining in other written contracts, that it may not be changed or sensibly impaired by parol. *Crane v. Library Assn.,* 29 N. J. L.; *Burnham v. Johnson,* 15 Wis., 286; 37 Cyc., p. 504."

It has also been held that when one assumes a pecuniary obligation by writing, a cotemporaneous agreement that he shall not be required to pay does vary the contract, and is not enforcible. *Bank v. Moore,* 138 N. C., 532; *Basnight v. Jobbing Co.,* 148 N. C., 350.

The Court says in the first of these cases, which was an action upon a note given for stock: "The only defense attempted amounts, in substance, to this: That though the defendant executed his note and received a valuable consideration for same, there was an understanding and agreement at the time that payment should never be enforced or demanded. All the authorities are agreed that such a defense is not open to the defendant." And in the second: "The plaintiff alleges the execution of the contract sued on, which is admitted by the defendants in their answer. The terms of that contract are plain and unambiguous. The defendants explicitly agree therein with the plaintiff that they will become sureties of the jobbing company for the strict performance of the obligation assumed by the company, which is that, upon demand, and one year from the date of the contract, the jobbing company will pay to the plaintiff the sum of $5,000 for his fifty shares of stock. There can be no doubt as to the correct meaning of this language. It is an express and unconditional promise in their individual character, that the money shall be paid at the appointed time. In their answers the defendants deny this allegation and aver that they were not liable personally or individually. This is a square contradiction of the terms of the contract and of the obligation to pay the money themselves, which they assumed by the execution of the instrument."

There is also another objection to the defense alleged, equally conclusive against the defendant, and that is that the law requires good faith and fair dealing between stockholders, and will not enforce a secret agreement, which is for the benefit of one and to the disadvantage of other stockholders and creditors.

Nor will it allow one to give or lend his good name to a promoter "to assist him in getting other people to take stock" and then relieve him from liability upon an agreement that he would not be required to pay.

The authorities are numerous in support of this principle, and we refer only to a few of the more recent.

"It will be no defense to an action to enforce the subscription that the subscription was colorable merely, not intended to be paid, and that there was a secret agreement that it should not be paid, but that it was intended merely to enable the corporation to get sufficient stock subscribed to enable it to become incorporated under the law, to induce others to subscribe for shares, or to give credit to the concern. The rule extends so far as to avoid all secret conditions annexed to the contract of particular subscribers by which their engagement is rendered more onerous to the corporation, more favorable to them, or in any respect different from that named in the written contract and in the governing statute, and to hold the subscriber liable to the obligations of a bona fide shareholder; and this is illustrated by a variety of decisions cited here and elsewhere. The reason is said to be that such contracts are contracts among the subscribers, as well as contracts between the subscriber and the corporation; so that to allow them to operate to release the subscription of the particular subscriber would operate as a fraud on the others." 10 Cyc., 433-4.

"Conditional subscriptions to stock of corporations have been declared to be contrary to sound public policy, by reason of their tendency to mislead and ensnare creditors, and not, therefore, to be encouraged. . . . A subscription to the stock of a company with the understanding of the president that the stock is not to be paid for or held, but is to be canceled, is fraud upon all subsequent subscribers, and holds the party thus subscribing to the responsibilities of a bona fide subscriber. . . . When a subscription contract is reduced to writing and signed, all oral agreements, whether prior or contemporaneous, are merged in it, and parol evidence of them cannot be received to vary the legal import of the writing." 7 R. C. L., 228-9.

"That one man has bound himself to place a certain amount of his money upon the risk involved in the proposed corporate enterprise is an inducement to others to venture their funds in like manner. To hold that a secret stipulation is valid would be, in law, a fraud upon other subscribers as well as upon the public dealing with the company. The party subscribing should be, and is, held bound to all the responsibilities of a bona fide subscriber. Otherwise, there might purport ostensibly to have been taken a large amount of capital stock, whereas, in fact,

there would be really no stock taken at all. The law, therefore, frowns upon all secret stipulations of any sort in subscription agreements, and treats them as a nullity." 9 M. A. L., 92.

We are, therefore, of opinion that there is no error in the judgment of the Superior Court.

Affirmed.

MARY IDA SWAIN ET AL. v. DAVIS CLEMMONS ET ALS.

(Filed 18 October, 1916.)

Courts—Evidence—Intimation of Opinion—Statutes.

Where it is material in a controversy over lands to establish the place where a certain swamp joins a certain named run, the evidence being conflicting, and a surveyor, theretofore appointed, had testified and his map put in evidence, tending to sustain the contention of one of the parties, it is reversible error for the trial judge to instruct the jury that they must be guided in their judgment, not from the map, but from the testimony of the surveyor and other witnesses, such being an intimation of opinion by the court upon the weight of the evidence forbidden by the statute. Revisal, sec. 535.

CIVIL ACTION to recover land, tried before *Rountree, J.*, and a jury, at October Special Term, 1915, of BRUNSWICK.

On the issue as to title there was verdict for defendant. Judgment, and plaintiffs excepted and appealed, assigning for error chiefly that the court in its charge expressed an opinion on the value of certain testimony relevant to the issue.

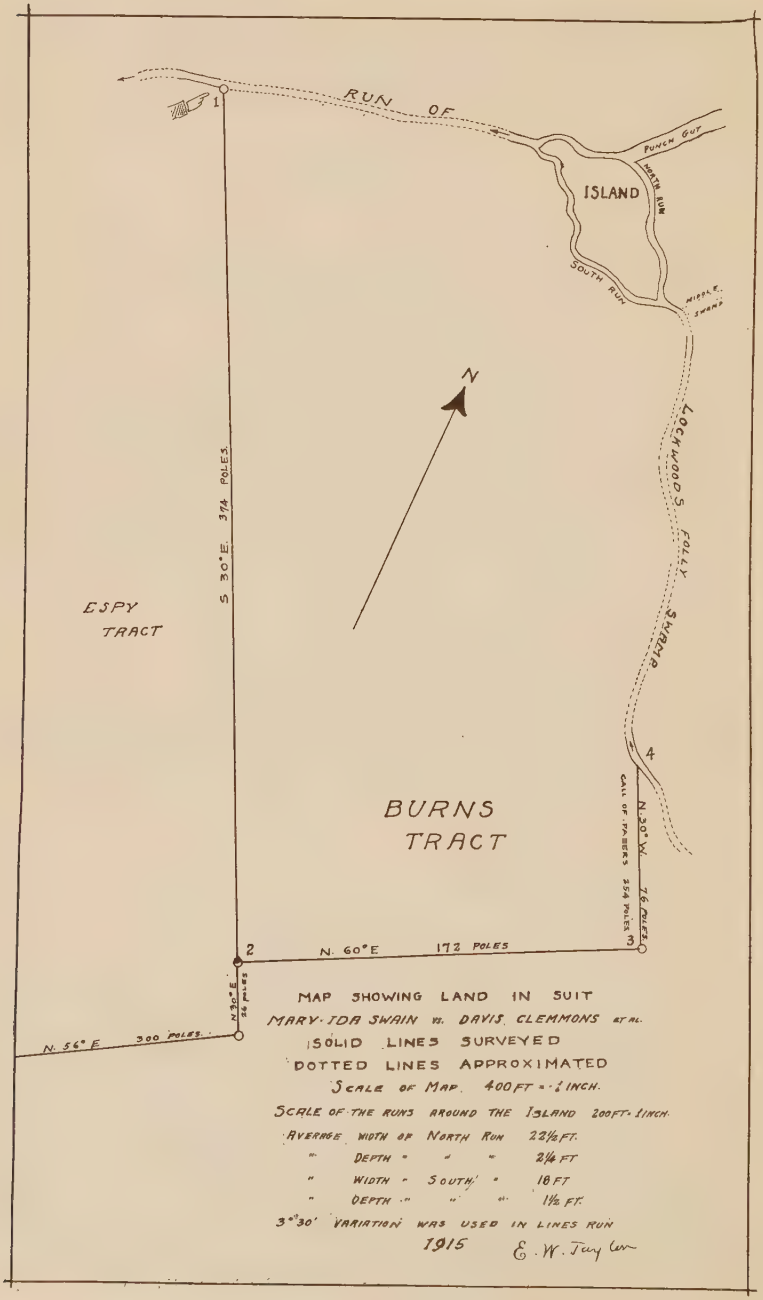
C. Ed. Taylor for plaintiff.
Cranmer & Davis for defendant.

HOKE, J. On the trial of the issue it became a relevant and material circumstance whether Middle Swamp Run joined with Lockwood's Folly Run above or below an island (the land in dispute).

Plaintiff offered evidence tending to show that the junction took place before it reached the island, and the map of the surveyor, made by order of court and in evidence, showed this to be the fact.

The defendants' evidence tended to show that Middle Swamp Run joined Lockwood's Folly Run below the island, and this was a very much disputed question between the parties.

His Honor, after referring very fully to the respective positions, among other things, charged the jury as follows: "Now, I was about


RUN OF
PUNCH GUT
MASTER RUN
ISLAND
SOUTH RUN
MIDDLE SWAMP
N
LOCKWOOD'S FOLLY SWAMP
ESPY TRACT
S. 30° E. 3¼ POLES
BURNS TRACT
CALL OF PATTERS 254 POLES
N. 30° W. 76 POLES
1
2
3
4
N. 60° E 172 POLES
N. 30° E. 56 POLES
N. 56° E 300 POLES
MAP SHOWING LAND IN SUIT
MARY IDA SWAIN vs. DAVIS CLEMMONS ET AL.
SOLID LINES SURVEYED
DOTTED LINES APPROXIMATED
SCALE OF MAP 400 FT = 1 INCH.
SCALE OF THE RUNS AROUND THE ISLAND 200 FT = 1 INCH.
AVERAGE WIDTH OF NORTH RUN 22½ FT.
" DEPTH " " " 2½ FT
" WIDTH " SOUTH " 18 FT
" DEPTH " " " 1½ FT.
3° 30' VARIATION WAS USED IN LINES RUN
1915
E. W. Turner

to overlook the fact that some of the testimony, which you ought to be satisfied with, shows that the Middle Swamp's Run really doesn't run into Lockwood's Folly until it gets around the island. They say that is so, and they say that the map of the surveyor is not necessarily correct. You must be guided in your judgment, not from the map, but from what the surveyor says and what all the other witnesses say." Plaintiff excepted.

After giving the matter full consideration, and in view of the fact that this was on a phase of the evidence which had become very material to the issue, the Court is of opinion that the portion of the charge objected to is in violation of the statute, Revisal, sec. 535, that "No judge, in giving his charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury."

Even if the comment as to the parol testimony of the witnesses should be held an inadvertence, sufficiently corrected by what immediately follows and tending to show that the judge was only giving the defendant's estimate of the testimony and not his own, the closing portion of the charge as to the map was clearly an adverse intimation on the weight the jury should attach to it. The map was in evidence as an official survey by order of court in the cause, and it was for the jury to determine what effect they would give it, and uninfluenced by any intimation from the court. A reference to our decisions on the subject will show that this Court has been very insistent on the requirement of the statute, and that an expression of opinion on the part of the trial judge is forbidden not only in the charge, but at any time during the trial, in the hearing of the jury. *S. v. Cook,* 162 N. C., pp. 586, 588; *Park v. Exum*, 156 N. C., 228; *Withers v. Lane,* 144 N. C., 184.

We think that the portion of the charge objected to must be held for reversible error, and that there should be a new trial of the cause.

New trial.

STEPHEN NELSON v. SUSAN D. LINEKER.

(Filed 18 October, 1916.)

Deeds and Conveyances—Calls—Natural Boundaries—Stone Markings—Evidence—Questions for Jury—Trials.

While a stone marked and securely embedded in the ground for the purpose of a survey and deed to lands is not strictly regarded as a natural boundary, it is an artificial monument of boundary, and when identified and properly placed may be controlled against calls of lesser

dignity; and where under such conditions and for such purposes a stone marked with the grantee's initials has been securely placed as at the end of a call, "to a point beyond a 4-mile post to a stake marked 'S. N.'" but has been removed, it is for the jury to determine, upon competent evidence, its former location with reference to the call in the deed, and, when so located, it will control the distance stated in the conveyance.

CIVIL ACTION to recover land, tried before *Peebles, J.*, and a jury, at April Term, 1916, of NEW HANOVER.

At the close of the testimony, on adverse intimation from the court as to plaintiff's right to recover, he submitted to a nonsuit and appealed.

J. D. Bellamy & Son for plaintiff.
A. G. Ricaud for defendant.

HOKE, J. Plaintiffs claimed under a deed containing the following description: "Beginning at the point where the run of Wildcat Branch intersects the main road on the east side thereof; runs thence north 45 degrees east with the eastern boundary of said road 22 chains to a point beyond the 4-mile post at a stone marked 'S. N.,' runs thence south 66 degrees east 15 chains to a stake; thence south 17 degrees west 14 chains and 15 links to a gum in the run of Wildcat Branch; thence westwardly with the run of said branch as it meanders to the main road, the point of beginning." And, in connection with same, introduced evidence tending to show that at the time he bought the land and took the deed he had the same surveyed, and, at the end of the call, "thence north 45 east with the eastern boundary of the road 22 chains to a point beyond the 4-mile post at a stone marked 'S. N.,'" he placed a stone procured for the purpose, marked "S. N."; this being at a point from 2 to 300 feet beyond the 4-mile post; that the same was a stone he had obtained from Mr. Myers at the marble yard; had these letters carved on it and placed it in the ground about 2 feet, leaving a portion above the ground; that it was so placed there to indicate the corner, and the line was run to it as such and called for as a corner in making the deed, etc.; that the stone had later been removed or dug up by mistake, after it had remained in its position fourteen or fifteen years, and witness could point out on the ground the exact position where the same had been planted. A witness by the name of Lamont testified that he recalled having plowed so as to loosen it, and pulled it up and carried same to his employer, a Mr. Herbert, who had bought a piece of the land himself; that it was near 2 feet long, 4 or 5 inches at the top, sloping larger towards the bottom, and was placed in the ground 18 inches or more, at or near the road, and about 100 yards north of the 4-mile post.

There was opposing evidence on the part of the defendant, and it was further made to appear that if plaintiff's deed could not extend to the

stone as claimed by plaintiff, but stopped at the end of the 22 chains, the distance called for, it did not cover the land in dispute.

At the close of the entire testimony the court gave intimation that he would charge the jury "that the stone marked 'S. N.' was not a natural boundary; that plaintiff's title would stop at the 22 chains, and that plaintiff could recover nothing beyond that." In deference to this intimation, plaintiff submitted to a nonsuit and appealed.

It is very generally recognized that a call for "stakes" in the descriptive terms of a deed is not sufficient to control course and distance unless the deed itself affords data from which the term "stake" can be given a definite placing. *Crowell v. Jones,* 167 N. C., 386; *Massey v. Belisle,* 24 N. C., pp. 170-179. They are usually of such a transitory nature, so liable to be destroyed or in some way removed, by chance or otherwise, that they are not regarded as monuments of boundary at all, but are considered only as imaginary points to be fixed and determined by a correct survey of course and distance if such calls appear also in the deed. *Reid v. Schenck,* 14 N. C., p. 65. The same principle might apply to a stone unidentified and casually placed and which would be subject to the same liability of removal. But the principle, in our opinion, does not apply to the facts of this case as presented in plaintiff's evidence. This testimony tends to show, as stated, that the stone claimed by plaintiff to be the corner was one procured for the purpose, with the initials of plaintiff's name carved thereon, securely placed in the ground as a corner called for in plaintiff's deed, and which was placed as such corner at the time the land was surveyed for the purpose of making the deed, and if these facts are accepted by the jury, it would give the call such elements of identification and permanence as to constitute it a monument of boundary, and usually considered sufficient to control course and distance if its original position is satisfactorily established. True, as his Honor stated, it would not be considered "a natural boundary," these in strictness referring to such objects as have permanent and natural placing upon the land; but it is an artificial monument of boundary, and usually given controlling effect as against calls of lesser dignity, such as course and distance. Tiedeman on Real Property, sec. 831; Jones on Law Real Property Conveyancing, sec. 386; Burdick on Real Property, p. 757; 3 Washburn on Real Property (5 Ed.), pp. 434 and 435; Tyler on Law Boundaries, p. 30, etc. And the position is not affected by the fact that the natural or established monument has been removed, if it is shown to have been placed by the parties as an original boundary of the land, and its original position, as stated, is established by satisfactory proof. In case of removal, however, if the lost monument cannot be given its proper placing, then resort must be

had to other calls, and, usually, the course and distance will then prevail. Tiedeman on Real Property, *supra;* 4 A. and E. Enc. (2 Ed.), p. 850.

While it is said, in these and other authorities, that an artificial monument of boundary is not, as a rule, given the same weight in controlling course and distance that is allowed to natural boundaries, the latter being regarded of a more permanent character and less likely to mislead, the former, in case of conflict, is considered the superior call in reference to course and distance, and controls the same when it is properly identified and placed and called for in the deed as a corner of the land." *Barnhardt v. Hageman,* 162 N. C., 460.

The testimony offered by plaintiff permits the inference, further, that the stone marked "S. N." was so marked, procured, and placed as a corner of the land, at the time of the survey made, with the view and purpose of making the deed, and that said deed was made intending to convey the land so surveyed; and, if this be true, the stone would be the proper boundary, whether called for in the deed or not, coming within the second rule laid down in the case of *Cherry v. Slades,* 7 N. C., 82, which is as follows: "Whenever it can be proved that a line actually run by the surveyor was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description in the patent or deed."

The rule has been applied in several recent decisions of the Court, among others, *Allison v. Kenion,* 163 N. C., 582; *Clark v. Aldridge,* 162 N. C., 326, and in the latter case the principle is stated as follows: "Where the parties, with the view of making a deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, though a different and erroneous description may appear upon the face of the deed, the land thus ascertained and intended will pass between the parties or voluntary claimants who hold in privity, this being an exception to the general rule that parol evidence may not vary or contradict the written instrument."

The Court is of opinion, therefore, that on the facts in evidence there was error in holding, as a matter of law, that the line, N. 45 E. 22 chains, stopped at the end of the specified distance, and, on the testimony as it now appears, the issue should be submitted to the jury on the question whether this stone was marked and securely placed as a corner of the land and called for in the deed, and whether the position of same, as originally placed, can now be established by proof.

For the error indicated plaintiff is entitled to a new trial of the cause, and it is so ordered.

New trial.

GALLUP & CO., INCORPORATED v. J. B. ROZIER ET AL.

(Filed 18 October, 1916.)

1. Vendor and Purchaser—Merchandise in Bulk—Statutes—Burden of Proof.

Under our statute the sale of a stock of merchandise, in large part or as a whole, in bulk, is prima facie evidence of fraud, and renders the transaction void, unless the seller has complied with the statutory requirements as to inventory and notice to his creditors, with the burden on him to show that he has done so. Gregory's Suppl. to Pell's Revisal, sec. 964a.

2. Same—Instructions—Appeal and Error.

In an action to set aside the sale of a stock of merchandise in bulk (Gregory's Suppl. to Pell's Revisal, sec. 964a) as void against creditors, it is for the jury to determine the fact as to whether the seller had complied with the statutory requirement as to invoice, notice to creditors, etc., upon his evidence that he had done so, under proper instructions from the court; and a charge in effect that if he had failed in this respect the transaction was prima facie fraudulent, and not that it was void, is reversible error.

3. Vendor and Purchaser—Merchandise in Bulk—Statutes—Burden of Proof—Trials—Evidence—Questions for Jury.

The burden of proof on the affirmative of the issue as to fraud in the sale of a stock of merchandise in bulk remains with the plaintiff in this action to set it aside, even if the seller had complied with the statute (Gregory's Suppl. to Pell's Revisal, sec. 964a), as in that case the sale in bulk is still prima facie evidence of fraud under the statute, leaving it for the jury to determine the ultimate fact of fraud, upon the evidence.

4. Vendor and Purchaser—Merchandise in Bulk—Statutes—Time of Notice—Definition.

The statutory requirement that the seller of a stock of merchandise in bulk shall give notice thereof to his creditors "within seven days" is interpreted to mean that such notice may be given at any time within the number of days specified.

5. Attorney and Client—Authority to Act—Ratification.

Where a defendant in an action in the court of a justice of the peace afterwards, in the Superior Court, on appeal, ratifies, by his conduct, the acts of an attorney who had assumed to appeal for him, it is equivalent to his having given original authority to the attorney.

CIVIL ACTION tried before *Daniels, J.*, and a jury, at May Term, 1916, of CUMBERLAND.

The record shows that plaintiff brought this action in the court of a justice of the peace to recover of defendant J. B. Rozier a debt of $151.56 for goods sold and delivered, and sued out an attachment which

was on 27 September, 1915, levied on certain personal property of defendant, being the stock of goods and machinery in his garage at Fayetteville, N. C. Defendant on 17 September, 1915, had agreed to sell the stock of goods in bulk to W. W. and T. H. Sutton, who were partners and as such owned and conducted a garage in said city. There was evidence which tended to show that J. B. Rozier on 17 September, 1915, made an inventory of the stock of goods and notified his creditors, among them the plaintiff, that he intended to sell his stock of goods in bulk to Sutton & Sutton, and that on 25 September, 1915, he did sell the same to them, giving a bill of sale therefor, which was duly registered, or filed for registration, on 25 September, 1916. Sutton & Sutton intervened as claimants of the property under the bill of sale. Plaintiff alleged that defendant J. B. Rozier had concealed himself to avoid the service of process, or was about to assign his property with intent to defraud his creditors, and that the sale of the stock of goods in bulk was void as against them. Defendant and Sutton & Sutton, intervenors, denied this allegation. There was evidence which tended to show that J. B. Rozier did not actually intend to defraud his creditors when he made the bill of sale or contracted to sell the stock and gave notice of it to his creditors.

The court charged the jury as follows, only two instructions being sent up.

"1. The burden is upon the intervenors to establish their title to the property involved in this controversy. Upon the issues involving the question of fraud, as raised in the second issue, which is submitted to you, if you should find from the testimony that the bill of sale was executed without complying with the terms of the statute, the law would raise the presumption that it was done for the purpose of defrauding creditors, and the burden would be upon the defendant Rozier to satisfy you that it was done in good faith. If you find from the greater weight of the testimony that an accurate and fair inventory was taken of the property, that the price realized from the sale to Sutton & Sutton was a fair price, and that the full amount realized from said sale was credited on the mortgages held by the National Bank, then you will answer the issue as to fraud 'No.'

"2. If the jury should find that the defendant Rozier executed the bill of sale under which the interpleaders claim, with intent to defraud his creditors, then the interpleaders would not be the owners of the property; therefore, if you answer the second issue 'Yes' you will answer the third issue 'No.' Of course, as I stated to you at the outset, if you should find that the bill of sale was not made in compliance with the statute which I read to you, then this would be prima facie evidence

of fraud. But if you find from the greater weight of the evidence that the bill of sale from Rozier and Sutton was executed in good faith, that it described the property attached by the plaintiff in this action, that the price obtained was a fair and adequate one, that the proceeds of the sale were applied to Rozier's mortgages to the National Bank, then you will answer the second issue 'No' and the third issue 'Yes.' "

The jury returned the following verdict:

1. Did the defendant J. B. Rozier keep himself concealed within the State for the purpose of avoiding service of process, the summons? Answer: "No."

2. Was the bill of sale executed in fraud of the creditors of J. C. Rozier? Answer: "No."

3. Are the interpleaders the owners of the property in controversy and entitled to the possession of it? Answer: "Yes."

Judgment was entered thereon, and plaintiff appealed.

V. C. Bullard for plaintiff.
Rose & Rose and Robinson & Lyon for defendants.

WALKER, J., after stating the case: There was an error in the charge to the jury which was prejudicial to the plaintiff. They were instructed that if the defendant J. B. Sutton, in making the sale of the stock in bulk, had not complied with the provisions of the statute the sale was prima facie fraudulent, whereas the statute declares that it shall be void. The jury may have found that he had not complied with the statute, and as the question then would be, under the instruction, if there was fraud in the transaction, with the prima facie presumption that there was, the jury might have found that there was no actual fraud, but that the sale was made in good faith with the intention to pay a valid debt to the bank out of the proceeds, as defendant testified was the case, and finding this to be true, they would naturally and even necessarily answer the second issue "No" and the third issue "Yes"; whereas, if the seller had not complied with the statute, their answer to the second issue should have been "Yes" and to the third issue "No," and they should have been so instructed by the court. The statute provides that "The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be *prima facie* evidence of fraud, and void as against the creditors of the seller, unless the seller, at least seven days before the sale, make an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall within

said time notify the creditors of the proposed sale, and the price, terms, and conditions thereof." Gregory's Suppl. to Pell's Revisal, p. 962, sec. 964a. This statute has been construed by this Court in *Pennell v. Robinson,* 164 N. C., 257, and its meaning clearly defined. "We think," says *Justice Brown,* "the construction of the statute contended for by the defendants would practically destroy its beneficial effect. Its purpose is to prevent the purchase of a stock of merchandise from various persons on a credit, and then selling it out in bulk for the purpose of defeating the rights of the creditors who extended the credit. The statute effectually protects such creditors not only by making it easier to establish fraud, but by declaring the 'sale in bulk' absolutely void unless the provisions of the law are complied with. As we construe the act, the sale in bulk of a large part, or the whole, of a stock of merchandise otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, renders the transaction prima facie fraudulent, and open to attack on such ground by creditors, even though the provisions of the act are fully complied with. But in case they are not complied with, then the 'sale in bulk' is absolutely void as to creditors, without any further evidence of a fraudulent purpose. The construction contended for by the defendants, if allowed to prevail, not only renders the act nugatory, but gives to the creditor no greater protection than he had prior to its enactment. A sale in bulk of a stock of merchandise was prima facie evidence of fraud under some circumstances before the passage of this act." And again: "The statute prescribes certain duties which must be performed by the buyer and certain correlative duties which must be performed by the seller. This is regulation, pure and simple. Unless these duties are complied with, and the requirements of the statute observed, such sale or transfer, as to any and all creditors of the vendor, is conclusively presumed to be fraudulent in law, whatever it may have been in fact."

The evidence is not such as permits us to assume any fact to have been proven. The burden was upon the defendant to show that he had complied in all essential particulars with the requirements of the statute, and it was for the jury to say, under proper instructions of the court, whether he had so done. The credibility of his testimony as to what he did was a question of fact for the jury to settle. He testified that he did make an inventory and did give the notice; but whether he did so or not, and what kind of inventory was made and notice given, and the further question whether what he did was in compliance with the statute, were, as we have indicated, all matters for the jury to consider and decide, according to the evidence and the law as stated to them by the court.

The statute calls for a certain kind of inventory and prescribes how the creditors shall be notified. The court should have instructed the jury, as to these things, that they might understand what the legal requirements of the statute as to inventory and notice were, and so that they could determine in the light of the evidence the question submitted to them, whether such an inventory had been made and the proper notice had been given. The instruction given was not a proper construction of the statute, as we have shown, and, therefore, was calculated to mislead the jury as to the law of the case. If the parties had admitted all the facts as to inventory and notice, and it appeared to us that there had been a compliance with the statute, we might hold the error in the charge to be harmless; but such is not the case, and the whole matter depends upon the finding of the jury under the evidence, the inference from which they must draw, and the truth of which they must pass upon.

The defendant testified that he made a full and complete inventory. The jury were not bound by this statement of the witness to find that he did make such an inventory. This was one of the facts in issue, with the burden upon defendant to prove a strict compliance with the statute, which requires that the inventory, to be made seven days before the sale, shall show the quantity (of the stock), and, so far as possible, the cost price to the seller of such articles as are included in the sale; and, further, that the seller "shall within said time notify the creditors of the proposed sale, and the price, terms, and conditions thereof."

It will be seen that there are details to be observed with respect to both inventory and notice, and we are unable to say with certainty, and without the risk of doing injustice to one or both of the parties, how the jury have found regarding them, or those of them which are essential. If the defendant has not complied with the statute, the sale is void; but if he has, it is still prima facie fraudulent, and the question of the presence or absence of fraud in the transaction must go to the jury, with the burden resting upon the defendant, because such a sale of a stock in bulk is prima facie evidence of fraud, and he must go forward with his proof, or take the chance of an adverse verdict. He is not bound to disprove the existence of fraud by the preponderance of the evidence, as the burden of establishing fraud, or the burden as to the affirmative of the issue, remains with the plaintiff, who has only the advantage of the law that the mere fact of such a sale having been made is itself prima facie evidence of fraud. It is like the doctrine with respect to *res ipsa loquitur,* so well stated by *Justice Pitney* in *Sweeney v. Erving,* 228 U. S., 233, which we may follow, with such changes in phraseology as the formal difference between the two cases may require. Evidence prima facie means that the fact of oc-

currence warrants the inference of fraud, not that it compels such an inference; that it furnishes circumstantial evidence of fraud where direct evidence of it may be lacking; but it is evidence to be weighed, not necessarily to be accepted as sufficient; that it calls for explanation or rebuttal, not necessarily that it is required; that it may make a case to be decided by the jury, not that it forestalls the verdict. Prima facie evidence, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well considered judicial opinions. That case was approved by us in *Ridge v. R. R.*, 167 N. C., at p. 518, citing, also, *Stewart v. Carpet Co.*, 138 N. C., 60, and other decisions of this Court upon the same subject. It may be that the defendant has fully complied with all necessary details, as to inventory and notice, but we cannot say so judicially, for we do not deal with the evidence in cases of this sort, it being solely within the province of the jury to do so.

It would seem, though, that the evidence as it now is, and provided the jury believe it, tends to prove that the sale was made in good faith and without any intent to defraud creditors, and for the fair and honest purpose of paying a debt or debts having a prior lien. The jury must say how this is, unhampered by an expression of opinion from us. We merely say that there is evidence of good faith in the transaction. But good faith and fair dealing of defendant will not help the intervenors if the statute was not complied with; and even if it was, the entire evidence must be submitted to the jury, with proper instructions as to the *prima facie case*, so that they may find the ultimate fact of fraud or no fraud.

We are of the opinion that the words of the statute, "within said time" (seven days), do not mean that the notice shall be given for the full period. The word within, when used to designate time or place or quantity, is defined to mean "inside of," "not without," "not exceeding," and "not longer in time than." Construing the words, when employed in a connection similar to the one we have here, the Court in *Hoover v. Krider*, 30 Pa. (15 S. and R.), 43, said that the term did not mean not less than so many days, but at any time not more than the number of days mentioned; and this is the general understanding of the courts. 40 Cyc., 2127, 2128. The Court held in *Davis v. Miller*, 130 U. S., 284 (32 L. Ed., 932), that "A cause requiring an importer to give a certain notice within ten days after ascertainment and liquidation of the duties must, according to fair and reasonable interpretation of the words as applied to the subject-matter, be held to fix only the *terminus ad quem*,

the limit beyond which the notice shall not be given, and not to fix the final ascertainment and liquidation of the duties as the *terminus a quo*, or the first point of time at which the notice may be given. In the case at bar the result is that the notice on each entry, having been given after the collector's decision and before the expiration of ten days from the date of finally stamping upon the entry the ascertainment and liquidation of the duties, was seasonable." See, also, *Altherton v. Corloss*, 100 Mass., 40.

There was no error in the order refusing to dismiss the defendant's appeal from the justice of the peace. The attorney had assumed to act for him, and defendant afterwards ratified what he had done. This was equivalent to original authority to act, under the familiar maxim of the law.

The error in the charge requires that a new trial be had, and it is so ordered.

New trial.

B. M. MEARES ET AL. v. WYNNEWOOD LUMBER COMPANY.

(Filed 18 October, 1916.)

1. Railroads—Fires—Foul Right of Way—Negligence.

The skillful and careful running of a properly equipped locomotive by the employees of a railroad company does not relieve the company from liability for damages caused to the owner of the lands by its negligence in permitting its right of way to be in a foul condition, covered by inflammable matters which was ignited by the dropping of sparks from the engine.

2. Same—Trials—Evidence—Proximate Cause—Questions for Jury.

Evidence is held sufficient to be submitted to the jury upon the issue of the defendant railroad company's actionable negligence in setting fire to the plaintiff's land, and upon the question of the proximate cause of the injury, which tends to show that the fire broke out upon the defendant's foul right of way, which had not been previously burnt off and was covered with pine straw and other inflammable matter, before the locomotive had passed from sight; that it had previously on several occasions been observed to throw quantities of sparks from its smokestack, and that the fire spread to the lands of the plaintiff, an adjoining owner, and damaged the growth thereon.

3. Railroads—Fires—Evidence—Appeal and Error—Objections and Exceptions—Questions and Answers.

A question, material to the controversy, asked a witness, whether he saw sparks from defendant railroad company's locomotive fall upon its

right of way, ignite the matter thereon, and spread to adjoining lands, is not objectionable, and where the answer is not objected to, it will not be considered on appeal, though erroneous. In this case the answer is held competent as tending to show that the locomotive was defective in emitting sparks.

4. Evidence—Impeaching—Substantive—Trials.

Questions and answers of the defendant railroad company's witness in this case, asked on cross-examination, for the purpose of impeaching his testimony in the defendant's behalf, and showing his bias, are held competent for those purposes, though incompetent as substantive evidence.

CIVIL ACTION tried before *Daniels, J.*, and a jury, at April Term, 1916, of BLADEN.

Plaintiff alleged that defendant, which operated a tramroad on its premises in 1914, on which was run an engine and log trucks, had negligently permitted sparks or live coals to escape from the engine, so that the stubble and other combustible material lying by the side of the railroad track caught fire, which spread and burned a large part of his timber near by. Defendant denied the allegations and insisted that there was no evidence of negligence. It will be necessary, therefore, to state some of the testimony.

W. C. Burney testified: "Fire got out on this land in March. I was working with Wynnewood Lumber Company in the log woods. They have a tramroad on the Meares land. Where the track was laid there was nothing but logs and stumps, and things were cleaned and some of it might have been burned off, but I don't remember. If it was, I have forgotten. The track was laid right on the grass. I disremember whether any of that portion of the Meares land was burnt over. I was working out there in the woods when the fire started. Did not see fire when it first started. Had been burning a short while. The tram engine had pulled out with the loading machine, and had no more than got out of sight when the fire got up about 50 yards from the machine on the track. I was at loading machine. Fire caught 4 or 5 or may be 6 feet from track. I didn't measure it. Right of way there where the fire got out had not been burned off. Didn't go where fire was. Didn't see anybody go. It burned off from track; I don't know how far. It was on Meares' land. It burned off from track, and all the woods was on fire where I was at work. Tram engine was at the loader, where I worked, two or three times a day. Don't know whether it was equipped with spark arrester or not. I have seen it sending out sparks. I noticed it sending out sparks any time I saw the engine. I did not go where fire originated at all—not that day. Don't know where fire originated. It had got up side the road after the train had passed.

Train had been gone just a short while, was not out of sight; it was about 300 yards down the track—something like that. Was at the machine when the train left. Don't know where fire was when train left. Don't know who put the fire out."

S. M. Black testified: "I was going in on a load of logs when fire got out. Remember when fire burnt the land of Mr. Meares in March, 1914. There was dead grass, pine straw, and bushes on right of way. Noticed fire as I drove up on the bed, down the road about 50 yards. I was hauling logs to railroad. Fire was about 6 feet of track of defendant when I saw it. The engine had just left there. It was not more than 300 or 400 yards down the road when fire sprang up."

Q. "What do you know about whether the engine was equipped with a spark arrester?" A. "It was throwing sparks all the time. I was not there that day. Fire burned towards Mr. Meares' house. It burned all day towards his house until we left. I worked on Meares' land after that time. Six hundred or seven hundred acres were burnt. It was pretty dry time. It was a pretty good fire—I mean a big, heavy fire—and it burned over the land and the undergrowth and things like that. After fire there was not much undergrowth and small trees. There was a number of people there. Don't know who set the fire out; don't pretend to say. Plenty of people were in the woods working around that particular locality. There were a lot of negroes there. Didn't see them smoking. They were not around me. Don't know whether they were smoking. There was no other fire in that particular locality that day. This was latter part of March, 1914; don't recollect date. That was all the fire there right then. There were other fires after that. They were cutting Meares' timber; had been at it something over a month. Don't know how fire originated or where it started. Did not see any smoke before engine passed. Fire occurred also in May in my woods and my father's. They kept the train on the tram by my place pretty near my house. The train went out one day and strung fire as it went out. I was looking at it and had to secure the fence, and it burned right on to the house. No one came but myself. It burnt all back towards my brother's house, when he was living on my place, towards the swamp. It burned, I suppose, 175 or 200 acres; it burned over that. I didn't go over to it that day or around it, as I had to secure the fence and buildings. Altogether, with the fires that occurred in between and the March and May fires, it burned about 700 acres, including all the fires. The tram kept putting out fires. I never saw the train but twice when it was setting out fire from the train blowing out some sparks; but there were others along the line where they were at work, and I saw it twice to my own knowledge.

Condition of right of way was rough. I mean undergrowth, grass, straw, and such. They burned the right of way on what they called the main line. After that there was no more right of way burned only as the train fired the woods, that I saw. I saw that much burned, about a quarter to half a mile. Where fire was put out in May, 1915, on right of way there was straw and leaves. It was not burned. It was left with fine litter on top of the ground, and it sprung out towards my place from both ways. It burned from the track on both sides. Don't know whether engine was equipped with a spark arrester. If they did, they had it on the inside of the smokestack where I could not see it. I saw the engine and rode it, too, and it was blowing out sparks. I saw the fire and sparks from the smokestack as it pulled out on day of the fire. I was not at the railroad. I saw it from the yard. It had been firing the woods, and it had not been burnt in there. It burned lots of lightwood, and killed lots of undergrowth and small timber and such like, to a great extent, and litter and straw. It burned it clean as it went, for it was dry, and where the woods were rough it killed the majority of the small timber. I don't know if fire went out at all from March until May. I didn't stay to see if it all went out. There were different fires between March and May."

W. J. Long testified: "I know where the Meares land is. I was working about 200 yards of the tramroad and cutting cross-ties on the Meares land, and I heard a roaring about ten minutes after the train passed and saw smoke, and I went as quick as I could and tried to put it out, and could not. It was in tree-tops and the wind was blowing heavy and the tree-tops were right by the side of the track, not even 10 feet. Tree-tops were dead. They had been cut two or three months. That fire burned a portion of Meares land. Have been over a portion of Meares land since it was burned; have been over 200 or 300 acres, I suppose. The land was burned clean. I know where fire started. Don't know how it started. It sprung up in ten minutes after train passed."

B. M. Meares, Jr., testified: "I was living on the property at time of fire in March, 1914; also May, 1914, and between those times. About 700 acres were burned over altogether. About 1,100 acres in whole tract. It burned everything off of it and killed the young timber and killed some timber which was 10 inches and killed lot of it. It left it clean. You could see the dirt. In March I reckon the fire burned over 500 acres. In May about 200 acres were burned. I know about them putting out a fire once after the May fire. I saw the March and May fires. Don't know anything about fire between March and May. Right of way was rough. They did not clean anything but the trees.

They left straw and grass there, and in some places the straw was 6 inches deep or more. Sometimes I would see the engine every day for a week and two or three times a day. Don't know whether it had a spark arrester."

Q. "State whether or not when the engine was in operation on the track across your father's land it emitted any sparks or fire, and, if so, to what extent?" A. "I saw it put out fire one day. I was looking at it, but they had the fireman on the loader throw a bucket of water on it. One afternoon they had him to watch it. Fire came from bottom of it. Started between the tracks. That was strip of woods that had not been burned, and they would keep the fire put out until they got where it had burned."

The jury returned the following verdict:

1. Are the plaintiffs the owners of the land described in the complaint? Answer: "Yes."

2. Did the defendant negligently set fire to and burn the lands of the plaintiffs, as alleged in the complaint? Answer: "Yes."

3. What damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: "$250."

Judgment was entered thereon, and defendant appealed.

Bayard Clark for plaintiffs.
Herbert McClammy for defendants.

WALKER, J., after stating the case: There was ample evidence in this case to the effect that the defendant's engine was improperly or defectively constructed with reference to its smokestack and fire box; that it was carelessly operated, and, lastly, that its right of way was very foul, being rank with combustible material; and also evidence that fire was set out by the engine which proximately caused the destruction and loss of plaintiff's timber. It is not necessary that the origin of the fire should be established by positive or direct testimony; that, for instance, of an eye-witness, who testifies that he was present and saw how it originated; but it may be shown by circumstantial proof, like any other material fact in issue. *McRainey v. R. R.*, 160 N. C., 570; *Thompson v. R. R.*, 72 W. Va., 555. This case, in every phase of it, except the questions of evidence, which we will notice later, falls within the principle as stated in *Knott v. R. R.*, 142 N. C., 238; *Williams v. R. R.*, 140 N. C., 623; *Whitehurst v. R. R.*, 146 N. C., 591; *Cox v. R. R.*, 149 N. C., 118; *Currie v. R. R.*, 156 N. C., 419; *Aman v. Lumber Co.*, 160 N. C., 360; and there are others of the same kind. In *Aman's case, supra*, we adopted the analysis of the law made in the *Williams case, supra*, as follows:

"1. If fire escapes from an engine in proper condition, having a proper spark arrester and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence.

"2. If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and dangerous condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Moore v. R. R.*, 124 N. C., 341; *Phillips v. R. R.*, 138 N. C., 12.

"3. If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, whether the fire catches off or on the right of way, and causes damage, the defendant is liable. *Williams v. R. R.*, 140 N. C., 623."

A railway company may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, and operated by the most skillful engineers. It may do all that skill and science can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow that it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fire from spreading to adjoining lands as the employment of the most improved and best constructed machinery. *Knott v. R. R., supra; R. R. v. Medley*, 75 Va., 499. This statement of the law was taken from *Medley's case* and adopted by us in *Knott's case*.

The witness W. C. Burney testified that the fire broke out just after the train had passed, or, to use his expression, "the train-engine was no more than out of sight when the fire got out about 50 yards from the machine on the track." W. B. Hobbs, who was working about 200 yards away, testified that he heard a roaring about ten minutes after the train passed and saw the smoke; that he went to where the fire was, and found it in dead tree-tops, "which were right by the side of the track—not over 10 feet distant." B. M. Meares, Jr., testified that "he had seen it put out fire one day, was looking at it, when they had the fireman on the loader throw a bucket of water on it, and watch it. Fire came from the bottom of it, and started between the tracks. This was

where there was a strip of woods that had not been burned, and they would keep the fire extinguished until they got to the place where it had been burned off."

This evidence alone made the question of negligence one for the jury, and makes out a much stronger case of negligence than did the proof in *Deppe v. R. R.*, 152 N. C., 79, or *McRainey v. R. R., supra,* which cites *Hardy v. R. R.*, 160 N. C., 116; *Henderson v. R. R.*, 159 N. C., 583; *Fitzgerald v. R. R.*, 141 N. C., 535, upon the sufficiency of circumstantial evidence to prove the fact of negligence in dropping live coals or cinders from the defendant's passing train. It appeared in that case that the train had passed by the place, where the burning occurred, more than two hours before the fire was discovered. When the witness spoke of the roaring which he heard at a distance ten minutes after the train had passed, and which came from the direction where he afterwards saw the fire, he evidently referred to the "roaring" noise which so large a fire makes when driven by a high wind.

Upon a motion of this kind we must view the evidence in the light most favorable to the plaintiff, and, thus considered, we are of the opinion that it was sufficient to warrant the jury in drawing from it an inference of negligence. *Armfield v. R. R.*, 162 N. C., 24.

The objections to testimony were not well taken. As to the evidence of B. M. Meares, Jr., the objection should have been to the answer, for the question was unobjectionable in form, as the witness could state whether he saw sparks coming from the engine. But we think the answer was also competent. If the engine, by emitting sparks, had caused a fire, it tended to show, not so much that it kindled this particular fire, as that it was in some way defective. *Knott v. R. R., supra; Whitehurst v. R. R., supra.*

The case of *Cheek v. Lumber Co.*, 134 N. C., 225, and *Ice Co. v. R. R.*, 126 N. C., 797, do not militate against this position. The latter case rather tends to sustain it. It comes within the rules adopted there as regulating the admissibility of such evidence, and taken from the opinion of the Court in *Henderson v. R. R.*, 144 Pa. St., 461. The engine was fully identified in this case, and it would seem from the evidence that there was but one on this logging road.

The questions asked the defendant's witnesses to which exceptions were taken were intended to impeach them and to discredit their statements as to the nonliability of the defendant for burning the plaintiff's woods. As such, they were competent. Many questions, and answers which are incompetent as substantive testimony, may, nevertheless, be admissible for the purpose of contradicting or impeaching a witness, and sometimes are very relevant for that purpose, or to show the bias

of the witness, and that his testimony has been warped by it. Lockhart on Evidence, sec. 280.

There is no error in the case disclosed by the record.

No error.

L. F. TILLERY ET AL. v. THE WHITEVILLE LUMBER COMPANY.

(Filed 18 October, 1916.)

1. Limitations of Actions—Trespass—Damages—Cutting Trees—Statutes.

Where the defendant pleads the three years statute of limitations to an action for trespass, with damages for cutting timber on lands, the burden is on the plaintiff to prove that he commenced his action within the time prescribed; and where from an analysis of the evidence it appears that this has not been done, a judgment of nonsuit is proper. Revisal, sec. 395 (4).

2. Same—Against State.

Construing Revisal, sec. 4048, providing that no statute of limitation shall effect the title or bar the action of one claiming it under an assignment from the State Board of Education, unless the same would protect the person holding the claim adversely to the State, with sections 375, 380, and 389, it is *Held*, that the limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands; and the three years statute to recover damages for trespass in cutting and removing trees from the land applies under the facts in this case. Revisal, sec. 395 (4).

ALLEN, J., did not sit.

CIVIL ACTION tried before *Stacy, J.*, and a jury, at February Term, 1916, of COLUMBUS.

McRackan & Greer and J. D. Bellamy & Son for plaintiffs.

Rountree, Davis & Carr and Schulken, Toon & Schulken for defendant.

WALKER, J. This is an action to recover damages for a trespass committed by cutting trees on plaintiffs' land, and removing them therefrom, the amount demanded being $2,045.40.

The decision of the case turns upon the statute of limitations. If the general statute barring such actions after the lapse of three years from the time the cause of action arose, or, in this case, from the time of cutting the timber, applies, we are of the opinion that the plaintiffs cannot maintain the action and the ruling of the court was correct.

As the defendant pleaded the statute, the burden was upon the plaintiffs to show that their suit was brought within three years from the time of the accrual of the cause of action, or, in other words, that it is not barred. This has been the prevailing rule in this Court as to the burden of proof in such cases. *Moore v. Westbrook,* 156 N. C., 482; *Sprinkle v. Sprinkle,* 159 N. C., 81; *Ditmore v. Rexford,* 165 N. C., 620.

G. L. Holmes testified that when he measured the stumps in the woods they indicated that the timber had been cut about three years before, and that J. K. Ward and G. L. Butler helped him to measure the timber. He did not state the time when he measured it, but J. K. Ward testified that the timber was cut ten or twelve years ago, or before the trial, which would fix the time of measuring the timber some years before the suit was commenced. Holmes, Butler, and Ward were witnesses of the plaintiffs. The only evidence from which any reasonable inference can be drawn as to the time of cutting the timber is that of J. K. Ward, which fixes the time in 1904 or 1906; and if his evidence is considered with that of Holmes, and if the latter was correct when he stated that at the time he measured the timber the appearance of the stumps indicated that it had been cut about three years, the timber must have been measured in 1907 or 1909, or about that time. But if the testimony in regard to the time of the cutting is so uncertain or indefinite that the date cannot be determined, it is the fault of the plaintiffs, as the burden was upon them of making it sufficiently certain for the jury to pass upon it and ascertain the time that had elapsed since the cutting of the timber, so as to determine whether or not the plaintiff's cause of action was barred. It seems to us that if we construe the testimony of Holmes and the testimony of Ward together, or even separately, it is clear that more than three years had run since the accrual of the cause of action before this action was begun. The statute, therefore, bars the action, if it applies at all to a cause of action prosecuted by the plaintiffs.

It is contended by the plaintiffs that the statute does not run against them by reason of Revisal, sec. 4048, which provides that "No statute of limitations shall affect the title or bar the action of the State Board of Education, or its assigns, unless the same would protect the person holding a claim adversely to the State." The defendants insist that neither the section cited nor section 380 of the Revisal applies so as to prevent the bar in this case, as, by Revisal, sec. 375, it is provided: "That the limitations prescribed by law shall apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties," which has been construed by this Court, in *Threadgill v. McLendon,* 170 N. C., 641, to

mean that the ancient maxim, "No time runs against the King" (*Nullum tempus occurrit rigi*), or, with us, against the State, has been abrogated, and that now, at least in some respects, time does run against the State, as consent has been given that it shall do so in the case of private persons. It also was held in that case that Acts of 1891, ch. 224 (Revisal, sec. 389), did change this law, except as to the species of public property therein mentioned, namely, public roads, and public streets, lanes, alleys, squares, and public ways of any kind. Revisal, sec. 380, may be confined to cases where, by reason of adverse possession of land for the time mentioned in the section, the State is willing to forego her title thereto, and agrees not to sue for the same, nor for any of the issues or profits thereof. It was not intended by this section that the State should not be barred from recovering except by the lapse of thirty years or twenty-one years, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title, and the State agrees that when the adverse possession has continued for so long a time—thirty years without color and twenty-one years with color—she will not sue the person who has thus held the possession, but surrender her title to him; nor will she sue for the issues or profits. But this does not mean that the time limited for bringing any suit for the rents, issues, or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, it should be thirty or twenty-one years. Those periods are not applicable to personal actions, but only, or, at least, generally, to actions for the recovery of land or some interest therein. When, though, the State has lost the title to land, under the provisions of section 380, that fact alone—regardless of the special limitation of three years, as to an action for the recovery of rents, issues, and profits, treated as a personal action—will also bar the right to any profits of the land, even those accrued just before the title was thus lost. Looked at in another way, the bar of any recovery for rents, issues, and profits was but incidental to the loss of the title to the land.

Being of opinion against plaintiffs on both points, we affirm the judgment, as in no view of the facts, giving the plaintiffs the most favorable construction of the evidence, can they recover. *Oldham v. Reiger,* 145 N. C., 254; *Cherry v. Canal Co.,* 140 N. C., 423; *Henderson v. R. R.,* 159 N. C., 581. We have assumed in the discussion that the plaintiffs occupy the same position as if the State were suing, and are entitled to her identical rights and remedies.

Affirmed.

ALLEN, J., did not sit.

J. S. WILLIAMS AND J. J. BORDEN, EXECUTORS, v. CAPE FEAR LUMBER COMPANY.

(Filed 25 October, 1916.)

1. Deeds and Conveyances—Timber—Realty—Title.

A valid conveyance of trees standing and growing upon lands can be made for the purpose of cutting and removing them therefrom within a fixed time; and until so cut the trees are to be considered realty. The title to those not cut within the time fixed by the deed reverts to the grantor, and does not pass by the deed.

2. Same — Grantee — Description — Trespass — Damages — Participation — Waiver.

Where a purchaser has acquired by deed the timber, of a certain size, standing upon lands, which he may cut and remove in a stated period of time, and has his deeds recorded, and thereafter conveys to another the timber owned by him on the lands, and refers for description to his own deeds, his grantee can acquire no further right to the trees than he has acquired under his own deed; and he is not responsible for damages caused by his grantee in entering upon the lands and cutting trees of less size than those conveyed, etc., unless he has in some way participated therein or knowingly received a part of the profits from the trespass, or in some recognized way ratified the act.

3. Deeds and Conveyances—Timber—Consideration—Payment—Future Ascertainment.

It is not necessary to a valid conveyance of timber standing or growing upon lands that a certain sum be fixed for the total purchase price to be paid, or that it be paid in whole or in part at the time of the conveyance, or notes for the purchase price should then be given; for it is sufficient if the price can readily and definitely be ascertained in the future by some fixed statement, as where the consideration for the deed is specified to be "$2 per thousand feet, log measure."

4. Deeds and Conveyances—Timber—Second Conveyances—Trespass—Trials—Instructions—Ratification.

Where the purchaser of standing timber upon lands, who has acquired the same under the usual form of deed, requiring it to be cut and removed within a stated period, specifying the size, has conveyed his right therein to another, and he is sued for damages for trespass committed by his grantee in going upon the lands and cutting and removing the timber of less size than that conveyed, it is reversible error for the trial judge to charge the jury that if the defendant's grantee, through its agents and servants, committed the trespass alleged, and paid the defendant rent for the undersized trees, the defendant would be liable, there being no evidence or contention that the defendant received any part of the money for the undersized trees knowingly or had participated in the acts of trespass, or had given some authority apart from the deed for the unauthorized act, or had ratified it.

HOKE, J., concurs in the result.

WILLIAMS *v.* LUMBER CO.

CIVIL ACTION tried at March Term, 1916, of DUPLIN, before *Allen, J.*

The action was brought to recover damages for cutting timber on plaintiff's land and removing it therefrom. The defendant, a corporation of Norfolk, Va., on 26 May, 1911, "granted and sold" to the Camp Manufacturing Company, a corporation of Isle of Wight County, Va., the standing timber, "owned by said Cape Fear Lumber Company," on a large body of land in Duplin County. The Cape Fear Lumber Company had previously bought from other parties, including the plaintiffs, certain logging rights, and the standing timber on the same land, "measuring 10 inches and upwards in diameter at the base, when cut," and it was this timber that it owned at the date of its conveyance to the other company. The Camp Manufacturing Company entered upon the land, and plaintiffs allege and offered proof to show that while it cut timber within the description of its deed, it also cut many trees on their land which were not conveyed by the deed to it from the Cape Fear Lumber Company, and were not owned by said company, but by the plaintiffs; and for this cutting, and for burning some of the trees and other things on the land, the action was brought. The deed from the Cape Fear Lumber Company to the Camp Manufacturing Company shows an absolute sale and conveyance of the trees owned by the former company at the date of the deed, as will appear by this extract taken therefrom: "In consideration of the sum of $2 per thousand feet, log measure, to be paid as is hereinafter set forth, the said Cape Fear Lumber Company hereby grants and sells to the said Camp Manufacturing Company, its assigns or successors, all of the standing timber owned by said Cape Fear Lumber Company in Duplin County, North Carolina, on tracts of land described in the following deeds, all of which deeds are recorded in the office of the register of deeds for Duplin County, North Carolina." Then follows a detailed list of the deeds referred to for a more particular description of the timber and land. The deed contains clauses for ascertaining the price to be paid and the payment thereof, as the timber should be actually cut and removed from the land, and directed that the money should be paid the Atlantic Trust and Banking Company of Wilmington, N. C., trustee for the Cape Fear Lumber Company, in accordance with the terms of the deed creating said trust. Then follows this clause: "The Cape Fear Lumber Company shall, at its own expense, defend all suits that may be brought against the Camp Manufacturing Company by reason of its cutting and removing, or attempting to cut and remove, any portion of the said timber, or going upon the land upon which same is located to cut and remove the same or any part of the timber herein sold, and shall pay whatever judgments may be rendered against said Camp Manufacturing Company in the said suits, if any there be."

The court charged the jury that if the Cape Fear Lumber Company authorized the Camp Manufacturing Company to enter upon the land and cut and remove timber and trees, paying the Cape Fear Lumber Company $2 per thousand feet as stumpage for said trees as were so cut and removed, and the Camp Manufacturing Company sent its agents and servants upon the land in March, 1911, and between that month and September of the same year, and they did cut and remove the merchantable timber thereon, and paid the Cape Fear Lumber Company $2 per thousand feet therefor, and that in cutting and removing timber they included trees not 10 inches at the stump or upwards when cut, and paid rent for said trees so cut, and under size, to the Cape Fear Lumber Company, said trees not being necessary for the purpose of building and constructing roads, tramroads, etc. (as described in the deeds of plaintiff to defendant), the jury should answer "Yes" to the first issue, which was as follows: "Did defendant Cape Fear Lumber Company wrongfully cut and remove timber and trees of plaintiff's testator, R. J. Williams, as alleged? Answer: Yes." Defendant excepted to the giving of this instruction.

The defendant requested the court to give this instruction to the jury: "The defendant Cape Fear Lumber Company contends that under the contract with the Camp Manufacturing Company it granted and sold unto the said Camp Manufacturing Company only such timber as was 10 inches and upward in diameter on 30 March, 1892; and that if the said Camp Manufacturing Company cut any timber upon said lands that was under this size on 30 March, 1892, said acts and conduct were without authority and were the wrongful acts of the Camp Manufacturing Company and its servants, for which the Cape Fear Lumber Company is not liable; and the court instructs you that if you find from the evidence that the Cape Fear Lumber Company contracted for the sale of certain standing timber, described in the deed referred to in the contract, of certain dimensions therein specified, at the price of $2 per thousand feet; that the Cape Fear Lumber Company was to defend all suits that might be brought against the Camp Manufacturing Company by reason of its cutting or attempting to cut and remove any portion of the timber described in said deed and contract, to wit, such timber as was then 10 inches and upward in diameter on 30 March, 1892, and that the Cape Fear Lumber Company reserved no control or supervision of the work or agents, agencies, or instrumentalities to be used in the cutting and removing of said timber under said contract, and that it was interested only in the payment of the purchase price of the timber under the contract, then the court instructs you that the defendant Cape Fear Lumber Company is not liable for any acts done

by the Camp Manufacturing Company, and the jury will answer the first, third, fifth, and seventh issues 'No.'" The court refused to give the instruction, and defendant excepted. The jury rendered a verdict against appellant for a large sum, and, after assigning errors, it appealed.

H. D. Williams, A. D. Ward, and W. F. Ward for plaintiffs.
Stevens & Beasley, Langston, Allen & Taylor for defendants.

WALKER, J., after stating the facts: This Court has held that trees growing upon land can be conveyed for the purpose of being cut and removed therefrom within a fixed time; that they are to be considered as realty, and that the title to such of them as are not cut within the prescribed time remains in the grantor, and does not pass by the deed. *Bunch v. Lumber Co.*, 134 N. C., 116; *Hawkins v. Lumber Co.*, 139 N. C., 160; *Lumber Co. v. Corey*, 140 N. C., 462; *Midyette v. Grubbs*, 145 N. C., 85; *Timber Co. v. Wilson*, 151 N. C., 154.

In the *Bunch case* we quoted with approval the doctrine as stated in *Strasson v. Montgomery*, 32 Wis., 52, as follows: "The conveyance is of all the trees and timber on the premises, with the proviso that the vendee should take the same off the land within four years. It is well settled, on principle and by authority, that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises."

So in *Hawkins v. Lumber Co., supra*, we held, in regard to the same matter: "It is an established principle in this State that growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property. The true construction of this instrument now before the Court is that the same conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed. A construction substantially similar has been placed on such deeds in the larger timber-growing States where contracts of this character are not infrequent," citing several cases for the position.

Under these authorities, the legal effect of the deed from the appellant to the Camp Manufacturing Company is that it conveys only the trees that were cut by the latter, and those not cut within the time fixed by the deed belonged to the grantor; and, further, that the deed conveyed only such trees as are described in it, that is, those then owned by the appellant and of the prescribed dimension. This instrument

itself, in form and substance, evidences only a sale of the trees, and that is the legal designation of the contract. It does not, on its face, purport to do anything but convey the trees to the grantee, or so many of a given dimension as are thereafter cut within the prescribed time. It was not necessary that the price should be paid down in cash, or that notes should be given for it. It could not then be ascertained definitely what it would be, and not until it was known how many of the trees would be cut. This did not change the character of the transaction as a sale, for that is certain which can be made certain by reference to something else. "The price may be left to be fixed in such manner as may be agreed upon in the contract of sale, as by the market price of the commodity at a certain time and place or by any other method by which it can be determined with reasonable certainty. So the price may by agreement be left to be fixed in accordance with a valuation of the goods to be subsequently made by some third person." The Camp Manufacturing Company was, therefore, not authorized by the deed to cut any other trees. The instruction of the court, when considered in connection with what precedes it, and the reference in the instruction to trees under a certain dimension, which is mentioned in the deed, being cut by the Camp Manufacturing Company, shows that it had reference to the authority, given to said company by the deed, to cut trees, and as thus treated, it was too broad. The Camp Manufacturing Company could cut, under the terms of the deed, only such trees as are described therein, and if it cut other trees the appellant would not be liable therefor, unless it gave some authority, apart from the deed, to do the act. Its authority given by the deed to cut trees of a certain dimension did not, of course, extend to trees not of that kind, and the Camp Manufacturing Company would be liable alone for the trespass if it did cut other trees, in the absence of any proof showing that the appellant participated in the cutting or was in some way connected with it. "It is the general rule that one who counsels, advises, abets, or assists in the commission by another of an actionable wrong is responsible to the injured party for the entire loss or damage. But mere knowledge that a tort is being committed against another will not be sufficient to establish liability. There exists no legal duty to disclose. Nor will the mere presence of a person at the commission of a trespass or other wrongful act by another render him liable as a participant. It is also well settled that the liability of one who has not actively participated may be established where the wrongful act is ratified by him. But mere acquiescence in the commission of a tort after the act does not make the person thus acquiescing a party to the wrong or liable therefor as a joint tort-feasor, since, to be liable, he must not only have

assented to the wrong, but the act must have been done for his benefit or have been of a nature to benefit him. Ratification will not be established from mere knowledge, approval, or satisfaction. It has been said that 'To hold one responsible for a tort not committed by his orders, his adoption of and assent to the same must at all events be clear and explicit, and founded on a clear knowledge of the tort which has been committed.' The ratification must be founded on full knowledge of the facts constituting the wrong which has been committed or a purpose without inquiry to take the consequences." 38 Cyc., 485 and 486. The Camp Manufacturing Company was authorized by the deed to enter upon the land and cut and remove trees, but not trees which did not come within the description of the deed; and for this reason the instruction was calculated to mislead the jury as to the law and the nature of the appellant's liability for the trespass of the Camp Manufacturing Company, if there was any liability on its part. The instruction, as we have said, manifestly referred to an entry upon the lands under the deed, to cut timber, and this extended the appellant's liability for the excessive acts of the other company beyond its legitimate scope. The acceptance of rent, without any knowledge of the source from which it came, or for what it was given, would not create liability for the tort or trespass of the Camp Manufacturing Company, as we have seen by the above reference to 38 Cyc., p. 486. The receipt of the money must be such as would amount to a ratification of the trespass, or, under some circumstances, it might be evidence of a participation therein. The instruction requested by the appellant is correct in principle, and should have been given, unless it has been extended to too many of the issues. We do not see now how it affects the seventh issue. If the appellant did nothing more than convey the trees he then owned of a certain kind and dimension, and merely received the price therefor, we do not see how it can be liable for the trespass of the Camp Manufacturing Company in cutting trees not described in the deed. If A. conveys to B. a certain tract of land, he is not liable to C. because B. takes possession not only of the tract conveyed to him by A., but also of an adjoining tract belonging to C. In that case B. has simply done something not authorized by A. to be done. Plaintiff may be able to show that, under all the facts and circumstances of the case, the jury should find that there was concert of action between the companies or that the appellant did so act as to authorize the trespass, and if it did not do so originally, it has since so acted as to ratify or indorse it.

It may be that the facts of the case are such as to make the Camp Manufacturing Company a proper party to this action, especially if it will be contended that the two corporations are really one and the same;

but we leave this matter for the consideration of counsel, without any suggestion from us as to the course that should be taken.

There was error in the instruction given by the court, which requires that a new trial should be had.

New trial.

HOKE, J., concurs in result.

Z. M. CAVENESS v. CHARLOTTE, RALEIGH AND SOUTHERN RAILROAD COMPANY.

(Filed 25 October, 1916.)

1. Railroads—Streets—Additional Burden—Abutting Owners—Compensation—Constitutional Law.

The construction and operation of a steam railroad upon a street is an additional burden thereon not contemplated by or included in the original dedication for street purposes, and is a physical interference with the proper enjoyment of an abutting owner on the street of his easement therein; and when used without compensation amounts to a "taking" within the meaning of the Constitution, though neither the abutting lot nor a part thereof has been entered upon by the railroad company.

2. Same—Measure of Damages.

Where a steam railroad enters upon a street in front of an abutting owner thereon, and constructs and operates its railroad there so as to constitute an additional burden, to the injury of the owner, for which compensation should be allowed, the owner may recover for the injury to the extent that the value of his property is impaired by the obstruction or hindrance to his easement, and by the annoyances and inconveniences usually allowed for in condemnation proceedings.

3. Railroads—Streets—Additional Burden—Deeds and Conveyances—Actions—Statutes.

The act of a railroad in entering upon and constructing and operating its railroad over a street abutting the lands of another, without having resorted to condemnation proceeding or having otherwise acquired the right, is a continuing trespass upon the lands of the abutting owner, and the right to recover permanent damages therefor will pass to the grantee of the owner, when no other provision has been made in the deed, unless the grantor has theretofore instituted his action to recover them,

4. Same—Lis Pendens—Motion in Cause.

Where the owner of lands at the time of the entry of a steam railroad company on his easement in a street has a right of action against it for permanent damages, which he brings and then conveys the land to an-

other, the proceedings thus instituted may be carried on and perfected as if no conveyance had been made, such proceedings constituting a *lis pendens*, Revisal, sec. 2594; and the vendee must assert his right by action or appropriate proceedings in the cause.

5. Railroads—Streets—Additional Burden—Damages—Actions—Title to Easement—Deeds and Conveyances.

Where a railroad company, without authority, enters upon a street abutting the lands of private owners, and constructs and operates its railroad thereon, the owner, by instituting his action to recover damages, confers the right to the easement to the railroad company, upon payment and tender, etc., by the company of the amount awarded by the appraisers; and where no action has been instituted, and the lands have been conveyed after their appropriation and use by the company, the right to recover permanent damages therefor inures to him who first institutes his action pending his ownership, unless there is a different provision in the conveyance.

CIVIL ACTION tried before *Connor, J.*, and a jury, at March Term, 1916, of WAKE.

The action was to recover permanent damages, claimed by plaintiff by reason of the construction and operation of defendant railroad, and the facts in evidence tended to show that in 1913 plaintiff was the owner and in the possession and occupation of a house and lot in the city of Raleigh abutting on Boylan Avenue on the east and on Montford and Cutler streets on the north and west, and at said time defendants constructed their railroad leading out of Raleigh, N. C., across said Montford and Cutler streets at the intersection of the two, and along Cutler Street for a distance of 60 feet and more, this being the locality where plaintiff's lot adjoined said streets, and the track of the road at that place being in a cut, excavated for the purpose, about 22 feet deep.

There was also evidence on the part of plaintiff tending to show that the value of his lot was greatly impaired by the building of said road and the running of defendant's trains thereon, by the noise, smoke, cinders, dust, and other inconveniences incident to its operation, etc.

It further appeared that in June, 1913, the road then being completed and in operation, plaintiff instituted this action to recover permanent damages for the injury to his property, duly filing his complaint therefor on 27 February, 1913, and that pending said suit, to wit, on 14 April, 1914, plaintiff sold and conveyed the house and lot to one J. A. Sanders, and he, in turn, had since sold and conveyed to others.

On denial of liability, the cause was submitted on issues, and verdict rendered, as follows:

1. Was the plaintiff the owner of the property described in paragraph 5 of the complaint at the time of the location, construction, and operation of defendant's railroad? Answer: "Yes."

2. Did the plaintiff commence this action and file his complaint herein after the construction and operation of defendant's railroad and before the sale and conveyance of said property by him? Answer: "Yes."

3. What damage, if any, is the plaintiff entitled to recover of the defendant by reason of the location, construction, and operation of said railroad? Answer: "$2,000."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

J. W. Hinsdale, Jr., Winston & Biggs for plaintiff.
R. N. Simms for defendant.

HOKE, J. It is objected for defendant that as no part of plaintiff's lot was taken by the railroad company, he is not entitled to recover damages for any impairment of value caused by the operation of defendant's trains; but the authorities are to the effect that the construction and operation of a steam railroad on a street is an additional burden not contemplated or included in the original dedication for street purposes, and that the same constitutes a physical interference with the proper enjoyment of his easement on the street by an abutting owner which amounts to a "taking," as the term is used and understood in applying the principles of eminent domain, and, this being true, such owner may recover for the injury to the extent that the value of his property is impaired by the obstruction or hindrance to his easement and by the annoyances and inconveniences usually allowed for in condemnation proceedings. *Kirkpatrick v. Piedmont Trac. Co.,* 170 N. C., 477; *R. R. v. Mfg. Co.,* 169 N. C., 156; *R. R. v. Armfield,* 167 N. C., 464; *R. R. v. McLean,* 158 N. C., 498; *Staton v. R. R.,* 147 N. C., 442.

In *Thomason v. R. R.,* 142 N. C., pp. 300-318, to which we were cited on the argument, the question chiefly presented was the right of an owner of real property *abutting* on a railroad right of way to recover of the company by reason of the manner its trains were being operated and its traffic business conducted on said right of way, and the Court held that, to the extent that the trains, etc., were being properly operated under its charter, no action would lie, and this notwithstanding the large increase in the company's trackage and volume of business required in the legitimate discharge of its duty to the public; that it was only when, under the claim of its charter privileges, the company was so conducting its business as to create unnecessarily a nuisance, causing damage to the property, that an owner adjoining the right of way could sue, under the principles applied in *R. R. v. Baptist Church,* 108 U. S., 317, and other like decisions. *Thomason's case,* therefore, is not directly apposite to the questions arising on this appeal—the

right and quantum of recovery by an owner whose property has been "taken" in the acquirement of the right of way.

Again, it is contended that the judgment cannot be sustained because it appears that, pending the action, plaintiff conveyed the title to another, and that the right of recovery follows as an incident to the title. On this question our statute provides (Revisal, sec. 394, subsec. 2) that no action shall be maintained against a railroad company for damages caused by the construction of its roads, or repairs thereto, but within five years from the time the cause of action accrues, "and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property."

In case of railroads this provision requiring an award of the entire damage in a single action prevailed in this State at the election of the parties prior to the enactment of the statute (*Ridley v. R. R.,* 118 N. C.), and, where such a position is recognized elsewhere, the cases very generally hold that one who owns the land at the time the railroad enters and constructs its road thereon may recover for the entire damage. These decisions proceed upon the theory that such an act on the part of the company will constitute a completed trespass, and that subsequent owners have no interest in a recovery based upon it. *Roberts v. Northern Pacific R. R.,* 158 U. S., 1; *McFadden v. Johnston,* 72 Pa. St., 681; *Central R. R. v. Hetfield,* 29 N. J. L., 206; *King v. So. Ry.,* 119 Fed., 1017; *Walton v. R. R.,* 70 Wis., 414; 10 R. C. L., 215, title, "Em. Domain," sec. 184; 2 Elliott on Railroads (2 Ed.), sec. 1000; 2 Lewis Eminent Domain (3 Ed.), p. 1647.

The decisions on the subject in North Carolina, however, are to the effect that, unless an action for permanent damages or condemnation proceedings have been instituted by the original owner pending his ownership, the right to recover will pass to the grantee. Our cases proceed upon the theory that the act of the railroad in entering upon the land and constructing its road, without resort to condemnation proceedings provided for by the statute, amounts to a continuing trespass, and the right to recover compensation for the easement arises to him who owns the property when the road enters and remains thereon as of right, that is, when the company acquires the right to enter and remain, to be perfected on the payment of damages. Thus, in *Phillips v. Tel. Co.,* 130 N. C., pp. 513-526, the telegraph company had placed its poles on a railroad right of way, amounting, with us, to an additional burden which entitled the owner of the property to compensation. The original owner, without having sued or instituted condemnation proceedings, conveyed the property, and it was held that the grantee could recover

permanent damages in compensation for the easement, the principle being stated in the ninth headnote as follows: "A purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages for the easement taken, and the telegraph company thereby acquires the easement and the right to maintain its line thereon"; and *Douglas, J.,* in the opinion, speaking to the question, said: "A subsequent purchaser cannot recover for a completed act of injury to the land, as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner, in the first case as for a continuing trespass, and in the latter for a fresh injury. If, in addition to this, the trespasser seeks to acquire the right to remain, he can do so only by the consent of the owner or under the principle of eminent domain. This is not the perpetration of a wrong, but the lawful acquisition of a right, and the damages incident thereto must be paid to the owner from whom the right is acquired. Aside from this action, the defendant has acquired no easement whatever as against the plaintiff, and if it takes that easement now, it must pay the man from whom it takes it. To say that one may acquire an easement in the land simply by an unlawful entry is an attempted extension of the doctrine of squatter sovereignty to an extreme which we feel entirely unable to concede. *Liverman v. R. R.,* 109 N. C., 52; *s. c.,* 114 N. C., 692."

The same principle was recognized and applied with us in condemnation proceedings in *Beal v. R. R.,* 136 N. C., 298; *Liverman v. R. R.,* 109 N. C., 52; *same case,* 114 N. C., 695; and this view seems to find support in 2 Lewis Em. Domain, sec. 895.

Under our statute and in condemnation proceedings, Revisal, sec. 2587, the railroad acquires the right to remain upon the land, construct and operate its road on the payment into court of the amount assessed by the appraisers, and the recovery should inure to the one who owns the property at that time. True, provision is made for appeal by either party, and the damages may thereafter be increased or lowered, and the right may be lost by failure to pay the amount ultimately awarded; but the right to enter and construct and operate its road is acquired when the company pays the amount assessed by the first appraisers, and the owner at that time is entitled to the compensation for the easement. In that case, however, if the owner at the time of entry shall have instituted condemnation proceedings, the statute, sec. 2594, expressly provides "That no change of ownership, by voluntary conveyance or transfer of real estate or any interest therein or of the subject-matter of the appraisal, shall in any manner affect such proceedings, but the

same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. The proceedings by this section are constituted a *lis pendens,* and, although the grantee, as stated, prior to payment of the amount may be entitled to this compensation, if proceedings have been instituted, he must assert his right by action or appropriate proceedings in the cause. *Abernethy v. R. R.,* 159 N. C., 340. And so, under our decisions, in case of suit the railroad company acquires the right to remain and construct its road when the owner enters suit for permanent damages for trespass. He thereby assents to the company's right to occupy and build its road upon the land upon the payment of the amount due, and the entire compensation for the easement should inure to the owner, who recognizes the railroad's right by entering this character of suit. *Liverman v. R. R.,* 114 N. C., at p. 697; *White v. R. R.,* 113 N. C., at p. 622; *Staton v. R. R.,* 147 N. C., at p. 443.

Under any view of the matter, therefore, the present recovery must be sustained, it appearing from the record that plaintiff owned the land when the railroad entered and constructed its road, and pending his ownership and before conveyance he entered suit and filed his complaint for permanent damages.

There is no error, and the judgment entered must be sustained.

No error.

JOSEPH H. WATTERS v. M. W. HEDGPETH AND W. A. HEDGPETH.

(Filed 25 October, 1916.)

1. Homestead—Conveyance—Limitation of Actions—Judgments—Executions.

The laying off of a homestead under a docketed judgment suspends the statute of limitations during the continuance of the homestead, and when it has been laid off since the enactment of the statute it is taken by the homesteader subject to its provisions, and upon conveyance thereof is subject to execution under the judgment. Revisal, sec. 686.

2. Accord and Satisfaction—Conditional Acceptance—Contracts.

The acceptance of an offer of compromise must be in accordance with its terms to be binding between the parties, and where an offer is made by a debtor to pay 10 per cent of the amount of a judgment, an acceptance of "10 per cent net" implies a variance between the parties, and is held, in this case, not to be binding.

3. Bankruptcy—Homestead—Conveyances — Judgments — Executions — Statutes.

Title to exempt property does not pass to the trustee in bankruptcy, and where the debtor's homestead has been laid off and the lien of a judgment has attached thereto more than four months before the filing of the petition in the bankrupt court, and the judgment creditor has proved his claim as unsecured and the homestead again laid off in proceedings in the bankrupt court, after the discharge of the bankrupt, the judgment creditor, under whose judgment the homestead was first laid off, may issue execution against the lands after the same has been conveyed by the homesteader. Revisal, sec. 686. *Blum v. Ellis*, 73 N. C., 293, cited and distinguished.

4. Bankruptcy—Homestead—Title—Bankrupt's Property—Discharge.

A judgment debtor has no property in a homestead laid off to him under a judgment, but merely an exemption from sale, and the land is practically the property of the judgment creditor, to the extent of his lien. Hence, a homestead laid off under our laws is not subject to the jurisdiction of the bankrupt court, and a lien of judgment thereon is not affected by the discharge of the bankrupt therein.

5. Bankruptcy—Homestead—State Decision.

The bankrupt court is bound by the construction put upon our exemption laws by the Supreme Court.

6. Bankruptcy—Homestead—Unsecured Claims—Judgments—Credits.

Where a judgment creditor, holding a valid lien upon the debtor's homestead, laid off under his judgment, thereafter proves his claim as unsecured against his debtor in the bankrupt court, any sum he may receive under a distribution of the assets will be credited upon his judgment, and will reduce the amount thereof to that extent.

APPEAL by defendants from *Stacy, J.*, at chambers in NEW HANOVER, 16 March, 1916.

This was a motion for leave to issue execution, heard upon agreed facts. The plaintiff obtained judgment against the defendants in 1902, and on execution issued the homesteads of defendants were allotted. In 1910 the defendants filed a petition in bankruptcy, in which proceeding the plaintiff proved his judgment as an ordinary unsecured debt, not asserting any lien upon the allotted homesteads. In the bankruptcy proceeding the homesteads of the defendants were again allotted, being the identical lands which had been allotted in the State court, and embracing all the lands owned by them. The trustee in bankruptcy made a return of no assets, and for this reason the reversionary interest in the homesteads was not sold in the bankruptcy proceedings. In 1911 the defendants received their discharge in bankruptcy, and thereafter one of the defendants, W. A. Hedgpeth, and his wife, sold and conveyed to one Surles the land which had been allotted him as a homestead by

the bankrupt court, the purchaser paying a part of the purchase money in cash and executing a mortgage upon the land to secure the balance. The other defendant, M. W. Hedgpeth, has not conveyed his homestead, but still occupies it.

After the discharge in bankruptcy the defendants offered to pay plaintiff 10 per cent of the amount of the judgment in compromise of their liability, if any, thereunder. Plaintiff accepted this offer, provided the 10 per cent was "net to him"; but before the defendants accepted this offer the plaintiff withdrew it.

The court ordered execution to issue against both defendants, and they excepted and appealed.

J. A. McNorton for plaintiff.
McIntyre, Lawrence & Proctor for defendants.

CLARK, C. J. The lien of the judgment is not barred by the statute of limitations, which is suspended and does not run against the docketed judgment during the life of the homestead. Revisal, 685, subsec. 5; Revisal, 686; *Farrar v. Harper,* 133 N. C., 71; *Wilson v. Lumber Co.,* 131 N. C., 163; *Formeyduval v. Rockwell,* 117 N. C., 320. "Even if the original judgment had become dormant, the right to enforce execution thereon upon the land subject to exemption arises on the termination of the homestead." *Rogers v. Kimsey,* 101 N. C., 564; *Jones v. Britton,* 102 N. C., 201.

Revisal, 686, was enacted 6 February, 1905. The homestead in favor of the defendant M. W. Hedgpeth was allotted thereafter, on 31 May, 1905, and in favor of W. A. Hedgpeth on 12 April, 1906. On 20 November, 1913, W. A. Hedgpeth and his wife conveyed the homestead allotted to him. The homesteads having been allotted to the defendants after the adoption of Revisal, 686, they received same vested with the rights as defined in Revisal, 686; and when W. A. Hedgpeth sold and conveyed the same he parted with his exemption, and the land, theretofore protected from sale "while occupied by him," by virtue of such exemption only, became subject to sale under the lien of the plaintiff's judgment. *Sash Co. v. Parker,* 153 N. C., 131. This has been cited as authority. *Fulp v. Brown,* 153 N. C., 533; *Davenport v. Fleming,* 154 N. C., 293; *Rose v. Bryan,* 157 N. C., 174; *Dalrymple v. Cole,* 170 N. C., 107; *Brown v. Harding,* 171 N. C., 690.

The acceptance of an offer must be in the terms in which it is made. The offer of the defendants to pay the plaintiff 10 per cent was not accepted, but a counter offer was made to accept "10 per cent net," which we understand to mean 10 per cent of the debt plus the full amount of the court costs, which had been paid by plaintiff. The plain-

tiff evidently meant to exact something more by requiring *10 per cent, net,* else he would simply have accepted the defendants' offer. The defendants must have understood the plaintiff's counter offer as being something different, for they delayed acting on it until the plaintiff withdrew the proposition, as he had a right to do.

Nor is the plaintiff's lien barred by the discharge of the debt in bankruptcy. "No title to exempt property passes to the trustee at all." Bankruptcy Act 1898, sec. 70 (a); 13 Remington on Bankruptcy, sec. 1024, p. 572.

"The discharge does not operate to cut off good and valid liens given or acquired for the debt, either a lien by contract or by legal proceedings, *nor to prevent their enforcement.* It is purely personal to the bankrupt." 2 Remington Bankruptcy, sec. 2673, p. 1589. Congress cannot destroy the plaintiff's lien against the homestead by the Bankruptcy Act. *Kener v. LaGrange Mills,* 231 U. S., 205.

"In actions to try title to property, *or determine the validity of liens on property,* or interest therein, where no recovery of a debt is sought, the defendant may not interpose his discharge in bankruptcy. The discharge bars debts, not ownership of property, whether such ownership be absolute, conditional, *or by way of lien,* whether it be ownership of the whole or merely partial ownership." 2 Remington on Bankruptcy, sec. 2668, p. 1587.

"The discharge bars all future legal proceedings for the enforcement of the debt or obligation discharged, except such as are by way of enforcement of a lien therefor not in itself invalid; but does not affect suits to determine the ownership of property, *or to enforce liens thereon.*" 2 Remington on Bankruptcy, sec. 2668, p. 1588.

A discharge in bankruptcy does not affect the lien of a creditor where the lien was created more than four months before the petition in bankruptcy was filed. "The effect of the discharge is personal to the bankrupt, and does not affect any lawful lien, charge, or encumbrance existing on his property, but judgment may be specially entered thereon *in rem.* The bankruptcy law was carefully designed to save all liens against property from being affected by the discharge, and its terms seem ample for that purpose." *Paxton v. Scott,* 66 Neb., 385, citing Lowell on Bankruptcy, 314, 396, 397; *Long v. Bullard,* 117 U. S., 617.

To the same effect, *Philmon v. Marshall,* 116 Ga., 811; *Smith v. Zachary,* 115 Ga., 722; 1 Remington Bankruptcy, sec. 1032, p. 538; *Lockwood v. Bank,* 190 U. S., 294; *Kener v. LaGrange Mills,* 231 U. S., 205.

Under the Bankruptcy Act of 1898 the bankruptcy court is without authority or power to administer property set aside as exempt under

the Constitution of this State. *McKenney v. Chenney,* 118 Ga., 387. And the authorities are numerous to that effect.

When the defendants went into bankruptcy they could not take into it the reversion in their homestead, for it was practically the property of the plaintiff, certainly to the extent of his lien upon it. The defendant had no property therein, but merely an exemption from sale. *Joyner v. Sugg,* 132 N. C., 588, and cases cited; Revisal, 686. When the plaintiff proved his debt in bankruptcy, if he had received any dividend thereon (which he did not) it would have been applied to reduce the indebtedness for which he held a lien, unless he had an unsecured claim against the defendants, to which it should have been applied in preference. The bankruptcy court could not discharge the lien on the property. If the defendants had moved in the bankruptcy court to sell the reversionary interest, this could not have been done except subject to plaintiff's lien, under our statute forbidding the sale of the reversionary interest, for "the bankruptcy court is bound by the construction put upon the exemption laws by the highest courts of the State." 1 Remington on Bankruptcy, sec. 1042, p. 593. "No title to exempt property passes to the trustee at all." Bankruptcy Act 1898, sec. 70 (a); 1 Remington on Bankruptcy, sec. 1024, p. 572, above cited.

In *Blum v. Ellis,* 73 N. C., 293, relied on by defendants, neither the lienor nor the bankrupt seems to have objected to such sale, and the reversionary interest having been sold in bankruptcy without objection, as it seems, the Court held that while the bankrupt law did not divest a lien, when the property had been actually sold, it could not afterwards be subjected by the judgment creditor. The reasoning in that case would apply it only to property *in custodia legis,* which could be sold and proceeds applied to discharge the mortgages and other liens, but not to homesteads, since our statute forbids the reversionary interest to be sold. In *Blum v. Ellis* it is frankly stated in the opinion that the authorities were in conflict. Though cited since, we think it is authority only in cases where, as just stated, the property, being *in custodia legis,* can be sold for application to the lien, and not to the reversion in the homestead, which cannot be sold. In the latest case citing *Blum v. Ellis,* this Court intimates as much, *Laffoon v. Kerner,* 138 N. C., at bottom of p. 287.

In this case the judgment creditor did not prove his lien in bankruptcy, and the reversionary interest was not sold, and remains unaffected by the bankruptcy proceedings. The trustee reported that there were "no assets," and there was no decree or attempt to sell the reversion, on which the plaintiff had his lien. This lien not having been divested, the plaintiff was entitled upon the termination of the home-

stead exemption to have the property subjected to payment of his lien. If this termination had occurred by the death of the homesteader, leaving no minor children, execution would issue, and under Revisal, 686, it can in like manner be subjected when the exemption is terminated by a sale and transfer of the property by the homesteader. The reversionary interest in this case has not been conveyed by any sale thereof under decree in bankruptcy, as in *Blum v. Ellis,* where it was actually sold and the purchaser reconveyed to the homesteader. In that case the creditor might have appealed from the decree in bankruptcy, and, not having done so, was bound by such sale.

Moreover, *Blum v. Ellis* was decided under the Bankrupt Act of 1867, and this case falls under the Bankrupt Act of 1898. One material difference between the two is thus pointed out in the notes to *Paper Co. v. Wheeler* (N. D.), 42 L. R. A. (N. S.), at p. 293: "From the provisions of the various acts as above set out it follows, as has been almost universally held, that real property liens existing for a proper length of time before the adjudication in bankruptcy are not affected by a discharge in such proceeding. The act of 1841 expressly preserves such liens, and it is the universally accepted rule that a discharge in bankruptcy does not, under the later acts, affect any liens except those specially stricken down by the acts themselves. In this connection, however, it should be remembered that the act of 1867 expressly destroys, except as therein otherwise provided, liens where the debt or claim was proved in bankruptcy, and, therefore, that a lien would be preserved only where the debt or claim was not submitted to the bankruptcy court; but this provision was not preserved in the act of 1898, under which proof may be made without impairing the lien."

In 3 R. C. L., Bankruptcy, sec. 143, citing the above case and others, it is said: "The setting apart of the homestead to a bankrupt and his subsequent discharge in bankruptcy do not relieve the property from the operation of a mortgage lien thereon obtained before the bankruptcy; and the same has been held to be true as regards judgment liens," citing *Paper Co. v. Wheeler, supra,* 42 L. R. A. (N. S.), 296, 297.

In this case the defendant has no interest in the reversion except by virtue of the allotment proceedings of the homestead, which had no effect save to exempt it from sale, and this exemption having now ceased, execution should issue against the property. Revisal, 686.

The order to issue execution against the homestead of the other defendant, M. W. Hedgpeth, who has not conveyed his homestead but still occupies it, was doubtless an inadvertence, and such execution should be recalled and set aside. As thus modified, the order of *Stacy, J.,* is

Affirmed.

J. P. QUELCH ET AL. v. D. K. FUTCH.

(Filed 25 October, 1916.)

Deeds and Conveyances—Interpretation—Vague Description—Habendum—General Description.

Words descriptive of lands sought to be conveyed in a deed are regarded as inserted for a purpose, and should be given a meaning that would aid the description; and where the writing manifests an intent to convey a tract of certain acreage, and the specific description in the conveying part of the instrument is too indefinite, it will not control a general description, following the habendum, which refers to another and recorded deed, from which the lands may definitely be ascertained.

ACTION to recover a tract of land, tried at April Term, 1916, of NEW HANOVER, before *Peebles, J.*

Upon an intimation from the court that he would charge the jury that a certain deed did not convey the land described in complaint, plaintiff submitted to a nonsuit and appealed.

Herbert McClammy, Kenan & Wright for plaintiffs.
John D. Bellamy, Walter P. Gafford, E. K. Bryan for defendant.

BROWN, J. Plaintiffs claim title under deed in fee in due form, dated 14 May, 1889, executed by D. T. Cronly to John B. Quelch. After the premises of the deed, which is in the usual form of a bargain and sale, follows a specific description of the tract of land as follows: "Beginning on the east side of the W. and W. railroad at a culvert"; then follows a description by metes and bounds.

Then the habendum and tenendum, in the usual form, to John B. Quelch and his heirs; then follows the usual covenant of warranty. Immediately following that the deed contains this general description of the land:

"The tract of land hereby conveyed being the same that was deeded by Thomas R. Williams and wife to R. L. Kirkwood, assignee of D. D. Gibson, and which is registered in the records of New Hanover County in Book BBBB, pages 653 and 654. The same said to contain 700 acres, more or less, and which tract was afterwards conveyed by deed bearing date 13 May, 1889, from the said R. L. Kirkwood, assignee, to the party of the first part of these presents."

It is in evidence that the first or specific description by metes and bounds does not cover the land described in the complaint. It is also in evidence that the description in the deeds from Thomas R. Williams to R. L. Kirkwood and from Kirkwood to Cronly (referred to in the

deed from Cronly to Quelch) does cover and include the tract of land described in the complaint. These deeds were offered in evidence by plaintiff.

The court intimated that he would hold that the specific description in the deed from Cronly controlled the general description, and upon that intimation the plaintiffs took a nonsuit. The intimated ruling of the court was vital to plaintiffs' recovery, and therefore they had the right to submit to a nonsuit and appeal.

We have in the deed in question a description by metes and bounds in which the land in controversy is not conveyed, and also a description which refers to another deed duly recorded by book and page, which gives a definite description covering the land in controversy.

It must be admitted that if the first or specific description entirely is eliminated from the deed, according to the evidence, the second or general description is sufficient, and covers the land described in the complaint. It matters not that the last description follows the warranty. The whole deed must be so construed as to give effect to the plain intent of the grantor, and the parts of the deed will be transposed if necessary. *Triplett v. Williams*, 149 N. C., 394; 13 Cyc., 627.

The entire description in a deed should be considered in determining the identity of the land conveyed. Clauses inserted in a deed should be regarded as inserted for a purpose, and should be given a meaning that would aid the description. Every part of a deed ought, if possible, take effect, and every word to operate.

A reference to another deed may control a particular description, for the deed referred to for purposes of description becomes a part of the deed that calls for it. 13 Cyc., 632; *Brown v. Ricaud*, 107 N. C., 639; *Everett v. Thomas*, 23 N. C., 252.

The manifest intention of the grantor, Cronly, was to convey the whole of a tract of land, containing 700 acres, more or less, being the land conveyed to Cronly by Kirkwood and by Williams to Kirkwood. It is in evidence that these deeds referred to cover the land in controversy. The fact that the metes and bounds of the preceding description do not cover it cannot be permitted to destroy the description that does cover it.

From the language of the deed an intent to convey the entire tract is plainly manifest, and this intent will not be defeated because the grantor inserted metes and bounds that are erroneous and do not cover it. As the general description is added, not simply to set out the grantor's title, but to identify and further describe the tract of land conveyed, such general description will be given effect. The additional clause will be considered as added for the purpose of giving a more

particular description. *Rutherford v. Lacy,* 48 Mo., 325; *Jackson v. Barringer,* 15 Johns (N. Y.), 471; *Lodge v. Lee,* 6 Cranch (U. S.), 237; 13 Cyc., p. 634, note 14.

Prentice v. R. R., 154 U. S., 164, relied upon by the learned counsel for defendant as settling the question and sustaining the ruling of the judge below, was a case of some note, and involved title to certain valuable land in the city of Duluth. The case was tried before *Justice Samuel F. Miller* and *District Judge Nelson* in the Circuit Court of the United States, and is reported 43 Fed., 270. *Justice Miller* delivered an elaborate opinion in the Circuit Court, which on appeal was followed and affirmed by the Supreme Court of the United States in an opinion by *Justice Harlan* for a unanimous Court. The syllabus made by the reporter appears to support the contention of the defendant, but it is stated in general terms, is misleading, and is not fully warranted by the opinion. In concluding the opinion, the Court says: "We are entirely satisfied with these views. It results that neither the description by metes and bounds *nor the general description* of the lands conveyed by the deed under which the plaintiff claims is sufficient to cover the lands here in dispute."

And again: "The case, then, is this: Looking into the deed under which plaintff claims title, for the purpose of ascertaining the intention of the parties, we find there a specific description, by metes and bounds, of the lands conveyed, followed by a general description which must be held to have been introduced for the purpose only of showing the grantor's chain of title, and not as an independent description of the lands so conveyed. As *neither description* is sufficient to cover the lands in suit, there can be no recovery by the plaintiff in this action of ejectment, whatever may be the defect, if any, in the title of the defendants."

In the deed we have under consideration the second or general description is introduced, not solely to set out a chain of title, but evidently to identify, make certain and describe the land conveyed. It is, in fact, an "independent description of the land so conveyed," and amply sufficient to support the deed, eliminating any other description.

The nonsuit is set aside.

New trial.

OTIS ELEVATOR COMPANY v. CAPE FEAR HOTEL COMPANY.

(Filed 25 October, 1916.)

Evidence—Incorporation—Contracts.

Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact.

APPEAL from *Peebles, J.*, at April Term, 1916, of NEW HANOVER.

This is an action to recover $706.32, a balance alleged to be due for the installation of an elevator in the hotel of the defendant, then in course of costruction.

The plaintiff did not allege a special contract in the complaint, but sought to recover the value of the property.

The defendant filed answer denying the material allegations of the complaint, including the allegation that the plaintiff was a corporation.

The evidence tends to prove that the defendant had in contemplation building a hotel of ten stories, and that it entered into a written contract with the plaintiff for the installation of the elevator; that it did not complete the building beyond the seventh story; that the plaintiff installed the elevator to the seventh story and was ready and able to install it to the tenth story; that the defendant paid the plaintiff the pro rata part of the purchase price based on a ten-story building, but not the pro rata part or the value, based on a seven-story building.

The plaintiff was permitted to introduce the written contract, and the defendant excepted.

The defendant moved for judgment of nonsuit upon the ground that there was no evidence of the corporate existence of the plaintiff, which was overruled, and the defendant excepted.

The jury returned a verdict in favor of the plaintiff for $382.60, and from the judgment rendered thereon the defendant appealed.

Kenan & Wright for plaintiff.
Herbert McClammy for defendant.

ALLEN, J. The written contract furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and it was therefore competent against the defendant as evidence of corporate existence. *Ryan v. Martin,* 91 N. C., 465; *Bank v. Duffy,* 156 N. C., 84.

It also follows, as this evidence was properly admitted, that his Honor could not grant the motion for judgment of nonsuit upon the ground that there was no evidence that the plaintiff was a corporation.

No error.

O. E. SEAWELL ET ALS., TRADING AS CHATHAM LUMBER COMPANY v. PARSONS LUMBER COMPANY, A PARTNERSHIP.

(Filed 25 October, 1916.)

1. Judgments—Excusable Neglect—Attorney and Client—Principal and Agent.

The negligence of counsel in failing to defend an action for his client in the course of his professional duty will not be attributed to the latter, if he himself is in no default, without regard to the solvency of the former; but where the counsel is authoritatively acting for his client outside of his professional employment, in matters which the client may perform, he then is the mere agent of the party, and his negligence is imputed to his principal.

2. Same—Neglect of Party—Rule of Prudent Man.

The employment of an attorney by a party to an action does not of itself excuse the party from properly attending to his case, and the test as to whether the party is himself negligent is in the application of the rule of the prudent man while engaged in transacting important business.

3. Attorney and Client—Nonresident Attorney—Laches—Principal and Agent.

The employment by a party of a nonresident attorney of this State to represent him in a professional capacity in our courts, who is not licensed to practice here, creates the relation of principal and agent; but if the employment is of a resident attorney, licensed to practice here, though he be a resident practitioner of another county, the relation of attorney and client exists, and the party, not himself in default, is not held responsible for the negligence of his counsel in failing to perform acts exclusively within the line of his professional duties.

4. Same—Judgments—Excusable Neglect.

Where a party to an action employs an attorney practicing in this State to defend an action brought against him in a different county, and upon his suggestion authorizes his attorney to employ local attorneys, which is accordingly done, and the latter promised to notify the leading attorney of the filing of the complaint, and send him a copy when filed, but through their misunderstanding of the fact of their employment, did not do so, and a judgment by default is finally taken; and it appears that the party had repeatedly asked his leading attorney if anything remained to be done by him, and was informed that nothing could be done until the complaint was filed: *Held*, the judgment, on motion, was properly set aside for excusable neglect.

5. Attorney and Client—Local Attorney—Offer of Employment—Acceptation—Excusable Neglect.

A client employed his attorney, licensed to practice law here, to professionally defend an action brought against him in another county, and authorized him to employ local attorneys there. His attorney wrote requesting them to act with him, and asked them to notify him when complaint was filed and send him a copy thereof. They replied, saying they would notify him as to the filing of the complaint, and send him a copy thereof, and they would appear with him "if desired to do so." *Held*, the leading attorney was justified in construing the answering letter as an acceptance of the employment offered; and in making the offer he acted in his capacity of attorney, and not merely as the agent for his client.

6. Judgments—Excusable Neglect—Findings—Appeal and Error.

Where the trial judge has set aside a judgment for excusable neglect, his findings as to good faith are conclusive on appeal.

7. Judgments—Excusable Neglect—Surety Bond.

It appearing, in this case, that the trial judge has set aside a judgment for excusable neglect, and required the defendant to give a bond in a larger sum than the amount of the judgment, conditioned to pay the plaintiff any damages recovered by him, it is *Held*, under the facts, that no substantial injury could be sustained by him.

APPEAL from order of *Daniels, J.*, at January Term, 1916, of ROBESON, setting aside a judgment under section 513 of the Revisal.

The action was commenced in Robeson County on 9 April, 1914, and the summons was served on the defendant 14 April, 1914.

The purpose of the action was to recover damages for an alleged breach of contract in the purchase of certain timber lands in Bladen County.

The complaint was filed 27 January, 1915, and the judgment for $3,000 was rendered at February Term, 1915, about six weeks after the filing of the complaint and about ten months after the commencement of the action.

His Honor found the following facts:

"2. That as soon as summons was served upon him herein defendant A. K. Parsons immediately went to see his regular counsel, Mr. H. L. Stevens, a competent, reputable, and experienced attorney residing at Warsaw, N. C., and employed said Stevens to represent defendants in this action. That said Stevens accepted such employment and agreed to represent the defendants in this action, advising said Parsons further that it would be necessary to employ associate counsel residing in Robe-

son County, and stating that he would at once communicate with such counsel and arrange for and employ counsel in Robeson County to represent the defendants. That a short time thereafter said Parsons again saw his counsel, Mr. Stevens, and was informed by him that he had secured the services of counsel in Robeson County to appear for the defense and represent defendants in the action.

"3. That upon being employed by said Parsons to represent defendants in this action, said H. L. Stevens immediately communicated with McIntyre, Lawrence & Proctor, a firm of competent, reputable, and experienced attorneys residing at Lumberton, and regularly practicing in the courts of Robeson County, advising them of the institution of the action; that defendants desired to employ counsel to assist him in the defense, inquiring whether any complaint had been filed in the action, and, if so, to furnish him with a copy, and asking whether they were in position to appear for and represent the defendants; and McIntyre, Lawrence & Proctor replied that no complaint had been filed; that they would send him a copy when filed; that they were in position to represent defendants if desired to do so, and would be glad to represent them. That upon receipt of this letter said Stevens advised McIntyre, Lawrence & Proctor that he had forwarded their letter to his clients, which he did.

"4. That as the result of his correspondence with McIntyre, Lawrence & Proctor, the said H. L. Stevens understood that he had employed McIntyre, Lawrence & Proctor to assist him in the defense, and that they understood they were so employed and would furnish him with a copy of the complaint when filed, and would do whatever was necessary to the defense of the action; and it never occurred to Stevens that there was any question as to whether McIntyre, Lawrence & Proctor had been employed by him to represent defendants and that they understood that they had been so employed.

"5. That as the result of the correspondence between him and McIntyre, Lawrence & Proctor, as above set forth, said Stevens advised defendant Parsons that he had employed counsel in Robeson County to assist him in the action; that no complaint had been filed; that his associates in Robeson would furnish him with a copy of the complaint when filed, whereupon he would notify said Parsons, and that until the complaint was filed there was nothing that the defendants could do in the matter, and that he would advise said Parsons when it was necessary for the defendants to do anything with respect to the action. That upon this statement the defendants took no further steps towards the employment of the counsel.

"6. That thereafter said Parsons frequently and repeatedly inquired of said Stevens if anything had been done in this action, whereupon said Stevens would advise said Parsons upon each inquiry that nothing further had been done; that if any complaint had been filed, McIntyre, Lawrence & Proctor would have advised him to that effect, and that as they had not so advised him, he knew that nothing further had been done in the matter. That in so advising defendant Parsons said Stevens understood that he had employed McIntyre, Lawrence & Proctor for defendants, and that they understood they were so employed; that they had agreed to furnish said Stevens with a copy of the complaint when filed, and he relied upon them to do so, and not being advised by McIntyre, Lawrence & Proctor that any complaint had been filed, he advised said Parsons at the time of each inquiry that no complaint had been filed and that nothing could be done until it was filed.

"7. That relying upon the statements made by said Stevens, the defendant A. K. Parsons took no further steps towards the defense of the action.

"8. That neither said Stevens nor defendant Parsons had any actual notice of the filing of the complaint, the trial, or the rendition of the judgment (other than that in the summons) herein until the execution was served upon Parsons by the sheriff of Pender County on 12 January, 1916. That immediately upon service being made, defendant Parsons at once went to Warsaw and advised said Stevens as to the service of the execution. That said Stevens then assured defendant Parsons that when he was first employed he had arranged with attorneys in Robeson County to appear with him for the defense, and they had agreed to do so, and had advised him that no complaint had been filed, but that they would furnish him a copy as soon as filed, and that as they had not advised him of the filing of the complaint, or sent him a copy, he felt sure there was some mistake about the matter, and that he would at once communicate with McIntyre, Lawrence & Proctor, and advise said Parsons as soon as he heard from them.

"9. That said defendant Parsons then came to Lumberton and saw McIntyre, Lawrence & Proctor, and ascertaining from them that they did not consider that they had been employed, but only regarded the letter of said Stevens as an inquiry as to whether they could accept employment, and that having heard nothing further from him, they had dismissed the matter from their minds, and that they did not know, until so informed by defendant Parsons, that any complaint had been filed, or trial had, or judgment obtained. That said Parsons immediately employed said counsel to make a motion to set aside the said judgment.

"10. That it was at all times the purpose and intention of defendant A. K. Parsons to properly defend the action; that it was his intention to employ counsel, and he understood that H. L. Stevens and McIntyre, Lawrence & Proctor were representing him and would do all things necessary for its proper defense, and would call upon him when it became necessary to file answer or take any other action, resting this belief upon his personal employment of said Stevens, and as to McIntyre, Lawrence & Proctor, upon the assurances of said Stevens that they had been employed and would advise him when the complaint was filed. That it was on this account that said defendant took no further action towards the employment of counsel.

"11. That had it not been for the firm belief and understanding upon the part of said Stevens that he had employed McIntyre, Lawrence & Proctor to represent defendant, and that they had agreed to do so and understood fully that they had been employed, said Stevens would have arranged for the employment of other counsel in Robeson County to assist him in the defense; and said Stevens did not learn until after the motion was made to set aside said judgment that there was any question in regard to the employment of McIntyre, Lawrence & Proctor, or that they did not consider that they had been employed.

"12. That the defendants have a good and meritorious defense to this action, both in fact and in law, this finding being made for the purposes of this motion.

"13. That H. L. Stevens is solvent and able to respond in damages for more than amount sued for in this action, including costs, as against any claim defendants may have against him herein."

His Honor set aside the judgment, but required the defendant to execute bond in the sum of $3,500, conditioned to pay any judgment which might be rendered in the action in favor of the plaintiffs, and the plaintiffs excepted and appealed.

McLean, Varser & McLean for plaintiff.
McIntyre, Lawrence & Proctor for defendants.

ALLEN, J. The distinction between the negligence of counsel, while engaged in the performance of a professional duty, and the negligence of the party, is clearly marked, and the uniform rule with us is that the negligence of the first will not be attributed to the client if he, himself, is in no fault; and this is true without regard to the solvency or insolvency of counsel. *Schiele v. Ins. Co.*, 171 N. C., 426, and cases there cited.

It is equally well settled that if the attorney is acting outside of his employment as attorney, and is engaged in the performance of an act

which the client can perform, and when it is his duty to do so, that then the attorney, in the performance of this act, is the mere agent of the client, and his negligence is the negligence of the client. *Edwards v. Henderson,* 109 N. C., 83; *Neal v. Land Co.,* 112 N. C., 841; *Norton v. McLaurin,* 125 N. C., 185.

It is also established that the employment of counsel does not excuse the client from proper attention to his case (*Pepper v. Clegg,* 132 N. C., 316), and that the test of the negligence of the client or party is whether he has acted as a man of ordinary prudence while engaged in transacting important business. *Norton v. McLaurin,* 125 N. C., 190; *Allen v. McPherson,* 168 N. C., 437.

In the application of these principles it has been held that a nonresident attorney who is not entitled to practice in the courts of this State is the agent of the client, and that the client will not be relieved under the statute because of his neglect; but that the client who has employed a reputable attorney who is entitled to practice in the county where the action is pending, who is himself not in default, will be relieved. *Manning v. R. R.,* 122 N. C., 824; *Bank v. Palmer,* 153 N. C., 503; *Gaylord v. Berry,* 169 N. C., 734.

We must then inquire in what capacity Mr. Stevens was employed, whether as attorney or agent; we must see if he was negligent, and, if he was, whether the defendant acted as a prudent man attending to important interests.

If he was the attorney of the defendant and negligent, or if he was his agent and not negligent, the defendant is entitled to relief if not negligent himself.

The negligence attributed to counsel is his failure to employ local counsel in Robeson County, where the action was pending, and relying upon counsel, who were not employed, to furnish him a copy of the complaint when filed.

Mr. Stevens was the general counsel of the defendant, and, as a licensed attorney of this State, was entitled to practice in the county of Robeson.

The defendant, immediately after the service of the summons, put Mr. Stevens in charge of the case, and he undertook its management, suggesting, however, the employment of local counsel to assist him, to which the defendant assented.

Mr. Stevens immediately communicated with McIntyre, Lawrence & Proctor, a firm of competent, reputable, and experienced attorneys residing at Lumberton and regularly practicing in the courts of Robeson County, advising them of the institution of the action; that defendants desired to employ counsel to assist him in the defense, inquiring whether

any complaint had been filed in the action, and, if so, requesting them to furnish him with a copy, and asking whether they were in position to appear for and represent the defendants; and McIntyre, Lawrence & Proctor replied that no complaint had been filed; that they would send him a copy when filed; that they were in position to represent defendants if desired to do so, and would be glad to represent them.

This correspondence, read in connection with the relationship existing between attorneys, would make a contract of employment of local counsel beyond question, but for the interpolation in the letter of Messrs. McIntyre, Lawrence & Proctor of the words, "if desired to do so," and when the correspondence is considered as a whole, it is not unreasonable for Mr. Stevens to conclude that they had accepted employment.

He wrote the attorneys at Lumberton that the defendants desired to employ local counsel to assist him in the action, and inquired if they were in a position to represent the defendants. This, among reputable attorneys, would bind him to employ these particular attorneys if they would accept employment.

They replied that they would be glad to appear for the defendants, and promised unconditionally to furnish a copy of the complaint when filed.

We have, then, what is equivalent to an offer of employment, with at least a qualified acceptance and a direct promise to perform an act which could only arise out of the employment, and Mr. Stevens might well conclude that the words, "if desired to do so," were inserted to avoid the appearance of too great anxiety to be employed, and his Honor finds as a fact that Mr. Stevens honestly understood that counsel at Lumberton had agreed to represent the defendant, and that he, in good faith, told his client that they had been employed, and that they would forward to him a copy of the complaint as soon as it was filed.

If, therefore, any default can be attributed to him, it consists in putting the wrong construction on a letter capable of two constructions, and in advising his client erroneously as to the meaning of the letter, and in this he was acting strictly in the line of professional duty and not merely as agent.

The remaining question is as to the defendant himself. Has he acted as a man of ordinary prudence while attending to important business interests?

Immediately after the service of summons he went to see his general counsel and employed him to take charge of the case, which counsel agreed to do. He followed the suggestion of his counsel and directed him to employ local counsel to assist in the trial of the action. Soon there-

after he made inquiry of his counsel and was told that local counsel had been employed, that the complaint had not been filed, that as soon as it was filed local counsel would furnish him a copy, and that there was nothing that the defendant could do until the complaint was filed, and that he would advise the defendant when it was necessary for him to do anything with respect to the action.

The defendant honestly believed that local counsel had been employed, that the complaint had not been filed, and he relied implicitly upon the statement of his counsel; but the defendant did not let the matter rest here, but frequently and repeatedly inquired of his counsel if anything had been done in the action, and was advised each time that nothing further had been done, that the complaint had not been filed, that he would be furnished a copy as soon as it was filed, and that he would then advise the defendant.

The findings of the judge, which are conclusive upon us, establish the good faith both of the defendant and his counsel, and it would seem that the defendant has done all that would be required of a man of ordinary prudence.

"The usual office and duty of an attorney at law is the representation of parties litigant in courts of justice, and it is for this purpose that he is licensed under the authority of the State." This office and duty "embraces the preparation of pleadings and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients. The relation of attorney and client is that of master and servant in a limited and dignified sense, and involves the highest personal trust and confidence. The attorney, by his obligation, is bound to discharge his duties to his client with the strictest fidelity, and he is answerable to the summary jurisdiction of the court for dereliction of duty. An attorney is, however, more than a mere agent or servant of his client. He is also an officer of the court." 2 R. C. L., 938.

Surely, with such a relationship of trust and confidence, established by law and recognized and sanctioned by the courts, a hearing will not be denied to a client because he has intrusted to his attorney, an officer of the court, the duty of writing a letter to local counsel, seeking to employ them, instead of writing the letter himself, and for relying upon the repeated assurances of his counsel that he had employed the counsel; and unless this is negligence there is no blame attributable to the defendant.

We are, therefore, of opinion that there is no error in setting aside the judgment and allowing the defendant to answer. This will give the opportunity to both parties to have a hearing upon the merits

when both parties are represented, and can do no substantial injury to the plaintiff, as his Honor required the defendant to execute a bond larger than the judgment recovered, conditioned to pay any sum recovered in the action, and the plaintiff, if entitled to recover damages, will be compensated for the delay by the payment of interest, which the jury may award as damages.

Affirmed.

F. H. WALTERS v. J. M. WALTERS.

(Filed 25 October, 1916.)

1. Trusts and Trustees—Parol Trusts—Deeds and Conveyances.

A grantor in a conveyance of lands reciting the consideration that the grantee should pay off a certain mortgage thereon is estopped by his deed from setting up a resulting trust in his favor and want of consideration, and showing that the grantee agreed by parol to pay off the mortgage from the rents and profits of the land.

2. Deeds and Conveyances—Consideration—Parol Evidence.

While parol testimony is competent to contradict the consideration recited in a conveyance of land, it may not change, alter, or contradict the conveyance itself, in the absence of fraud, mistake, or undue influence.

3. Trusts and Trustees—Parol Trusts—Deeds and Conveyances—Statute of Frauds.

A parol trust in favor of the grantor, that the grantee pay off a mortgage thereon from the rents and profits, being unenforcible, it is incompetent to further show by parol that the grantee had then obligated himself to sell the lands and pay his grantor a part of the proceeds of sale, as such falls within the meaning of the statute of frauds.

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1916, of ROBESON.

T. A. McNeill and T. A. McNeill, Jr., for plaintiff.
McIntyre, Lawrence & Proctor for defendant.

CLARK, C. J. The plaintiff on 6 March, 1911, executed a deed in fee simple to the defendant, his son, with full warranties, for the land in dispute for the recited consideration of $2,000, it being recited in the deed that the grantee assumed responsibility for a mortgage on said land due to one Barnes, and agreed to settle on the land. The defendant entered into immediate possession of the premises and has been in continuous possession thereof ever since, claiming the whole in fee simple under said deed.

This action is by the plaintiff, claiming that there was an oral trust at the time of the deed that the grantee would collect the rents as they fell due and apply them to the mortgage and other indebtedness due said Barnes, and after such payment the plaintiff would sell the land and give the defendant part proceeds of the sale. This is denied in the answer, which avers that the defendant has satisfied the mortgage to Barnes as set out in the deed, and avers that the only collateral agreement was that the plaintiff, being under indictment, sold and conveyed the land in fee simple to the defendant upon payment of $25 cash and his assumption of plaintiff's indebtedness to Barnes, which aggregated over $800, and responsibility on the bond for the plaintiff's appearance to answer the criminal charge and to assume the care and support of plaintiff's youngest daughter, then 9 or 10 years of age, and that this was the full consideration to be paid, and that it is a full and fair value of the said land, and that the defendant has strictly complied with said agreement in that he has paid the said mortgage to Barnes and a large part of the other indebtedness to Barnes, which he assumed and is now engaged in paying off; that he discharged the liability for the default of the plaintiff upon the bond for his appearance on the criminal charge, the plaintiff having fled to another State; that he paid the $25 cash and has cared for and supported said infant at his own expense, the fair value of which is $125 per year, and will continue to do so; that he took possession of the lands in good faith under said fee-simple deed, and has placed valuable improvements on the land in the sum of $600, and has otherwise improved and made the land more valuable. In short, so far as the consideration of $2,000 is concerned, the defendant pleads payment in part and his willingness to discharge the rest, but denies the allegation of a parol trust as to the land.

The plaintiff is estopped by his deed from setting up a resulting trust on account of alleged failure of consideration. This question has been discussed, with full citation of authorities, by *Hoke, J.*, in *Gaylord v. Gaylord,* 150 N. C., 226, where it is said: "The authorities are to the effect that in a deed of this character, giving on its face clear indication that an absolute estate was intended to pass, either by the recital of a valuable consideration paid or by an express covenant to warrant and defend the title, no trust would be implied or result in favor of the grantor by reason of the circumstance that no consideration was in fact paid." *Gaylord v. Gaylord, supra,* has since been cited verbatim and approved in *Jones v. Jones,* 164 N. C., 322, and also in *Cavenaugh v. Jarman, ib.,* 375, where it is said: "If there was no estoppel, the plaintiff could not establish a parol trust in his own favor against the grantee in his deed."

In *Campbell v. Sigmon,* 170 N. C., 351, the above authorities are cited and approved, the Court adding: "If, notwithstanding the solemn recitals and covenants in a deed, the grantor could show a parol trust in himself, it would virtually do away with the statute of frauds, and would be a most prolific source of fraud and litigation. No grantee could rely upon the covenants in his deed." The Court further added: "It is true that the recital of the amount of the consideration, or of its receipt, can be contradicted in an action to recover the purchase money, but that is because this is no part of the conveyance. *Barbee v. Barbee,* 108 N. C., 581, and citations thereto in the Anno. Ed."

In this same case, *Walters v. Walters,* 171 N. C., 313, the Court in setting aside the judgment by default intimated that "no cause of action was alleged in the complaint under *Gaylord v. Gaylord,* holding that a parol trust cannot be engrafted in favor of the grantor upon a deed conveying the absolute title to the grantee."

The consideration recited being not part of the conveyance, its amount and whether paid or not can be contradicted, but the conveyance cannot be changed, altered, or contradicted by a parol agreement, nor, in the absence of proof of fraud, mistake, or undue influence, can a deed solemnly executed and proven be set aside by parol testimony.

The grantor cannot set up a parol trust in his own favor against the grantee. Nor, treating this action as one to recover a part of the purchase money should the land be thereafter sold, can the plaintiff recover. In this aspect the case would be very similar to *Sprague v. Bond,* 108 N. C., 382, where *Shepherd, J.,* says: "The plaintiff could not have compelled the defendant to execute her agreement to sell her land, as there was no enforcible trust, and the agreement was within the statute of frauds."

In *Brown v. Hobbs,* 147 N. C., 75, it is said: "In this case the defendant did not agree to convey any part of the land to the plaintiff, but to sell and convey it to some other person, and pay plaintiff his share of the net proceeds in money. The first part of this promise, namely, the promise of defendant to sell the land, was within the statute, and if he had refused to sell the plaintiff could not have maintained an action to enforce the promise." To same effect, *Bourne v. Sherrill,* 143 N. C., 381.

The ruling in *Gaylord v. Gaylord,* 150 N. C., 222, that a parol trust cannot be set up by a grantor as to a conveyance in fee to his grantee, is not only upheld by the reasoning and authorities therein cited, but that case has since been upheld and reaffirmed in *Ricks v. Wilson,* 154 N. C., 286; *Jones v. Jones,* 164 N. C., 322; *Cavenaugh v. Jarman, ib.,*

375; *Trust Co. v. Sterchie,* 169 N. C., 22; *Campbell v. Sigmon,* 170 N. C., 351; and in this very case, when here before, 171 N. C., 313.

The demurrer *ore tenus* to the complaint "because it did not state a cause of action" was properly sustained.

Affirmed.

J. H. MURRAY v. SOUTHERN RAILROAD COMPANY.

(Filed 25 October, 1916.)

Evidence—Vendor and Purchaser—Delivery—Trials.

Where there is evidence of a contract between plaintiff and defendant railroad company for the sale of cross-ties; that plaintiff placed certain of these ties where the defendant customarily received them from plaintiff and others; that these were seen being loaded upon cars at this place by persons appearing to be defendant's employees, it is *Held,* sufficient upon the question of delivery and acceptance by the defendant of the ties to be submitted to the jury.

APPEAL by defendant from *Devin, J.,* at May Term, 1916, of ORANGE.

A. H. Graham and John W. Graham for plaintiff.
Parker & Long for defendant.

CLARK, C. J. This is an action to recover for 106 cross-ties which the plaintiff alleges that he sold and delivered to the defendant and avers that 100 were first-class ties worth 45 cents each and 6 were second-class, worth 30 cents each. His testimony is that he sold and delivered these ties by placing them at the usual place where the defendant had given notice that it would receive ties, and that after he had placed said ties on the right of way at that spot, they had been carried off, and one Smith, witness for the plaintiff, testified that he saw a force of hands, which he took to be the employees of the defendant, loading ties from this yard, about the same location where Murray's ties had been placed.

The exceptions are to the refusal of the motion to nonsuit and from the charge that there was some evidence for the jury to consider whether the plaintiff sold and delivered the ties to the defendant railway company.

In this we find no error. There was evidence that the defendant did purchase ties from parties, and maintained a yard near the station at Hillsboro to which ties were hauled and stacked by various parties,

from which it hauled away ties, and there was evidence which would justify the jury in finding that the defendant received and hauled away these ties. The court could not have held that there was no evidence. The facts were within the knowledge of the defendant company, but it offered no evidence that it did not in fact load these ties on its train and haul them off. Upon the uncontradicted testimony the court was justified in leaving the issue to the jury.

No error.

OLD DOMINION PANTS COMPANY v. J. H. MEWBORN ET ALS.

(Filed 1 November, 1916.)

1. Judgments—Justices of the Peace—Superior Court—Docketed.

A judgment of a justice of the peace, docketed in the Superior Court, becomes a judgment of the Superior Court for the purposes of lien and execution, and is enforcible on the same property, by the same kind of execution, within the same limitations prescribed by law for the enforcement of judgments rendered in the Superior Court, and can be revived, when dormant, in the same way.

2. Same—Dormant Judgments—Executions—Revisal—Statutes.

A judgment becomes dormant by the failure to issue execution thereon within three years, or by allowing this period of time to elapse between the issuance of successive executions; and where the judgment is one of a justice of the peace, docketed in the Superior Court, and has become dormant, it may be revived under Revisal, sec. 620, within ten years from its rendition, and execution may issue thereon though the proceeding to revive is commenced after seven years.

3. Same—Expiration of Lien—Execution—Levy.

Execution on a judgment may issue from the Superior Court against real and personal property after the expiration of ten years, where the judgment has not become dormant, by the issuance of successive executions or when it is revived under Revisal, sec. 620; but after the ten-year period the lien of the judgment has ceased, and it can only be acquired from the levy.

4. Judgments—Assignments—Executions.

A transfer and assignment of a judgment, in writing, filed in the record and noted on the docket in the Superior Court, is sufficient, and the assignee thereof is entitled to the same right to issue execution thereon as his assignor thereof; and the fact that he has asked, by affidavit, for an amendment to the judgment does not preclude him from resorting to the regular process of the courts to enforce it.

PANTS CO. *v.* MEWBORN.

APPEAL from *Connor, J.*, at chambers, 17 December, 1915; from LENOIR.

This is a motion to recall an execution issued to enforce the collection of a money judgment. The material facts are as follows:

The plaintiff recovered judgment against the defendant before a justice of the peace of Lenoir County on 26 September, 1904, for $102.45, and this judgment was immediately thereafter docketed in the Superior Court of Lenoir County; that no execution issued on said judgment until 22 April, 1913; that on the first day of April, 1913, a proceeding was begun under section 620 of the Revisal to revive the judgment, and on 21 April, 1913, the judgment was duly revived and an execution issued on the following day; that on 16 August, 1915, the plaintiff in the judgment duly transferred and assigned said judgment for value to J. P. Lynch and fully authorized and empowered him to have execution issued upon the judgment and to collect the same; that said transfer and assignment of the judgment was in writing and was filed in the record and noted on the docket; that on 16 September, 1915, within three years from the time said judgment was revived and execution issued thereon, another execution was issued on said judgment returnable to the November Term, 1915, of the Superior Court of Lenoir County; that on 21 September, 1915, the defendant filed his petition before the clerk asking that said execution be recalled, upon the ground that the plaintiff had lost his right to enforce the same by lapse of time. The clerk allowed the motion, and the plaintiff appealed to the judge. The judge reversed the action of the clerk and held that the plaintiff was entitled to have execution issued, and the defendant excepted and appealed.

G. G. Moore for plaintiff.
Rouse & Land for defendant.

ALLEN, J. When a judgment of a justice of the peace is docketed in the Superior Court it becomes a judgment of the Superior Court for the purposes of lien and execution, enforcible on the same property, by the same kind of executions, within the same limitations prescribed by law for the enforcement of judgments rendered in the Superior Court, and can be revived, when dormant, in the same way. *Broyles v. Young*, 81 N. C., 315; *Adams v. Guy*, 106 N. C., 277.

If no execution issues on the judgment within three years from the docketing, or if that length of time is permitted to elapse at any time within the ten-year period, which is the time during which the judgment is a lien under the statute, the judgment is dormant; but it may be revived under Revisal, sec. 620, and execution may issue thereon

although the proceeding to revive is commenced after seven years, the time which bars an action on a justice's judgment. *Adams v. Guy,* 106 N. C., 277.

The lien of the judgment expires after ten years; but if the judgment is not then dormant execution may issue thereon against real and personal property, which will not, however, be a lien except from the levy. *Williams v. Mullis,* 87 N. C., 159; *Spicer v. Gambill,* 93 N. C., 378; *Heyer v. Rivenbark,* 128 N. C., 272; *Wilson v. Lumber Co.,* 131 N. C., 166.

"If the plaintiff, or owner of the judgment, has caused executions to be issued regularly within the successive three years, he may issue without motion or order after the expiration of ten years, although the lien may be gone, and levy on land or personalty." *Barnes v. Fort,* 169 N. C., 434.

The language in the quotation, which is to be found in several cases, "has caused executions to be issued regularly within the successive three years," was intended to indicate that under those conditions the judgment would not be dormant, and not to exclude the idea that the same result would follow if the judgment had become dormant and was revived.

In *Wilson v. Lumber Co.,* 131 N. C., 167, the judgment was revived, and execution was issued after ten years, and this was recognized as regular, the Court saying: "The execution issued on the revived judgment has lien only from its levy, and by virtue of the levy, and not by virtue of his docketing the judgment in 1889."

It was not necessary to make any change in the judgment to show that Lynch had bought it, and the fact that he asked for it to be amended in his affidavit does not preclude him from resorting to the regular process of the courts to enforce it, as his motion, if insisted upon, would not be an action on the judgment.

Affirmed.

THE WORTH COMPANY v. INTERNATIONAL SUGAR FEED No. 2 COMPANY.

(Filed 1 November, 1916.)

1. Bills and Notes—Negotiable Instruments—Prima Facie Evidence—Due Course—Statutes.

Where there is neither allegation nor evidence that a negotiable instrument sued on is defective (Revisal, sec. 2204), and the plaintiff claims as a holder in due course, his introduction of the instrument duly indorsed makes out a *prima facie* case under the statute, Revisal, sec. 2201, that he was a purchaser for value, in good faith, before maturity, and without notice of any defect in the title of the person negotiating it.

2. Same—Banks and Banking—Principal and Agent.

Where a bank discounts a paper and places the amount, less the discount, to the credit of its depositor, the indorser, with his right to check on it, but the bank reserves the right to charge back the amount if the note is not paid, by express agreement or one implied from the course of dealings, the bank is an agent for collection and not a purchaser of the paper in due course.

3. Same—Impeaching Evidence—Contradictory Evidence—Questions for Jury.

Where the bank, claiming as an indorsee of a negotiable paper in due course, has made out a *prima facie* case by introducing the paper in evidence, and the testimony of its witnesses tends to show an arrangement with its indorser that it was to be charged back to his balance in case of nonpayment, which had always been sufficient; and, to the contrary, that no such agreement had been made, expressed or implied, but that the indorser had no liability therefor, except as such: *Held*, that while the plaintiff should not be permitted to impeach the testimony of its own witness, it could show the fact to be otherwise than he had testified; and having made out a *prima facie* case, the question was for the jury to find the fact of the agreement upon the conflicting evidence.

4. Bills and Notes—Negotiable Instruments—Deposits—Agreement—Intent—Evidence.

Where a bank takes a negotiable paper by indorsement from its depositor, who had always sufficient funds there to protect its payment, and gives him credit for the amount, with the right to check on it, the transaction is evidence that the bank purchased for value; and when the evidence is conflicting as to an agreement between them that the bank should charge the item back upon *nonpayment*, it is for the jury to determine the intent of the parties, upon which they may consider the course of dealings, the rate of discount, the state of the account, and other relevant circumstances. *Latham v. Spragins*, 162 N. C., 408, cited and distinguished.

APPEAL from *Peebles, J.*, at April Term, 1916, of NEW HANOVER.

This is an action brought by the plaintiff against the defendant feed company, before George Harriss, justice of the peace, to recover the

amount of $106.50, claimed by the plaintiff to be due and owing to it by the defendants for commission on certain goods sold. An attachment was issued against the proceeds of a certain draft in the Murchison National Bank, and the Bank of Commerce and Trust Company of Memphis intervened and claimed ownership of draft. Judgment was rendered in the justice's court against the defendant, and the intervenor, the Bank of Commerce and Trust Company, appealed to the Superior Court.

In the Superior Court, when the case came on for trial, the plaintiff offered evidence as to its debt, and the intervenor offered evidence as to the ownership of the draft. The following issues were submitted to the jury, the first issue being submitted at the request of the plaintiff and the second at the request of the intervenor:

First. What amount, if any, is plaintiff entitled to recover? Answer: "$106.50."

Second. Is the Bank of Commerce and Trust Company, the intervenor, the owner of the proceeds of the draft attached in the cause, and entitled to possession of the same?

The evidence of the debt was not disputed, and the court directed the jury to answer the first issue "Yes; $106.50," if they believed the evidence. There was no exception taken by the defendant, as it did not appear and make a defense, but appearance and defense was made by and for the intervenor, Bank of Commerce and Trust Company.

The court directed the jury to answer the second issue "No," and the intervenor, the Bank of Commerce and Trust Company, excepted and appealed to the Supreme Court, only its right being involved in this appeal.

The feed company sold a car of feed to J. H. Watters of Wilmington, N. C., and drew a draft with bill of lading attached for the purchase price.

The feed company then indorsed the draft and bill of lading, and delivered the same to the intervenor, the Bank of Commerce and Trust Company, and the trust company forwarded the same to the Murchison National Bank at Wilmington for collection.

The draft was paid, and the plaintiff attached the proceeds in the possession of the Murchison Bank as the property of the feed company.

The material part of the testimony offered by the intervenor, the Bank of Commerce and Trust Company, was in substance as follows:

E. L. Rice testified: "I live at Memphis, Tenn. Am vice president of the Bank of Commerce and Trust Company. The Bank of Commerce and Trust Company is a corporation engaged in the banking business and also title and guaranty business. Its main business is

banking business. It is located in Memphis, Tenn. It is a large bank as compared with other banks in the city of Memphis. I know of a certain draft that was drawn on Joseph H. Watters of Wilmington, N. C., by the International Sugar Feed No. 2 Company for the sum of $280. That draft was handled by the bank on 19 November, 1914. The draft was discounted and passed to the credit of the International Sugar Feed No. 2 Company, and was discounted at the rate of $2.50 a thousand. The date the item actually passed to the credit of the International Sugar Feed Company was 19 November, 1914. We purchased the draft and put it to the credit of the International Sugar Feed Company at rate of discount. There was no agreement that passed between the Bank of Commerce and Trust Company and the International Sugar Feed Company with reference to charging back against the International Sugar Feed Company the proceeds of this draft, which was not paid. We had no conversation with them upon that subject. We had no written agreement of anything of that kind in advance about it. I cannot answer the question as to whether anything was said, as the draft was handled by the teller, but the records show nothing except that it was discounted and put to their credit; that is all.

"I do not remember the amount of this draft in question. I have a record of it, and that shows $280, less 70 cents discount. That is the usual discount, because the draft is drawn with exchange. I think the draft was drawn at sight. I would not say positively. That is what it would cost a person going into our bank to cash a draft drawn on Wilmington for that amount with the bill of lading attached. The records show that the bill of lading was attached to this draft, but I do not know what it covered. The bill of lading was sent with the draft to Wilmington and it was afterwards paid. It is not customary for us to charge drafts back when we handle them with bill of lading attached when the draft is dishonored and sent back. It is customary for us to get check for them. We will get a check for them. They have never refused to give us a check; but in the event they refused to give us a check we would charge it back to their account. When a draft is dishonored and comes back either the customer or the indorser for whom it is cashed covers the dishonored draft with a check. Our bank, so far as I know, had no agreement with the International Sugar Feed Company, No. 2, by which the bank should lose the proceeds of this draft if it was not paid. On the contrary, my assumption is that the agreement was that if the draft was not paid the International Sugar Feed No. 2 Company would cover it, and if they were not willing to cover it voluntarily, and it came to a question of who should lose

the draft, we would arbitrarily charge it back to their account. I have an idea of what the average balance of the International Sugar Feed Company was for the last two years. It was a good balance. They usually kept a good, large balance, and since 19 November, 1914, that balance has run largely in excess of $280; I think it has. This was not a collection draft; we didn't handle it as a collection draft. It was handled as a cash item, and all drafts are handled with the idea that if the draft is not paid the International Sugar Feed Company would, of course, indemnify us against loss. There was no agreement with Mr. Hall, representing the International Sugar Feed Company, about this specific draft, that this item would be discounted with the understanding that if it was not paid by the drawee that he would not permit us to lose anything on it. The draft was deposited in the Bank of Commerce and Trust Company, and the proceeds went to the credit of the Sugar Feed Company. We had no agreement about this specific draft whatever. It was put to their credit, and we sent it to the party on whom it was drawn. Of course, we expected to get our money from the party on whom it was drawn originally. If we could not get the money from him, we would naturally go back on Mr. Hall. We had a custom of discounting Mr. Hall's drafts. That is, drafts of the International Sugar Feed Company, as they were presented to the teller. We handled them every day. The teller did not make any agreement with him. He took off the discount that it was customary to take off of drafts. The teller didn't agree on it. The teller only had instructions to obey these rules, which are laid down by some officer of the bank. He was acting under orders of the bank, and there was no rule made to the teller that if a draft was not paid that the customer should cover it. That is the custom. The general rule is that if the draft is dishonored by the party on whom it is drawn, then it is covered by the party who draws the draft or the indorser who cashes it. It is a fact that Mr. Hall is advised of this situation, and he understands that if we have to pay on the bond that he will protect us and indemnify us. The bank doesn't lose anything, no matter which way the litigation goes. The amount of the draft discounted for the International Sugar Feed Company was passed to its credit and it was subject to their check. That is different from a draft taken for collection. When a draft is taken by the Bank of Commerce and Trust Company simply for collection, it is not passed to the credit of the party who delivers it to the bank until it is finally paid. We consider that a party who makes a draft is legally bound to pay that draft, and we also consider that he is not only morally and legally bound, but that he is financially able to pay a draft if it is dishonored by the drawee. Our expectation

to collect from the International Sugar Feed No. 2 Company in this case was not at all different from our expectation to collect from any person who indorses any paper which is discounted or purchased by the bank and indorsed for.

"Since the foregoing, I have been authorized by Mr. Hall to answer the question relative to the balance to the credit of the International Sugar Feed No. 2 Company at the close of the business on 19 November, 1914, and at the close of business on 15 March, 1916, and upon examination of the books I find the balances to be as follows: Balance 19 November, 1914, $17,128.88. Balance 15 March, 1916, $16,926.44."

Will A. Hall testified: "I am connected with the International Sugar Feed No. 2 Company as resident manager at Memphis, Tenn. This is a suit in regard to a certain draft drawn on Joseph H. Watters of Wilmington by the International Sugar Feed No. 2 Company. The bill of lading covering a car-load of feed was attached to the draft. The draft, after it was drawn with bill of lading attached, was sold and discounted at the rate of $2.50 per $1,000 on 19 November, 1914, the number of the draft being 2944. The International Sugar Feed No. 2 Company was paid for the draft by being credited with the amount thereof in cash on said date, 19 November, 1914.

"We had no agreement with the Bank of Commerce and Trust Company that if this draft was not paid it should be charged back to us. We checked against this account that was credited with the draft. We did not at any time agree with the Bank of Commerce and Trust Company, or any one representing them, that if the draft was not paid it might be charged back to our account. We did not assume any liability other than that which the law puts on us as a drawer of the draft. No person at Memphis, Tennessee, other than myself, has any authority to make an agreement of any kind with a bank with reference to a matter of this kind on behalf of the International Sugar Feed No. 2 Company.

"The Bank of Commerce and Trust Company still owns the draft or its proceeds. I mean to say that the Bank of Commerce and Trust Company still owns the proceeds of this draft, and we have drawn against the proceeds of it as cash account that was credited when the draft was sold. I do not know, if the Bank of Commerce and Trust Company still has the proceeds of the draft, to what account it is placed. I know that the Bank of Commerce and Trust Company has not charged our account with this $280. I have no knowledge to the effect that the Bank of Commerce and Trust Company, in case it is not allowed to retain the proceeds of this draft, is going to look to us for this $280. We, the International Sugar Feed No. 2 Company,

did not assume any liability whatever. I mean to say that if we assumed any liability other than being the makers of the draft—which we did not—as to the legal phase of that, I am not advised. There would be no interest, if the Bank of Commerce and Trust Company fails to collect the proceeds and looked to us for the payment of this $280, since they have already been remitted the proceeds of the draft. There is no agreement between the International Sugar Feed No. 2 Company and the Bank of Commerce and Trust Company that in case the Bank of Commerce and Trust Company has to respond on its bond in Wilmington, that we expect to pay back the money to the Bank of Commerce and Trust Company. There is no agreement of that nature. Inasmuch as there is no agreement or any contract between the International Sugar Feed No. 2 Company and the Bank of Commerce and Trust Company, that is, as far as I can answer, and I do not know that they expect us to reimburse the Bank of Commerce and Trust Company to the extent of this draft in the case the Bank of Commerce and Trust Company has to pay it. As to whether or not we expect to reimburse them, I could not testify as to problematical matters, or as to logical proceedings that might be involved in this case. In reply as to whether we, the International Sugar Feed No. 2 Company, ever expected to pay the Bank of Commerce and Trust Company $280, the proceeds of this draft, in case it has to pay that sum on its forthcoming bond in Wilmington, I will be obliged to say that inasmuch as there is no contract or agreement to that effect, and proceedings after this time would be problematical, and that I or any one else in my position could not answer that question yes or no. I only know what we intend to do so far as any contract or agreements with the Bank of Commerce and Trust Company are concerned, and we have no contract in regard to this matter. We have no intention in reference thereto, because we believe this is bank property, and the only interest we have is that of drawer of the draft, and I cannot answer as to future proceedings. In reply to the question asked me, if it is ever our intention to pay the proceeds of this draft to the Bank of Commerce and Trust Company in case it has to pay on its forthcoming bond at Wilmington, I will say that it is not our intention unless we are made to pay it. I have never told Mr. Rice that, as the matter has never been discussed with us. If Mr. Rice is under a different impression, he did not get that impression from me. This matter has absolutely never been discussed between the International Sugar Feed No. 2 Company and the Bank of Commerce and Trust Company, as to any refunding on this item of any character at any time. As to whether we ever had one of our drafts turned down which we cashed through the Bank of Commerce and

Trust Company, I will say that under some conditions we possibly might, but I do not recall any specific case. Over a long term of years we have never had a case similar to this. We might have had, during that long term of years, drafts which have been dishonored, and as to whether we ever permitted the Bank of Commerce and Trust Company to lose anything on any of these drafts, I don't recall those transactions. I don't think the Bank of Commerce and Trust Company ever lost anything on our drafts. I don't recall under what conditions any others might have been returned. I don't recall specific instances, and I would not like to give testimony unless I could recite specific instances and circumstances surrounding them, as to whether we ever permitted the bank to lose money on drafts drawn by us. I don't understand that the effect of this transaction was that the bank was lending us the money on the draft. I understand it is a discount, the draft becoming the property of the Bank of Commerce and Trust Company, our title in the draft having passed to the bank, as the bank bought it at a price. We don't consider it a loan."

After this attachment suit was instituted and before the draft was paid at Wilmington, and the proceeds remitted to the Bank of Commerce and Trust Company, the Bank of Commerce and Trust Company did not charge this draft back to the International Sugar Feed No. 2 Company, and the International Sugar Feed No. 2 Company did not pay the Bank of Commerce and Trust Company anything on this draft between the time it was attached and the time the proceeds were remitted at Wilmington to the Bank of Commerce and Trust Company.

The approximate amount of the average balance of the International Sugar Feed No. 2 Company with the Bank of Commerce and Trust Company is about $5,000 to $10,000.

Rountree, Davis & Carr for plaintiff.
John D. Bellamy & Son for defendant.

ALLEN, J. The intervening bank was the holder of the draft duly indorsed, and as there is neither allegation nor proof that the title of the feed company, which negotiated the draft, was defective (Rev., sec. 2204), the only question presented by the appeal is whether his Honor correctly held, as matter of law, that the bank held the draft for collection and not as a purchaser for value.

If it was a purchaser for value, the draft became the property of the bank, and the proceeds could not be attached in the hands of the Murchison Bank as the property of the feed company; but if a mere collecting agent, the proceeds would belong to the feed company and be the subject of attachment.

The holder of a negotiable instrument duly indorsed (and it is not contended that the draft was not negotiable) is, under the statute (Rev., sec. 2201), prima facie a purchaser for value, in good faith, before maturity, and without notice of any defect in the title of the person negotiating it.

If the instrument is negotiable, the holder may, upon proof of the indorsement, rest his case, because the statute says, under such conditions and nothing else appearing, that he is a purchaser for value. *Moon v. Simpson,* 170 N. C., 336, and cases cited.

In this last case the Court says: "The burden is upon the holder of a negotiable instrument payable to order, which has been indorsed, to prove the indorsement (*Tyson v. Joyner,* 139 N. C., 69), and when he does so he is deemed prima facie to be a holder in due course (Rev., sec. 2208), that is, he is deemed *prima facie* to be a purchaser in good faith for value, before maturity, and without notice of any infirmity in the instrument or of any defect in the title of the person negotiating it. Revisal, sec. 2201. He is not required to prove that he paid value for the instrument, as the statute furnishes this evidence for him. The following authorities and others sustain this position: *Mfg. Co. v. Tierney,* 133 N. C., 630; *Evans v. Freeman,* 142 N. C., 61; *Trust Co. v. Bank,* 167 N. C., 261; *Bank v. Roberts,* 168 N. C., 475."

It follows, as the bank introduced the draft and proved the indorsement, it made out a prima facie case, which it was entitled to have submitted to the jury, and, therefore, there was error in instructing the jury to answer the second issue "No." *Currie v. R. R.,* 156 N. C., 425.

The plaintiff contends, however, that it appears from the oral evidence introduced by the plaintiff that the draft was taken for collection and not as a purchase; that the drawer had at all times a large amount to its credit and that the prima facie case of the bank is rebutted.

The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the indorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the indorsement, the bank is an agent for collection and not a purchaser. *Packing Co. v. Davis,* 118 N. C., 548; *Cotton Mills v. Weil,* 129 N. C., 452; *Davis v. Lumber Co.,* 130 N. C., 176, and *Bank v. Exum,* 163 N. C., 202.

The difficulty with the plaintiff in the application of this principle is, first, while a party cannot impeach his own witness, he may show the facts otherwise than as testified to by him (*Smith v. R. R.,* 147 N. C., 608), and the bank had the right to rely on its prima facie case, although

the oral evidence tended to rebut it; and, secondly, all of the evidence introduced did not necessarily lead to the conclusion that the bank was a collecting agent.

The witness Rice, vice president of the bank, testified that the bank purchased the draft and put the amount to the credit of the feed company with the right to draw on it, and that there was no agreement with reference to charging back the proceeds if the draft was not paid. His cross-examination weakens this statement, and furnishes evidence of the contention of the plaintiffs, that there was an agreement, expressed or implied, to charge back the draft, as he says that if the feed company had not assented to charging it back he would have done so arbitrarily.

The witness Hall, who was the manager of the feed company, testified that the draft was sold to the bank, and the amount credited as cash to the feed company, with the right to draw on it; that there was no agreement that it should be charged back, and, in substance, that the feed company did not expect to pay the draft unless compelled to do so by law.

This was at least evidence of a purchase by the bank.

The other position taken by the plaintiff, that the bank is not a purchaser for value because the drawer had at all times a considerable amount to his credit, is supported by authority, *Mann v. Bank* 30 Kan., 421; *Blake v. Bank,* 79 Ohio St., 189; *Citizens Bank v. Cowles,* 180 N. Y., 346; Mod. Am. L., 119; and other cases hold to the contrary, that if an unqualified credit is given, it is as if money was paid, and is a purchase. *Wassen v. Lamb,* 120 Ind., 514; *Bank v. Loyd,* 90 N. Y., 535; *Taft v. Bank,* 172 Mass., 365; *Williams v. Cox,* 97 Tenn., 555; *Aebi v. Bank,* 124 Wis., 76; *Hoffman v. Bank,* 46 N. J. L., 607; *Armstrong v. Bank,* 90 Ky., 436; *Hazlett v. Bank,* 132 Pa., 118; *Milling Co. v. Bank,* 18 L. R. A. (N. S.), 44; *In re Bank,* 56 Minn., 119; *Piano Co. v. Aulo,* 86 A. S. R., 782. Still others, which in our opinion are supported by the better reason, hold that crediting to the account of the drawer or indorser with the right to check on the account is evidence of a purchase for value, without regard to the state of the account, and that the real determinative question is as to the intention of the parties, to be determined as a fact. *R. R. v. Johnson,* 133 U. S., 566; *Burton v. U. S.,* 196 U. S., 302; *Shaw v. Jacobs,* 89 Iowa, 713; *Ditch v. Bank,* 47 A. S. R., 389, and extended note; *Strong v. King,* 31 Ill., 1; 7 C. J., 599; *Bank v. Summers,* 7 L. R. A. (N. S.), 695, and note; 3 R. C. L., 633.

Was it the mutual understanding and intention that the title should pass unconditionally to the bank, with no right to charge back except by

reason of the indorsement, or was it the intention of the parties that the title should only pass conditionally, and that credit should be given temporarily for the convenience of the parties, with the right arising by express or implied agreement to charge back?

If the first, the bank would be a purchaser for value and the owner, and, if the second, it would be an agent for collection.

In passing upon the question of the intention of the parties, it is competent to consider the course of dealing, the rate of discount, the state of the account, and other relevant circumstances.

There is a statement in *Latham v. Spragins,* 162 N. C., at page 408, apparently in conflict with the conclusion we have reached, but it was not necessary to the decision of the case, as it appeared that Spragins was indebted to the bank, and it can be distinguished from the present case because it is based on the supposition that the bank incurred no increased obligation; whereas, if the contention of the bank in this case is true, it incurred the increased obligation of paying the amount credited to the depositor upon its check.

We are therefore of opinion it was error to instruct the jury to answer the second issue "No."

New trial.

AMERICAN NATIONAL BANK v. SAVANNAH TRUST COMPANY AND WACHOVIA LOAN AND TRUST COMPANY, GARNISHEE.

(Filed 1 November, 1916.)

1. Banks and Banking—Correspondent Bank—Collection—Drafts—Lost in the Mail—Negligence.

Where a bank sues its correspondent bank for the amount of a deposit therein, and the defendant sets up, as a counterclaim, the negligence of the plaintiff in not notifying it of a draft, the amount of which would offset the amount claimed in the action, and it appears that the plaintiff mailed the draft to the defendant without hearing from it and without inquiry for a month, and that the defendant had not received it: *Held,* the omission of the plaintiff to make due inquiry after not hearing from the defendant was negligence *per se.*

2. Same—Drafts—Payee Bank—Negligence.

It is negligence *per se* for a bank to send a draft or check for collection to the payee bank.

3. Same—Counterclaim—Burden of Proof—Trials—Questions for Jury.

While a forwarding bank may be negligent in not making due inquiry of its correspondent bank, etc., as to a draft sent the latter for collection,

but was lost in the mail, the burden of proof is on the correspondent bank to show, in order to recover the amount set up as a counterclaim in plaintiff's action, that it has sustained damages arising from such negligence, which raises an issue for the determination of the jury.

CIVIL ACTION tried at April Term, 1916, of NEW HANOVER, before *Peebles, J.*

At the conclusion of all the evidence the court rendered judgment in favor of the defendant The Savannah Trust Company. The plaintiff appealed.

Herbert McClammy for plaintiff.
John D. Bellamy & Son for defendant.

BROWN, J. The plaintiff sued the defendant The Savannah Trust Company to recover the amount of a deposit in the said trust company, a corporation of Savannah, Georgia, and attached the sum of $1,400 in the possession of the Wachovia Loan and Trust Company of Winston-Salem. The defendant admitted the deposit and claimed that it had applied a part of it to the payment of a draft for $705, dated Swansea, S. C., 18 November, 1912, drawn by R. L. Lybrand & Co. on the Bank of Swansea in favor of Reliance Fertilizer Company. The defendant forwarded the draft to plaintiff bank, where it was received and credited to defendant 23 November, 1912. The plaintiff claims it forwarded the draft to the drawee, the Bank of Swansea, on same day for payment. The drawee made no acknowledgment, and plaintiff charged it up to the defendant, which in effect struck out or balanced the credit of the item. The defendant charged the $705 up to plaintiff as a debit against latter's deposit, and avers in its counterclaim that plaintiff is liable to it for the $705 in failing to exercise due diligence in collecting the draft, for which sum defendant prays judgment against plaintiff.

In any view of the evidence as now presented, we think plaintiff was negligent. It received the draft 23 November, 1912, and forwarded it by mail to the drawee, the Bank of Swansea, the same day for payment. Plaintiff never heard from the Bank of Swansea until 24 December, 1912, when in response to telegraphic inquiry the latter replied in substance that plaintiff's letter and draft were never received. There is no evidence before us that plaintiff made inquiry of the Swansea Bank, after mailing the draft, until 24 December, 1912. There is no evidence that plaintiff notified the defendant of the loss of the draft in the mails and that it had not been paid until over a month after plaintiff had received it and credited defendant with it.

We think, in any view of the evidence, plaintiff was guilty of negligence in not notifying the defendant of the loss of the draft as soon as it had reason to believe it was lost. The evidence is that a letter mailed at Wilmington, N. C., in the morning should reach Swansea, S. C., the following day.

Not hearing from the Swansea Bank, plaintiff should have made inquiry of it at once, and in due time have notified the defendant in order that the latter or its customer, the payee, might take immediate steps to protect themselves. Not to do so for one month after receiving the draft was negligence.

Plaintiff was also negligent in sending the draft direct to the drawee, the Bank of Swansea. "It is negligence in a bank having a draft or check for collection to send it directly to the drawee, and this is true though the drawee is the only bank at the place of payment." *Bank v. Floyd,* 142 N. C., 187; 3 R. C. L., 255, note 13; *Bank v. Bank,* 5 A. and E. Anno. Cases, 753. While the form of this action in arraying the parties is different, this is practically an action by the defendant to recover damages of the plaintiff for negligence in respect to the draft. That is the gravamen of defendant's counterclaim. If the evidence is taken to be true, the plaintiff has been negligent; but something more is necessary to justify a recovery by the defendant. The burden of proof is upon it to show that it has sustained damage by reason of plaintiff's negligence. While there is evidence from which a jury might infer that the draft would have been paid if presented in apt time, the judge drew the inference himself and did not submit the issue to the jury. There is no evidence that defendant purchased the draft or paid anything for it. We would infer from the correspondence in evidence, and especially the letter of 6 February, 1913, that the fertilizer company was a customer of the defendant and deposited the draft for collection. There is no evidence that the defendant has paid to its customer the amount of the draft or admits its liability for same.

For these reasons we think there must be a *venire de novo,* and that the issues should be submitted to a jury with proper instructions.

The costs of this Court will be taxed against the defendant The Savannah Trust Company, the appellee.

New trial.

H. GLENN HALL v. PIEDMONT ELECTRIC AND RAILWAY COMPANY.

(Filed 1 November, 1916.)

Appeal and Error—Trials—Instructions—Issues—Harmless Error.

Where contributory negligence is pleaded in an action to recover damages for a personal injury, with evidence tending to support it, it is the better practice to submit to the jury a separate issue thereon, especially if the trial is an extended and involved one; but where this does not exist, a proper instruction under the issue of negligence as to the law of contributory negligence will not be held for error, certainly not to the defendant's prejudice, when the burden is placed upon the plaintiff by reference to that issue.

CIVIL ACTION to recover damages for alleged negligent killing of plaintiff's horse, tried before *Devin, J.*, and a jury, at May Term, 1916, of ALAMANCE.

The cause was before this Court at Fall Term, 1914, on appeal from a judgment of nonsuit (167 N. C., 284), and this judgment having been reversed and decision certified down, was tried at said May term on the following issues:

1. Was plaintiff's horse injured by the negligence of defendant, as alleged in the complaint?

2. What damage, if any, is plaintiff entitled to recover?

There was verdict for plaintiff. Judgment on the verdict. Defendant excepted and appealed, assigning for error chiefly that his Honor declined to submit an issue as to contributory negligence.

W. H. Carroll for plaintiff.
E. S. Parker for defendant.

HOKE, J. The evidence on the part of plaintiff tended to show that in October, 1912, plaintiff was on his horse on Front Street in Burlington, N. C., when it became restive at the approach of the car on defendant's track; that plaintiff dismounted, holding the rein, and the horse commenced backing towards the track, giving full indication that it was beyond plaintiff's control and that a collision was likely; that the car was some 250 feet away when the horse commenced backing, and could have been readily stopped, but defendant's operators, though in full view, made no effort to stop or slow down; the horse backed on the track and the car ran on it, breaking its leg, and it had to be killed.

The evidence of defendant tended to show that the horse, though restive, had given no sign of backing on or towards the track, and the front of the car had passed in safety when the horse suddenly backed into the car, causing the collision and resultant injury.

These two views were fully presented in his Honor's charge, and, the jury having accepted the plaintiff's version, an actionable wrong was clearly established.

There is very little place here for the position that the negligent conduct of plaintiff contributed to the injury, the facts in evidence presenting rather a case involving the doctrine of the last clear chance. See opinion on former appeal, 167 N. C., pp. 284-286, citing *Bullock v. R. R.,* 105 N. C., 180; *Snipes v. Mfg. Co.,* 152 N. C., 42. But if such a defense was permissible on the evidence, every phase of the testimony bearing on it was embodied in a prayer for instructions offered by defendant and which was given by the court, as follows:

"If you find from the evidence in this case that the plaintiff, with the horse, which he knew or had cause to know would become frightened at a street car, carelessly took and kept the same upon a street where a car was likely to pass, and sat sideways upon it with the rein around his hands so that he could not readily loosen the horse, and that the car came, and that the plaintiff could see that the horse was becoming frightened, and did not attempt to lead the horse away from the track, but continued to keep it near the track, so that the horse backed and ran into the side of the car as the car passed and was injured, then I charge you to answer the first issue 'No.'"

The defendant here was given the full benefit of such a defense, and this, too, on an issue where the burden was on the plaintiff, and the failure to present the position on an issue of contributory negligence may not be held for error. *Moseley v. Johnson,* 144 N. C., pp. 257-263; *Ruffin v. R. R.,* 142 N. C., 120; *Wilson v. Cotton Mills,* 140 N. C., pp. 52-56; *Deaver v. Deaver,* 137 N. C., 241.

In *Ruffin's case* the Court held: "While it is the better practice to submit an issue in regard to contributory negligence, when pleaded and there is evidence to sustain the plea, the omission to submit the issue is not reversible error, where the court fully explained to the jury the several phases of the testimony relied upon to show contributory negligence, and it was apparent that the defendant had been given the benefit of such testimony, with its application."

And in *Deaver's case:* "It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law."

As said in *Ruffin's case, supra,* where contributory negligence has been pleaded and there is testimony tending to support it, it is better to submit the issue, and it may be that in an extended and complicated trial, if it should be made to appear that a failure to submit such an

issue has likely tended to prevent a clear apprehension of the facts on the part of the jury, it might be considered reversible error; but in a case like the present, where the facts are circumscribed and simple and it is clear that no injury has been done to the litigant, the view having been fully presented under the first issue, the objection, as shown by the authorities cited, should not be considered reversible error, and the results of the trial will not for that reason be disturbed.

The judgment is, therefore, affirmed.

No error.

P. E. FOWLER v. A. A. MURDOCK ET ALS.

(Filed 1 November, 1916.)

1. Judgments, Non Obstante.

Under our Code system of pleading, a judgment *non obstante veredicto* may be rendered for either party, but only when the pleadings entitle the party to it irrespective of the verdict.

2. Judgments—Verdict—Court's Discretion—Subsequent Term.

The trial judge may not set aside a judgment upon a verdict, and continue the motion for judgment until a succeeding term, leaving the verdict to stand, and then, within his discretion, set the verdict aside; for the discretion given him must be exercised during the term in which the verdict was rendered.

3. Judgments, Non Obstante—Limitation of Actions—Trials—Matter in Defense—Questions for Jury.

The plea of the statute of limitations in an action gives the right to the opposing party to introduce evidence of disability, etc., to repel the bar of the statute, and ordinarily presents mixed questions of law and fact; and where it only appears that the period of time prescribed by the statute has run, it is reversible error for the trial judge to decide the matter as a question of law, and render a judgment *non obstante veredicto*, when it had not been passed upon by the jury in rendering their verdict; and a judgment upon the verdict should be rendered.

CIVIL ACTION, with ancillary proceeding of claim and delivery, to recover a horse, tried before *Devin, J.*, April Term, 1916, of DURHAM, upon these issues:

1. Is the plaintiff the owner and entitled to the possession of the horse described in the claim and delivery proceedings in this action? Answer: "Yes."

2. What amount, if any, is the plaintiff entitled to recover by reason of the wrongful detention of the horse? Answer: "None."

3. Is plaintiff's action barred by statute of limitations? Answer: "No."

The court signed judgment for plaintiff for the recovery of the horse, but during the term set aside the judgment and *ex mero motu* continued the motion for judgment until a succeeding term. The court did not set aside the verdict of the jury, but at May term rendered a judgment for defendant dismissing the action. The plaintiff appealed.

L. L. Tilley and J. G. Mills for plaintiff.
Scarlett & Scarlett for defendants.

BROWN, J. The judgment of the court contains this statement: "The jury having in their verdict answered the issue in favor of the plaintiff, as shown by the record, and the court being of the opinion that upon the testimony and the admissions of the plaintiff, his cause of action has been barred by the statute of limitations, it is ordered and adjudged that the plaintiff take nothing," etc.

The judge did not set aside the verdict in his discretion at the term when rendered, as he had a right to do, but at a subsequent term rendered a judgment *non obstante veredicto* for defendants. In this there was error.

At common law such judgment was never rendered for the defendant. Under the Code system of pleading such judgment may be rendered for either party, but only when the pleadings entitle the party against whom the verdict was rendered to a judgment. *Shives v. Cotton Mill,* 151 N. C., 291.

The plea of the statute of limitations usually presents a mixed question of law and fact. When the statute was pleaded the plaintiff had the right to offer evidence of facts tending to take the cause of action from under the bar of the statute. For instance, the plaintiff may be under age or the defendants, although at the commencement of the action residents of Durham County, may have been residing out of the State so as to stop the running of the statute, and the property sued for may have been out of the State and not within the jurisdiction of its courts.

These are matters of fact requiring the introduction of evidence to establish. It appears in the record that the court based its judgment "upon the testimony and the admissions of the plaintiff." Neither the testimony nor the admissions of the plaintiff are contained in the record, except such matters as are set out in the pleadings.

The judge had the power to set aside the verdict at the term when rendered, and it was his duty to do so if he concluded that it was

against the weight of the evidence or that he had committed an error of law. Having failed to do so, the plaintiff is entitled to judgment upon the issues as answered.

The cause is remanded with instructions to enter judgment for plaintiff.

Error.

A. C. ALBRIGHT ET AL. V. T. F. ALBRIGHT ET AL.

(Filed 1 November, 1916.)

1. Wills—Codicils—Interpretation.

A codicil to a will should be construed as in explanation or alteration thereof, or as adding to or subtracting something from the will of which it is a part.

2. Wills—Heirs—Interpretation.

The words "heirs," "heirs of the body," or "bodily heirs" have under the statute the same significance, and the rule holding them to designate the class of persons who, by law, take the property by inheritance or succession from one another is more insistent as applied to conveyance *inter vivos* than to testamentary dispositions.

3. Same—Intent—Children.

Though the words "heirs," "heirs of the body," or "bodily heirs" have a legal significance, and may under our statutes carry the estate in fee simple when appearing after the name of the grantee, this construction will not obtain when it clearly appears from interpreting a will as a whole that the testator intended they should have a different meaning from the technical one.

4. Same—Contingent Limitations—Defeasible Fee.

A devise of an estate in a will to a son, A., and his heirs, with codicil, "I further change the text of my will to the extent that the word 'heirs' shall mean and be construed by my executors as 'bodily heirs,' so that if one of my children shall die without leaving bodily heirs, it is my will that that child's part in the distribution of my estate shall be equally divided among my grandchildren who are the bodily heirs named in the above will": *Held*, the devise to A. was a fee-simple estate, defeasible upon his dying without leaving children.

5. Wills—Interpretation—Intent—Personalty.

Where the word "heirs" in a will is used in connection with the testator's disposition of his realty, the words in a codicil thereto which refers to it as a "disposition of personalty" is not controlling as to the intent of the testator.

CIVIL ACTION tried before *Daniels, J.*, at the September Term, 1916, of ALAMANCE.

This is an action to remove a cloud from title, the plaintiffs alleging that they are owners in fee of the lands described in the complaint, under the will of D. H. Albright, and that the defendants are setting up an adverse claim thereto.

During the trial of the action the court intimated to plaintiffs' counsel that, in its opinion, the plaintiffs were not entitled to judgment declaring the plaintiffs the owners in fee of the lands devised by D. H. Albright to them, the court being of the opinion that each of the plaintiffs took the lands devised to him under the will as a defeasible fee.

Upon this intimation of the court the plaintiffs submitted to a judgment of nonsuit and appealed.

Charles A. Hines for plaintiff.
No counsel for defendants.

ALLEN, J. This is an appeal from a judgment of nonsuit, to which the plaintiffs voluntarily submitted upon an intimation by the judge presiding that they held only a defeasible fee under the will of D. H. Albright, and, therefore, the only question presented is as to the proper construction of the will.

The devises to Walter H. Albright and Maude D. Albright are in substantially the same language, and as the devise to A. C. Albright is less favorable to the contention of the plaintiffs that they are the owners in fee of the land in controversy, we will deal only with the devise to Walter H. Albright.

In the original will of 23 April, 1906, the testator devises the land to "Walter H. Albright and his heirs," and in his codicil thereto, after making certain changes in the will, he provides as follows: "I further change the text of my will to the extent that the word 'heirs' shall mean and be construed by my executors as 'bodily heirs,' so that if any one of my children shall die without leaving bodily heirs, it is my will that that child's part in the distribution of my estate shall be equally divided among my grandchildren who are the bodily heirs of the children named in the above will."

As was said in *Green v. Lane,* 45 N. C., 113, "A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life. Jarman on Wills, 11. A codicil is a supplement to a will, or an addition made by the testator and annexed to and to be taken as a part of a testament—being for its explanation, or alteration, to make some addition to or subtraction from the former disposition of the testator. 2 Black. Com., 500; Williams Exrs., 8."

We must, then, consider the codicil as a part of the original will, and must keep in mind that its office is for explanation or alteration of the will, or to add to or subtract something from it.

The words "heirs," "heirs of the body," or "bodily heirs" have, under the statute, the same legal significance (*Smith v. Lumber Co.,* 155 N. C., 392), and in the absence of a contrary intention appearing from the context, they are usually held to designate "the class of persons who, by law, take property by inheritance or succession from another" (*Donnell v. Mateer,* 40 N. C., 10); but this rule is more insistent as applied to conveyances *inter vivos* than to testamentary dispositions. *Allen v. Pass,* 20 N. C., 212.

It has been held that "heirs of the body" means children or issue (*Thompson v. Mitchell,* 57 N. C., 441; *Crawford v. Wearn,* 115 N. C., 541; *Swindell v. Smaw,* 156 N. C., 1), and the same construction has been given to "bodily heirs" (*Pless v. Coble,* 58 N. C., 231), and to "lawful heirs" (*Francks v. Whitaker,* 116 N. C., 518); and as said by *Hoke, J.,* in *Smith v. Lumber Co., supra,* "There are numerous decisions, here and elsewhere, by which the words 'heir or heirs or issue' in wills are construed to mean children and grandchildren when such a construction would effectuate the manifest purpose of the testator."

Let us, then, look at the will and the codicil for the purpose of seeing what was the intent of the testator in the use of the words "heirs" and "bodily heirs," and what disposition he intended to make of his estate.

In the original will he devises the land to "Walter H. Albright and his heirs," which is an estate in fee absolute, and if he intended this estate to continue there was no reason for executing a codicil.

He does not, however, leave in doubt his purpose to make a different disposition of his property, as he says in his codicil, "I further change the text of my will to the extent," etc.

It is also evident that the testator did not understand that "heirs" and "bodily heirs" meant the same thing, because one of the changes made in the original will is that "heirs" appearing therein "shall mean and be construed by my executors as 'bodily heirs'"; and in the codicil "bodily heirs" and "children" and "grandchildren" are used interchangeably.

It is, therefore, clear that "bodily heirs" as used in the codicil means children, and that the devise is to the child of the testator, with provision that if he dies without leaving children, his part shall go to the grandchildren of the testator who are the children of the children of the testator *named in the will,* to be equally divided between them, and, as so construed, that it is a defeasible fee, as his Honor held. *Whit-*

field v. Garris, 131 N. C., 148; *s. c.,* 134 N. C., 24; *Maynard v. Sears,* 157 N. C., 1; *Wilkinson v. Boyd,* 136 N. C., 46.

In the *Whitfield case* the devise was to Franklin Whitfield, "and in the event of the death of the said Franklin Whitfield leaving heirs of his body, then, etc.," and the Court held that it "was a devise in fee simple, with a condition of defeasance, that if he died without leaving heirs of his body his fee-simple estate should be defeated and the land should go to the three children of L. C. Whitfield named in the will," and this was affirmed on a rehearing, 134 N. C., 24.

The other cases are in point, and many others could be cited to the same effect.

The words, "in the distribution of my estate," in the codicil indicate a disposition of personalty, but the language is not controlling as to the intent of the testator, and particularly when it appears from the original will that the word "heirs" was not used in connection with the personal estate.

Affirmed.

BLUE PEARL GRANITE COMPANY v. MERCHANTS BANK, N. UNDERWOOD, PENNSYLVANIA GRANITE COMPANY AND FRANK GABARDINI.

(Filed 1 November, 1916.)

1. Mechanics' Liens—Materials—Assignment—Attachment.

Where a second subcontractor files its itemized statement of goods furnished for and used in the building, with the owner thereof, in the manner provided by law, it is entitled to a lien on the funds then due by the owner to his contractor, and by the latter to his subcontractor; and where the first subcontractor has assigned the amount due him by the contractor, and yet another has taken out proceedings in attachment against him on this fund, but in neither case for material or labor, etc., for which the statutes create a lien upon the building, the filing of the claim by the second subcontractor relates back to the furnishing of the material, without the necessity of its having filed its statement with the clerk; and upon bringing action of foreclosure against the owner and the contractor, to which the others are made parties, within the statutory time, this lien has priority both of the assignments and the levy of attachment, though subsequent in time and without notice to them of the lien for material. Revisal, secs. 2020, 2022, 2023.

2. Same—Priorities.

Where a subcontractor has assigned the funds due him by his contractor to A., and B., his creditor, has sued out an attachment thereon, but in neither case for materials, etc., furnished for the building; and C., a material man, has previously furnished materials used in the building,

and has duly filed his statutory statement with the owner, which entitles him to a lien: *Held*, the assignment to A. was of a chose in action, which would put him in the shoes of his assignor, against whom the lien for material, perfected under the statute by C., is superior, according to its terms; and as notice by an assignee to a debtor at any time before judgment is sufficient, the lien of the attachment in this case is secondary to the rights of A., the assignee of the subcontractor.

3. Mechanics' Liens—Materials—Filing Claims—Subsequent Funds.

Where the owner of the building has paid his contractor to the time of filing the statutory claim for material furnished, the moneys thereafter becoming due the contractor, under the same contract, are subject to the lien.

APPEAL by Commercial Credit Company and Frank Gabardini from *Devin, J.*, at March Term, 1916, of DURHAM.

W. G. Bramham for Blue Pearl Granite Company.
Brawley & Gantt for Commercial Credit Company.
R. H. Sykes for Gabardini.

CLARK, C. J. The Merchants Bank, owner of a lot in the city of Durham, in July and August, 1914, made a contract with N. Underwood to put up a bank building and in February, 1915, they made a further contract for the interior of the building, at a total price for all the work of $27,000.

On 31 July, 1914, Underwood, the contractor, contracted with the Pennsylvania Marble and Granite Company to furnish and erect the superstructure of the front of the bank building, and the latter company contracted with the Blue Pearl Granite Company to furnish certain granite to be used by the Pennsylvania Marble and Granite Company.

On 16 March, 1915, the Blue Pearl Granite Company filed with the Merchants Bank, the owner, and N. Underwood, the contractor, respectively, an itemized account for $435, setting forth in detail the material furnished by it to the Pennsylvania Marble and Granite Company, giving the details as to time and so forth as required by the statute. At the time of filing said notice there was in the hands of the owner, the Merchants Bank, the sum of $5,263 due the contractor for the exterior of the bank building upon which the material furnished by the Blue Pearl Granite Company had been used, and this sum was subsequently thereto paid by the bank to the contractor, and the contractor at the date of the filing also had in his hands, due the Pennsylvania Marble and Granite Company, its subcontractor who furnished said material, the sum of $760.98.

On 12 June, 1915, less than three months after filing its notice with the owner and contractor, the Blue Pearl Granite Company brought

this action against the Merchants Bank, N. Underwood, and the Pennsylvania Marble and Granite Company, *i. e.,* the owner, the contractor, and the subcontractor, to enforce its lien as material man, and at August Term, 1915, of Durham, Frank Gabardini was duly made a party defendant, and filed his answer.

On 22 December, 1914, about a month after the Blue Pearl Granite Company had furnished the granite under its contract to the Pennsylvania Marble and Granite Company, the latter company assigned all its right, title, and interest in the amount due it by Underwood, the contractor, to the Commercial Credit Company. But Underwood had no notice of this assignment until 29 March, 1915, thirteen days after notice had been served on him, as above, by the Blue Pearl Granite Company, and the latter company had no notice of such assignment until 9 November, 1915, when suit was started by said assignee, the Commercial Credit Company, against Underwood, to recover of him the amount due by him to the Pennsylvania Marble and Granite Company.

The Pennsylvania Marble and Granite Company during 1913 and 1914 became indebted to Frank Gabardini in the sum of $3,345, on which, deducting payments, there was a balance due of $656.14, for which on 11 March, 1915, Gabardini brought an action to Durham Superior Court against the Pennsylvania Marble and Granite Company, service being made by publication. On said 11 March, 1915, a warrant of attachment was issued in said action against the funds in the hands of Underwood, the contractor, due the Pennsylvania Marble and Granite Company, and he was summoned as garnishee to appear before the clerk, and, being examined, stated that he owed said Marble and Granite Company the sum of $760.98, which, on order of the court, he paid into the office of the clerk of said court to abide the result of this action.

These cases were all consolidated and referred to W. B. Guthrie, Esq., and on exceptions to his report by Gabardini and the Merchants Bank and Commercial Credit Company, the court approved the findings of fact and conclusions of law of the referee, and held that it appearing therefrom that the contractor, Underwood, having paid into the clerk's office the sum of $760.98, being the amount due by him to his subcontractor, the Pennsylvania Marble and Granite Company, that the Blue Pearl Granite Company was entitled to a material man's lien upon said funds to the amount of its claim upon said funds for $435 for material furnished, with interest thereon from 7 November, 1914, and that this was a prior lien to any other parties, and that after payment of said amount and the costs of this action, including the allow-

ance to the referee and stenographer, the balance of the fund should be applied to the claim of Frank Gabardini, and the Merchants Bank and Underwood were discharged from liability.

From said judgment the Commercial Credit Company and Gabardini appealed.

Gabardini contends that his claim should have been satisfied out of said fund in preference to the Blue Pearl Granite Company, because his attachment was levied 11 March, 1915, prior to 16 March, 1915, when the Blue Pearl Granite Company filed its notice of lien as material man, and prior to the filing, on 29 March, 1915, by the Commercial Credit Company with Underwood, the contractor, of notice of the assignment to it by the Pennsylvania Marble and Granite Company of the sum due it by Underwood. The Blue Pearl Granite Company had no notice of such assignment until 9 November, 1915. Only a part of the sum due by the Pennsylvania Marble and Granite Company to Gabardini, and none of that to the Commercial Credit Company, was on account of this building contract, but was indebtedness incurred on other transactions, and the former asserted a lien only by virtue of the attachment.

The Blue Pearl Granite Company having furnished its material on 7 November, 1914, and having filed in due time its itemized statement in the manner provided by law, claiming the lien for material, is entitled to the prior lien on the funds due by Underwood, the contractor, to the Pennsylvania Marble and Granite Company, as set forth in the judgment, *Chadbourn v. Williams,* 71 N. C., 444; *Lumber Co. v. Hotel Co.,* 109 N. C., 658; and this is true even though an attachment was levied against the fund prior to filing such statement and bringing suit thereon. The statement having been filed within the statutory time, and in the manner required by law, dates back to the time of furnishing the material. The claim of Gabardini is not for laborer's or mechanic's lien, but is on an open account, and his only lien is by virtue of his attachment, while the Commercial Credit Company claims purely under an assignment of the account; hence there can be no prorating of the fund. The Blue Pearl Granite Company, having perfected its lien, is entitled to its claim and interest in full before the other claimants. *Hardware Co. v. Schools,* 151 N. C., 507.

The Blue Pearl Granite Company, by filing in due time an itemized account with the owner and with the contractor, and following this notice having brought suit within six months to perfect the lien, is entitled to payment without filing its statement with the clerk. Revisal, 2020, 2022, 2023; *Hildebrand v. Vanderbilt,* 147 N. C., 639, and *Mfg. Co. v. Andrews,* 165 N. C., 294, where it is said: "The lien of the subcon-

tractor is acquired by notice to the owner (Rev., 2020), and there is not only no requirement that he shall file notice of a lien with the justice or clerk, but it is expressly provided in Revisal, 2022, that the sums due for furnishing the materials, etc., shall be a lien without any lien being filed before a justice of the peace or in the Superior Court."

It is immaterial whether the contractor had been paid up in full for work done to the time notice was filed by the material man. The fact that he continued the work under the same contract for the exterior of the building and thereafter was paid $5,262 for work done under the said contract will make the fund thereafter earned subject to the material man's lien. *Brick Co. v. Pulley,* 168 N. C., 371.

The claim of the Commercial Credit Company that the assignment to it by the Pennsylvania Marble and Granite Company entitled it to the fund in preference to the Blue Pearl Granite Company under its material lien cannot be sustained. The assignee of a *chose in action* stands in the shoes of the assignor, and, as *Ruffin, J.,* says in *King v. Lindsay,* 38 N. C., 81, "In truth, the assignee of a *chose in action* gets no title to it, properly speaking, and cannot be said to be a purchaser without notice. He gets only the right to use the assignor's name to enforce the claim, therefore, to recover what the assignor might, and the very nature of the subject warns him of the necessity of inquiring respecting the obligor's equity, and, therefore, amounts to notice of such equity."

In *Clark v. Edwards,* 119 N. C., 119, it was held that "Where a mechanic's or laborer's lien or lien for material is filed as required it dates back and *takes priority of all liens* attaching and against all purchasers for value (though without notice) made subsequent to the beginning of the work or furnishing the first material." This was decided under Code, sec. 1789, now Revisal, 2028, originally enacted in 1868, and which was followed by the enactment of Revisal, 2022, in 1887, dispensing with filing statement with the justice of the peace or the clerk of the court.

The Commercial Credit Company contends that there is no precedent for a case like this where there is an assignment and attachment and a material man's lien, all contesting for priority; but our statute provides that the material man's lien, when properly perfected, as in this case, is *"prior to all liens* attaching subsequent to the furnishing of the first material."

As to the priority between the lien of the attachment and the assignee, the authorities seem to agree that notice by an assignee to the debtor at any time before a judgment is sufficient, and if after such notice the debtor pays out the fund to the attaching creditor, or other claimant, without pleading the assignment, he becomes individually liable. The

law is thus summed up 4 Cyc., 32: "As between assignor and assignee, it is not necessary to the validity of the assignment that the debtor be notified thereof; and as between successive assignees of the same chose from the same person, the assignee prior in time will be prior in right, although he has failed to give notice of the assignment to the debtor, and subsequent assignee has given such notice. The assignment will also be complete against creditors of the assignor garnisheeing *the chose* after assignment, and before notice of the assignment to the debtor if given in time to permit him to disclose the assignment in his answer to the garnishee process," citing many cases.

The judgment should have been in favor of the Commercial Credit Company instead of in favor of Gabardini after the payment of the claim of the Blue Pearl Granite Company, and the court costs, and should be thus

Modified and affirmed.

W. J. DICKSON ET AL. v. G. W. PERKINS ET AL.

(Filed 1 November, 1916.)

1. Statutes—Different Acts—Interpretation.

Where a later legislative enactment refers to a former one, with express recognition of its existence, and that it controls the subject-matter, except as therein modified, they should be construed together as the law regulating the subject, and applied as a whole.

2. Same—Roads and Highways—Damages—Constitutional Law—Taking of Property—Due Process.

A public-local law provided for the establishment, etc., of highways on petition before the county commissioners, with right of appeal to the Superior Court on all material issues, the road to be laid off by a surveyor and two freeholders, who should assess damages, report to county commissioners, allowing the landowners ten days within which to except and have such exceptions duly passed upon, and a later one recognized its provisions except as therein modified, required the petition to be filed before the township trustees; with intermediate appeal to the county commissioners, provided payment out of the road funds, if any, but otherwise to become a county charge. *Held*, the later statute directing the trustees as commissioners to lay out the highway established it by direct legislation; and construing the acts together, they were not unconstitutional as a taking of the lands of the owners without compensation and due process of law.

3. Roads and Highways—Eminent Domain—Statutes—Notice—Constitutional Law.

A landowner is not entitled to notice that his land is being taken for the establishment and maintenance of a highway under proceedings had

therefor under the terms and provisions of a statute, if the statute provides that notice and opportunity be afforded him to appear before a designated tribunal and contest the question of damages.

4. Roads and Highways—Constitutional Law—Due Process—Damages—Appeal—Statutes.

Where the statute authorizing the laying out, construction, etc., of a public road by commissioners provides for an appeal therefrom to the courts, *Semble*, the assessment of damages to the landowners, being incidental to the construction of the road, are included in the right to appeal, though not expressly stated, and come within the true intent and meaning of the statute.

5. Same—Courts—Right of Review.

Semble, the Legislature may make the award of assessors to lay off and construct a public road final as to the amount of damages to be paid the owners of the land so appropriated; and *Held*, the awarding of such damages is to a large extent a judicial question, and unless the statute clearly shows that the action of the appraisers is to be regarded as final, the Superior Court, in the exercise of its general powers of supervision and control over any and all subordinate tribunals, may in proper instances bring the cause before it for review, certainly in case of manifest and gross abuse.

CIVIL ACTION heard on return to preliminary restraining order before *Webb, J.*, holding the courts of Eleventh Judicial District, on 16 March, 1916, at chambers, from ASHE.

The order was to restrain the defendants from laying out a public road pursuant to chapter 717, Public-Local Laws 1915.

There was judgment dissolving restraining order and appointing a jury to assess damages, pursuant to general road law, Ashe County, and plaintiff excepted and appealed.

J. B. Councill, G. L. Park, and C. B. Spicer for plaintiff.

Y. C. Bowie for defendant.

HOKE, J. The act in question, chapter 717, Public-Local Laws 1913, appoints defendants as commissioners and directs them to lay out a certain highway in Ashe County over the lands of plaintiffs and others, and it is objected to his Honor's judgment that the statute is unconstitutional in that it makes no provision, or no adequate provision, for the award and payment of the damages that may be suffered by the plaintiff and others, landowners along the designated route. Regarded as a separate and independent piece of legislation, the objection might be sustained, but the statute is, and purports to be, an amendment to the general road law, Ashe County, as contained in chapter 185, Public-Local Laws 1913, and chapter 286, Laws 1899, expressly recognizes these acts as existent and controlling except as modified, and they thus become, together, the law regulating the subject and to be construed

and applied as a whole. *Keith v. Lockhart,* 171 N. C., 451. Considered in that aspect, we are of opinion that sufficient provision is made for the award and payment of compensation for any damages that may arise to plaintiffs and others in like case, and the objection to his Honor's judgment cannot be sustained. In chapter 286, Laws 1899, secs. 25 and 26 provide for the establishment, etc., of highways, on petition before the county commissioners, with the right of appeal on all material issues to the Superior Court. In chapter 185, Public Laws 1913, this petition is to be filed before township trustees, with intermediate appeal to county commissioners. In section 27, Laws 1899, the road, when established, is to be laid out by a surveyor and two freeholders, who shall fix the grade and assess the damages. These shall make a report to the county commissioners (now township trustees), and during ten days any landowner may except and have his exception duly considered and passed upon, and we are of opinion that, in the present statute directing defendants as commissioners to lay out the highways, it was intended to establish the road by direct legislative action, a method permissible in the proper exercise of the power of eminent domain, 10 R. C. L., title, "Eminent Domain," sec. 167, p. 195, and to substitute these commissioners for the surveyor and two freeholders, as to the laying out the road, fixing the grade, and assessing the damages, and that, pursuant to the other requirements of the section, defendants as commissioners should make their report to the board of township trustees, where it should remain for ten days, giving all owners their right of exception, as stated. Under section 47, chapter 185, Laws 1913, the damages assessed to a landowner are to be paid by the treasurer of the road trustees of the township on an order signed by the chairman and at the least one other member of the board, and if there are no funds on hand these payments to become a county charge, payable on the order of the board of township trustees and the treasurer of the township and accompanied by a certificate that no funds are available.

It is recognized with us that in these statutes taking over property for public use under powers of eminent domain a landowner is not of right entitled to notice as to the appropriation of his property, and that it suffices if proper notice is given and opportunity afforded to appear and contest the question of damages. *Kinston v. Loftin,* 149 N. C., 251; *S. v. Jones,* 139 N. C., 613. In *Loftin's case* the principle is stated as follows: "A statute authorizing such an assessment which provides for a notice that would enable the property owner to appear before some authorized tribunal and contest the validity and fairness of the assessment before it becomes a fixed charge upon his property is not open to the objection that it deprives the owner of his property without due process of law." The case of *S. v. Jones* is also in approval of the position that,

although notice to the landowner is not expressly provided for in the statute, the proceedings may be upheld if in fact adequate notice is given and opportunity afforded to appear and be heard on the issue. It is further insisted that the statute is invalid because no proper provision is made for an appeal on the question of damages. If this be conceded as the correct interpretation of the statute, it is very generally held that, unless in violation of some express constitutional provision, the Legislature may make the award of appraisers final as to the amount of damages. *R. R. v. Ely,* 95 N. C., 77; *R. R. v. Jones,* 23 N. C., 24; *Ross v. Board Sup.,* 128 Iowa, 427; 2 Lewis Eminent Domain, sec. 787.

Sections 25 and 26, however, of the general statute applicable, chapter 286, Laws 1899, as stated, provide for an appeal in case of laying out, discontinuing, or altering a highway, and the matter of fixing the grade and assessing the damages being usually incident to such a procedure, we incline to the opinion that the right of appeal as to the amount of damages is within the true intent and meaning of the statute. And, in any event, this matter of awarding the damages, being to a large extent a judicial question, unless the statute clearly shows that the action of the appraisers is to be considered final, it has been held that the Superior Court, in the exercise of its general powers of supervision and control over any and all subordinate tribunals, may, in proper instances, bring the cause before it for review, assuredly so in case of manifest and gross abuse. *S. v. Tripp,* 168 N. C., 150; *Perry v. Comrs.,* 130 N. C., 558; *Comrs. v. Smith,* 110 N. C., 417.

In no aspect of the matter, therefore, can the objection be sustained, that the statute is invalid, and, on the record, we are of opinion that the restraining order should be dissolved and the action dismissed.

Modified and affirmed.

W. H. SHEETS ET AL. v. L. V. MILLER ET AL.

(Filed 1 November, 1916.)

For digest, see next preceding case of *Dickson v. Perkins et al.*

THIS was an action to restrain the defendants from laying out a public road in Ashe County, pursuant to chapter 400, Public-Local Laws 1915, also heard before *Webb, J.,* at Spring Term, 1916, of ASHE.

There was a judgment dissolving the restraining order, and plaintiff excepted and appealed.

G. L. Park, J. B. Councill, and C. B. Spicer for plaintiff.

Y. C. Bowie for defendant.

HOKE, J. The questions presented on this appeal are the same considered and disposed of in the preceding case of *Dickson v. Perkins.* For the reason stated in that opinion, the judgment dissolving the restraining order is affirmed and the action dismissed.

Dismissed.

E. H. TILLEY v. SOUTHERN RAILWAY COMPANY.

(Filed 1 November, 1916.)

1. Carriers of Goods—Penalty Statutes—Consignee—Party Aggrieved.

Where under agreement with his principal the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment (Revisal, sec. 2642), he is the party aggrieved, within the meaning of the statute, Revisal, sec. 400, and may maintain his action to recover the excess, and also the penalty when settlement has not been made within sixty days, Revisal, secs. 2643, 2644, and he has complied with the provisions of the statute as to filing written demand supported by the original freight bill and the original or duplicate bill of lading, etc., Revisal, sec. 2643.

2. Same—Written Demand.

Where the carrier has demanded and received an unlawful freight charge for a shipment, and the party aggrieved has made written demand of the carrier for payment of the overcharge, required by the statute, it is not necessary for him, in order to maintain an action for the penalty imposed upon the carrier failing to settle in sixty days, that the written demand specify the penalty, or that demand therefor was made in the justice's court or alleged in the complaint filed on appeal therefrom. Revisal, sec. 2643.

3. Same—Freight Overcharge—Amount Demanded.

The carrier should know the amount of freight it is lawfully permitted to charge for a shipment of goods, and in an action to recover the overcharge, with the penalty for its failure to repay it in sixty days, it is not necessary that the plaintiff's demand state, or exactly state, the correct charges allowed the carrier by law, in order to permit a recovery of the penalty. Revisal, sec. 2644.

APPEAL by defendant from *Long, J.*, at July Term, 1916, of ASHE.

Charles B. Spicer for plaintiff.

R. A. Doughton, Manly, Hendren & Womble for defendant.

CLARK, C. J. The plaintiff was consignee of a wagon which was delivered to defendant at Mount Airy, N. C., in February, 1915, billed

to the plaintiff at West Jefferson, N. C. By error of the defendant the wagon was shipped to North Wilkesboro, N. C. The plaintiff was agent for the maker of the wagon at Mount Airy, N. C., and had sold the wagon to one Miller, to be delivered to him by the plaintiff at West Jefferson. On learning that the wagon was at North Wilkesboro, the plaintiff hired Miller to go there and get it. The defendant made an overcharge on the freight of $1.42, which amount was paid to defendant by Miller as plaintiff's agent and it was refunded to Miller by the plaintiff.

On 23 March, 1915, plaintiff wrote defendant, filing with his letter the original freight bill and duplicate bill of lading, claiming that an excess of freight had been charged, asking defendant to refund. On 12 April, 1915, the plaintiff received from the defendant a letter admitting an overcharge of 96 cents and offering to refund that amount. Neither this nor any other overcharge having been paid, the plaintiff on 18 August, 1915, brought this action to recover the overcharge and penalty for failure to refund. On the trial it was agreed by both plaintiff and defendant that the true amount of the overcharge was $1.42. The jury so found, and that it had not been refunded, and rendered verdict in favor of the plaintiff for that amount and for penalty $100.

Revisal, 2642, makes it unlawful for any railroad company to collect more than the rates prescribed in its printed tariff. Revisal, 2643, provides that when any party has been overcharged the party aggrieved may file a written demand, supported by the original freight bill and the original or duplicate bill of lading, and a maximum period of sixty days is allowed the company to settle the claim thus filed. Revisal, 2644, prescribes as a penalty for failure to refund the overcharge within sixty days after such notice, $25 for the first day and $5 per day thereafter until the penalty shall amount to $100.

In this case it was admitted by defendant at the trial that there was an overcharge of $1.42, and this was also shown by a comparison of the printed tariff and the freight receipt, which were all in evidence. The plaintiff was the consignee of the wagon and was the party aggrieved. The freight was to be paid by him, and was in fact paid by him through his agent, Miller, to whom he refunded the entire freight, including the overcharge, besides paying Miller for his trouble and time in going to North Wilkesboro. The secretary of the shipper and manufacturer testified that his company was not chargeable with the freight, and the plaintiff, being liable therefor, and having paid it, was the party aggrieved and clearly entitled to recover the same. In *Stone v. R. R.*, 144 N. C., 220, the Court held that on delivery to the common carrier of freight for transportation the title, in the absence of direction or

agreement to the contrary, vests in the consignee, who is entitled to sue as "the party aggrieved" for the penalty. To same effect, *Cardwell v. R. R.*, 146 N. C., 218; *Gaskins v. R. R.*, 151 N. C., 18; *Buggy Corporation v. R. R.*, 152 N. C., 119; *Elliott v. R. R.*, 155 N. C., 236. Laws 1911, ch. 139, enlarged the statute to authorize recovery to be made by the consignor "when it shall appear that the consignor was the owner of the shipment"; but in this case the consignee, the plaintiff, was the party in interest, having been chargeable with and having paid the freight out of his own pocket, and was therefore the party in interest, who alone could bring this action to recover it back. Revisal, 400.

The record shows that the claim for an overcharge was duly made in the manner prescribed by the statute, filing the bill of lading and freight bill with the written application for the same on 23 March, and the acknowledgment by the defendant on 12 April of the claim, with an admission of 96 cents overcharge. The offer to refund this, if a tender at all, was not sufficient, as the overcharge was $1.42.

Revisal, 2643, prescribes a maximum period of sixty days in which the common carrier must settle such claim by payment of the overcharge. This time expired 11 June. The action was begun 18 August. Revisal, 2644, gave $25 penalty for the first day's delay and $5 per day thereafter until the amount reaches $100, which the plaintiff, therefore, was entitled to recover.

The defendant's principal contention is that the plaintiff is not entitled to recover any penalty because he did not specify the same in his claim filed, and that in his action before a justice of the peace and also in the complaint filed on appeal he claimed that $1.96 was the amount of the overcharge. It is not a general principle in pleading that a party cannot recover what is justly due him because in his complaint he asks for a larger amount, and there is nothing in Revisal, 2643, which changes this as to an action of this kind.

Nor does the fact that the plaintiff in his letter of 23 March did not specify the amount of the overcharge debar his recovery. Revisal, 2644, does not require this, though section 2634 does, doubtless for the reason that the defendant has full notice of the amount of freight it should have charged according to its printed tariff, and the freight bill filed and its own books show what it did charge and collect. The proviso in Revisal, 2634, that the plaintiff cannot recover the penalty for a refusal to pay the amount of loss or damage to freight unless the full amount of the plaintiff's claim is recovered is based upon the ground that the plaintiff should know the amount of such loss and damage, and that if he demands more than a just amount the defendant is not to be penalized for refusing to pay an unjust claim. This is discussed and pointed out by *Allen, J.*, in *Supply Co. v. R. R.*, 166 N. C., 86.

It is a matter of common knowledge that railroad companies are often neglectful in adjusting and settling claims for loss or damage to goods in transit and for overcharges. Considering the large number of agents that these companies must have, it is not to be wondered at that such losses or damages and overcharges occur. But in the aggregate such claims are very large, and it is a matter of importance to the public that the carrier shall be impressed with the necessity of paying such claims, even when small severally, for the party aggrieved should not be debarred from recovery of his just dues because of the expense of counsel fees and the annoyance of litigation. To remedy this, Revisal, 2634, prescribes a penalty for failure to adjust and pay claims for loss or damage to goods beyond sixty days, but protects the carrier by forbidding a penalty when the plaintiff has demanded an excessive amount. As to overcharges in freight, which are usually very small severally, though aggregating large sums, the carrier knows the amount of the overcharge, which is a matter peculiarly within its knowledge, and the penalty is inflicted not to exceed $100 for a delay to refund the overcharge within sixty days. These penalty statutes are a declaration by the Legislature of the public policy of the State in this regard, and they have always been held constitutional under the police power.

No error.

J. B. CHANDLER v. CAROLINA MILLS.

(Filed 1 November, 1916.)

Appeal and Error—Fragmentary Appeals—Trials—Negligence.

To entitle a plaintiff to take a nonsuit upon an adverse intimation of the trial court, and have the ruling reviewed in this Court on appeal, the ruling of the lower court must be such as would defeat a recovery upon every aspect of the case; and where two elements, only one of which is necessary to a recovery for a personal injury, are presented, one as to the duty of the master to furnish safe appliances and the other as to the negligence of a fellow-servant, a voluntary nonsuit upon an adverse intimation on one of these phases of the case is premature, and an appeal therefrom is fragmentary, and will be dismissed.

CIVIL ACTION tried before *Starbuck, J.*, and a jury, in the county court and by *Long, J.*, on appeal, in the Superior Court at September Term, 1916, of FORSYTH.

The plaintiff sued for the recovery of damages on account of personal injuries received by him while assisting one James Hunter in lifting

the heavy lid of a dye-machine, under orders from the superintendent of the defendant's mill, he being, at the time, in the employ of defendant. This was not his regular duty, as he was assigned to work, as fireman, at the engine.

He alleged that his injuries were caused by two distinct acts of negligence on the part of defendant:

1. That the dye-machine was defectively constructed with reference to the lifting of the lid in safety, it having no proper appliances or means of raising and lowering the lid, which weighed 400 pounds, and that defendant failed to provide sufficient and competent help with which to do the work.

2. That while they were lifting the lid James Hunter negligently let go the lid before plaintiff could fasten the same securely, and thereby allowed it to fall on the plaintiff's arm.

Judge Starbuck, at the close of the evidence, intimated that he would charge the jury, among other things, that if they should find there was no negligence of defendant in respect to the construction of the dye-machine or in not furnishing a sufficient force to lift the lid, the defendant would not be liable on account of any negligence of James Hunter, he being a fellow-servant of plaintiff. Plaintiff excepted to this intimation of opinion, and, in deference thereto, he submitted to a nonsuit and appealed. The judgment was affirmed in the Superior Court, and plaintiff again appealed.

Holton & Holton and J. B. Craven for plaintiff.

J. C. Buxton, Watson, Watson & Robinson, and R. G. Parker for defendant.

WALKER, J., after stating case: We need not inquire into the correctness of the ruling as to the effect of any negligence of James Hunter, as we are of the opinion that the nonsuit and appeal were prematurely taken. The law with respect to this matter has been thoroughly well settled by this Court. Before a plaintiff can resort to a nonsuit, and have any proposed ruling of the trial court reviewed here by appeal, the intimation of opinion by the judge must be of such a nature as to defeat a recovery. If there is any ground left upon which the plaintiff may succeed before the jury, after the elimination of all others by an adverse intimation, the remedy is not by nonsuit and appeal, but the case should be tried out upon the remaining ground, for the plaintiff may recover full damages, in which case no appeal by him would be necessary. In other words, the threatened ruling must exhaust every ground upon which a verdict could be had, and, therefore, be fatal to plaintiff's recovery. Speaking to this peculiar but sometimes expedi-

tious practice of the courts, it was said in *Hayes v. R. R.,* 140 N. C., 131, 134: "It is common practice for a plaintiff to submit to an involuntary nonsuit which he is driven or compelled to take, reserving leave to move afterwards to set the same aside, with a view not to abandon the prosecution of the suit, but to further prosecute it by appeal, in order to test the correctness of a ruling of the court which may otherwise be fatal in his case; and the practice is a useful one when restricted within its proper limits. *Mobley v. Watts,* 98 N. C., 284; *Hickory v. R. R.,* 138 N. C., 311; *Hedrick v. Pratt,* 94 N. C., 101. In order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed has been said to apply ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by plaintiff. Plaintiff's right to take the course he did was challenged in this Court, because the ruling did not cover the whole case, but left him ground upon which a recovery could be had." To the same effect is *Midgett v. Mfg. Co.,* 140 N. C., 361; *Hoss v. Palmer,* 150 N. C., 17, and *Merrick v. Bedford,* 141 N. C., 504. The Court said in *Midgett's case, supra:* "An intimation of an opinion by the judge adverse to the plaintiff, upon some proposition of law which does not take the case from the jury, and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature, and the appeals will be dismissed. . . . If the plaintiff is permitted to take a nonsuit and appeal whenever an adverse ruling is made during the trial, not necessarily fatal to the case, it is possible the same case may be brought to this Court for review repeatedly, and numerous and unnecessary trials had in the court below. It is best that the case be 'tried out,' and then, if an appeal is taken, all the alleged errors excepted to during the trial may be reviewed here," citing *Hayes v. R. R., supra; Tiddy v. Harris,* 101 N. C., 591; *Gregory v. Forbes,* 94 N. C., 221, and *Crawley v. Woodfin,* 78 N. C., 4. The rule of practice itself has prevailed in our courts for many years, but it has been strictly confined in its application to cases where the intimation of opinion reaches to the whole case and leaves nothing for the plaintiff to stand upon, so that the review of the ruling in this Court will extend to all essential matters upon which a recovery could be based; otherwise the appeal would be fragmentary, and we would be giving our opinion upon a single question of law not finally determinative of the case, and trials would thus be uselessly multiplied and protracted.

According to this established principle in the procedure of the courts, plaintiff submitted to a nonsuit prematurely, and we must, therefore, dismiss his appeal. *Merrick v. Bedford, supra.*

Appeal dismissed.

IN RE WILL OF PARIS EDWARDS.

(Filed 1 November, 1916.)

1. Wills—Interpretation—Contracts.

Where a paper-writing begins with the usual formality and declares itself to be the will of the testator, before making disposition of his property, and thereafter the testator revokes therein all former wills which he had made, and it is duly subscribed and witnessed in accordance with the requirements for a will, it does not lose its character as such, or assume that of a contract, because of an unsigned provision that the beneficiary agrees to support the testator "as long as he lives"; and this clause may be disregarded as surplusage, when the instrument has been retained by the testator.

2. Same—Validity Upheld.

Where a paper-writing will operate as a will and not as a contract, it will be upheld as the former.

3. Wills—Devises—Statutes—Forms.

The power to devise is purely statutory, requiring no special form to give the intention of the testator effect as his will.

APPEAL by propounder from *Webb, J.*, at May Term, 1916, of FORSYTH.

Devisavit vel non begun before the clerk and transferred to the Superior Court for trial on the issue raised by caveat.

The court instructed the jury, "After a careful examination of the paper the court is of the opinion that it is not a will," and the jury so found. The propounder excepted and appealed.

Fred M. Parrish, Phillip Williams, and Hastings & Wicker for caveator.

Sapp & McKaughan and Holton & Holton for propounder.

CLARK, C. J. The following paper-writing was offered for probate as the will of Paris Edwards:

18 November, 1912.

I, Paris H. Edwards, of the State of North Carolina, Guilford County, being of sound mind and memory, do make, publish, and declare this to be my last will and testament, to wit:

1. I, Paris H. Edwards, of the first part, do agree to give Will Kirkman all I possess, to have and to hold and diminish as he may see fit.

2. I, Willie Kirkman, of the second part, do agree to take Paris Edwards and care for him as long as he lives.

I, Paris Edwards, of the first part, do declare this to be my last will and testament, hereby revoking all former wills by me made and written.

Wherefore, I have hereunto set my hand and seal, this 18 November, 1912.

His
PARIS × EDWARDS.
mark

Witness:
E. S. JONES.
J. F. HASSELL.

The court instructed the jury that this was not a will. The verdict and judgment were rendered accordingly. The caveator moved to dismiss the appeal for failure to assign error; but exception was taken at the time, and the appeal being from the judgment, is of itself a sufficient assignment of error. *Ullery v. Guthrie,* 148 N. C., 417; *Queen v. R. R.,* 161 N. C., 217.

A will has been defined as "a disposition of property to take effect on or after the death of the owner." 40 Cyc., 995. In *Payne v. Sale,* 22 N. C., 457, it is defined as "the just sentence of our will touching what we would have done after our death."

The testator certainly understood that he was making a will, for in the first paragraph of this paper-writing he recites: "being of sound mind and memory, I do make, publish, and declare this to be my last will and testament, to wit":

And in the last paragraph he again recites: "I do declare this to be my last will and testament, hereby revoking all former wills by me made and written." The same is duly witnessed by the signature of two witnesses thereto, as required by law for a will. In the body of the writing, between the paragraphs above quoted, he provides: "1. I, Paris H. Edwards, of the first part, do agree to give Will Kirkman all I possess, to have and to hold and diminish as he may see fit.

"2. I, Willie Kirkman, of the second part, do agree to take Paris H. Edwards and care for him as long as he lives."

The above constitutes the whole of the instrument except the attesting clause.

The intention to dispose of all his property in favor of Willie Kirkman, and that this is to be Paris Edwards' last will and testament, is thus most explicitly stated. The paragraph containing the statement that Willie Kirkman is to care for him "as long as he (Edwards) lives" is an indication that Kirkman is to have his property after the testator's death, and his getting it then is conditioned upon Kirkman carrying out that understanding. While it is inartificially drawn, the evident intent is to express this motive for executing the will. This agreement is not signed by Kirkman and there is no contract by Kirkman.

This is the not unusual case of a testator giving a reason for willing his entire property to a stranger. If Kirkman had not rendered these services, a question might have been raised as to the validity of the will; but we need not pass upon that. By the testator's own declaration, twice made in this paper-writing, this was "his last will and testament." The recital that Willie Kirkman had agreed, in consideration of his making the will in his favor, to take care of the testator for the remainder of his life, is mere surplusage.

We have a very recent case, exactly in point, *In re Cole's Will,* 171 N. C., 74, where a holograph will of the husband, signed by him and his wife, purporting to be their joint will, disposing of all of the property of both, was held to be valid as the holograph will of the husband, and the joinder therein by the wife and her signature thereto was held mere surplusage.

"No particular form of expression is necessary to constitute a legal disposition of property by will. Although apt words are not used, and the language is inartificial, the Court will give effect to it where the intent is apparent," says *Brown, J.,* in *Kerr v. Girdwood,* 138 N. C., 473, citing *Henry v. Ballard,* 4 N. C., 397, and *In re Belcher,* 66 N. C., 54, to the above purport, that: "Form will be discarded, and has been, so that an instrument in form a deed has been held to be a will." The subject is fully discussed with ample citation in *Morrison v. Bartlett* (Ky.), 41 L. R. A., 39. In the notes to this case are many interesting cases in which instruments in the form of a contract, acknowledgment of indebtedness, assignments, indorsements, bank deposits, commercial paper, leases, powers of attorney, orders on executors, and other informal papers are held to be sufficient as wills when the intent sufficiently appears that there is to be a disposition of the testator's property after death. This was not a contract, for it was not signed by the other party, nor was it a deed, for it was not delivered.

Kerr v. Girdwood, 138 N. C., 473, is reported with notes 107 Am. St., 551, which cite *Ferris v. Nelville,* 89 Am. St., 486, where the subject is fully discussed in a very illuminating monograph.

In 40 Cyc., 1091, it is said: "It is not necessary that any particular form of words be used to make a will. Any writing to take effect at death may constitute a will." The power to devise is purely statutory (*In re Will of Garland,* 160 N. C., 555), and our statute does not require any particular form, and, indeed, this will is sufficiently formal. The paragraph therein in regard to the promise of the devisee to take care of the testator during his lifetime is unsigned and at most mere surplusage.

This paper-writing was neither signed by the other party nor was it delivered to him. It could not, therefore, be a contract; and if it is not a will, it is nothing. A case exactly in point is *Heaston v. Krieg* (Ind.), 119 Am. St., 475, where as to an instrument which was entitled "contract" and recited that it was an "agreement" between the deceased and another party in consideration of support during the former's lifetime, the Court held: "No matter by what name the parties to an agreement may call it, or to what extent there may be contractual provisions in it, yet if a provision of a clearly testamentary character is found in the writing, and it is witnessed in accordance with the requirements of law, it may operate as a will." It was also held that "A writing susceptible of being construed as a will and also as a deed will be construed as a will if it is a nullity as a deed." As already said, the present instrument is a nullity unless it is a will, as the testator emphatically characterized it. In that case the Court said: "It affords no objection whatever to the testamentary character of an instrument that it contains provision of a contractual nature," citing numerous cases.

In *Smith v. Eason,* 49 N. C., 34, it is said: "In ascertaining whether an instrument was intended by the maker to operate as a bond or as a will, words which may not change the legal effect of the instrument, if its character has been established, may be quite material in determining its character," as in this case, the statement of the maker, emphatically reiterated, that it was "his last will and testament."

Error.

J. A. HOLLOMAN v. SOUTHERN RAILWAY COMPANY.

(Filed 1 November, 1916.)

1. Carriers of Goods—Notice of Arrival—Mail—Evidence—Actual Notice.

Where there is evidence that the carrier mailed a postal card to the consignee of a shipment of goods, giving due notice of the arrival, in accordance with the rules of the North Carolina Corporation Commission, and that it was properly addressed and put into the postoffice, it is presumed to have been received, in the absence of evidence that it was not, and is sufficient to take the question to the jury. *Semble,* actual notice of the arrival of the goods dispenses with the formal written notice.

2. Carriers of Goods—Notice of Arrival—Written Notice—Parol Evidence.

The written notice required by the North Carolina Corporation Commission to be given by the carrier to the consignee of goods is a matter collateral to the issue of whether the latter is responsible to the former for storage charges accrued, and admits of parol evidence of its contents.

3. Carriers of Goods—Damaged Condition—Accepting Goods—Worthless Condition.

Where goods transported by the carrier are claimed by the consignee to have arrived at their destination in bad condition, it is the latter's duty to receive the goods and sue for damages unless they are rendered practically worthless.

4. Same—Action—Estoppel.

Where the consignee of goods has refused to receive them because of their damaged condition unless the carrier would accept a receipt to that effect, and sues for the damages, and then for possession of the goods, after a judgment adjudicating the amount of the damages, but leaving open the question of title and right of the defendant to storage charges, he is estopped to claim that the goods were in a condition practically worthless at the time he refused to accept them.

5. Carriers of Goods—Damaged Condition—Storage Charges—Claim Rejected—Inconsistent Defenses.

Where the consignee has refused to accept a shipment of goods because of their alleged damaged condition, and contends that the carrier agreed to keep them, without charge, pending an adjustment, and it is shown that the carrier wrote him a letter positively declining to allow the damages claimed by him, whereupon he had brought suit to recover them: *Held*, if any such agreement had been entered into, it terminated upon the refusal of the carrier to consider the claim for damages; it was also inconsistent with the plaintiff's action therefor, and the carrier is entitled to recover its proper charges for storage.

6. Carriers of Goods—Storage Charges—Services Rendered—Consideration.

Storage charges are allowed the carrier for the service rendered in taking care of the goods, the inconvenience to the warehousemen, and the liability for their safe custody if they do not exercise proper care.

7. Carriers of Goods—Storage Charges—Liens.

A carrier has a lien upon the goods for its proper storage charges therefor, and may hold them until the charges are paid or properly tendered.

8. Appeal and Error—Brief—Exceptions—Waiver.

Where the appellant excepts to the allowance of storage charges awarded to the carrier of goods, and no point is made in the brief as to the time for which they are allowed, it is waived under the rule of the Supreme Court.

CIVIL ACTION tried before *Long, J.*, and a jury, at May Term, 1916, of FORSYTH.

The action was brought for the recovery of certain knitting mill machinery which was shipped from Raleigh, N. C., to the plaintiff at Kernersville, N. C. When the machinery arrived at Kernersville it was found to be in a damaged condition, and plaintiff refused to receive it, according to plaintiff's version of the facts, unless the defendant

would take a qualified receipt for it, showing its bad condition, which defendant declined to do. The machinery was, therefore, placed in defendant's warehouse. Plaintiff brought suit in Guilford Superior Court to recover damages for the injury to the machinery, and got a judgment for $1,500 at February Term, which contained this clause: "It is therefore ordered and decreed that this judgment is without prejudice to the rights of plaintiff as to the ownership and possession of the machinery described in the complaint, and as to the right of defendant to demurrage and freight charges and storage." Plaintiff then commenced this action against defendant in Forsyth County to recover possession of the machinery, and defendant set up its claim for storage, under the storage and demurrage rules of the State Corporation Commission, amounting to $724.27. At the trial the jury returned the following verdict:

1. Is the plaintiff the owner and entitled to possession of the property described in the complaint, subject to such lien, if any, as the defendant may have for freight and storage charges? Answer: "Yes."

2. In what sum, if any, is the plaintiff indebted to the defendant for freight and storage charges? Answer: "$342.08."

3. Is the said property subject to lien in favor of the defendant for said amount of freight and storage charges? Answer: "Yes."

The court entered a judgment upon the verdict in favor of the plaintiff for the property, subject to the lien of defendant for its storage charges as awarded by the jury, and in favor of defendant for said charges declaring therein a lien upon the machinery and appointing a commissioner to sell the same if the storage charges were not paid. Plaintiff appealed.

L. M. Swink and Philip Williams for plaintiff.
Manly, Hendren & Womble for defendant.

WALKER, J., after stating the case: The plaintiff, in his brief, states his contention as follows:

"The judgment in this case is clearly erroneous in adjudging that the defendant is entitled to recover storage charges, because:

"1. The defendant's right to recover storage charges is dependent upon notice of the arrival of the shipment in accordance with the rules of the Corporation Commission; and there was no competent evidence to prove such notice.

"2. The defendant was estopped from asserting the right to claim storage charges.

"3. The court decided as a matter of law that the right to charge storage had not been waived."

We are of the opinion that none of these several contentions should prevail. There was ample evidence that notice of the arrival of the machinery was promptly given. This was done by postal card properly addressed and mailed and presumed to have been received by the plaintiff, in the absence of evidence that it was not. *Model Mill Co. v. Webb,* 164 N. C., 87; *Trust Co. v. Bank,* 166 N. C., 112. It has been held that where the consignee has actual notice that the goods have arrived and that the carrier is ready to deliver them at his depot, it dispenses with any formal written notice of the fact; nor could he demand it, 4 R. C. L., p. 755; *Normile v. N. P. Railroad Co.,* 67 L. R. A., 271; but we do not decide as to this view, as we have held that sufficient notice was given. Plaintiff objected to oral evidence in regard to mailing the postal card announcing the arrival of the machinery; but this position is not tenable, as the mailing and contents of the postal card are matters collateral to the issue and not the subject-matter of the litigation. It was held in *Ledford v. Emerson,* 138 N. C., 502, that the rule excluding parol evidence as to the contents of a written instrument applies only in actions between parties to the writing, when the enforcement of any obligation created by it is substantially the cause of action. 1 Greenleaf on Ev., 275, 279; *Pollock v. Wilcox,* 68 N. C., 50; *Reynolds v. Magness,* 24 N. C., 26; *Carden v. McConnell,* 116 N. C., 875; *Belding v. Archer,* 131 N. C., 287; *S. v. Credle,* 91 N. C., 640; *Jones v. Call,* 93 N. C., 170. The last two cases related to notices, and it was there held that the rule requiring the production of the writing itself as the best proof of what it contains does not extend to mere notices, which persons are not expected to keep. 1 Greenleaf on Ev., sec. 561.

The other objections of the plaintiff, as to estoppel and waiver, are correlated and may be considered together. If these questions are properly raised there is nothing for them to rest upon. The matter resolved itself into one of fact, whether the defendant had kept the machinery in its warehouse on storage, or held it, under an agreement with the plaintiff, until defendant could investigate the dispute between them, as to condition of the machinery and the liability therefor, and either accept or reject the plaintiff's proposal as to payment for the damage, or until the matter was otherwise adjusted. The court, in a very clear and impartial statement of the contentions, submitted this question of fact to the jury, instructing them that if they found that the plaintiff's version was the correct one, to answer the second and third issues against defendant. The jury seem to have found with the plaintiff, anyhow, at least to some extent, for the defendant was certainly entitled to charge storage from the time plaintiff received the Hooper letter declining to pay any damages, and the jury only allowed

for storage charges from that date. It was then the duty of plaintiff, as consignee, to take the machinery and sue for the damages, as defendant had declined to pay anything, and, therefore, there was nothing to adjust. Plaintiff is not in a position to say that the machinery was so badly damaged as to be worthless, and, therefore, no obligation rested upon him to receive it, as he has recovered damages for injuries to it, and has brought this suit for the machinery itself. In his former action plaintiff's position was that the machinery was only damaged and not practically destroyed, and, in this action, he takes the same position by asking for the possession of the property. He will not, therefore, be allowed to repudiate his former contention by now alleging that it had become worthless by defendant's act and, therefore, he should not be charged for keeping it in storage. If it was his property, and worth anything, he is chargeable with storage after the defendant had refused to comply with his demand, and the jury so found under correct instructions. Plaintiff's attitude would seem to fall within the very principle he invokes in his brief against the defendant: "Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim, or conduct to the prejudice of another." 16 Cyc., p. 785. "A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same and the same questions are involved." 16 Cyc., p. 799; *Williams v. Scott,* 122 N. C., 545; *Chard v. Warren,* 122 N. C., 75; *Brantley v. Kee,* 58 N. C., 332; *P. W. & B. Railroad Co. v. Howard,* 54 U. S., 13; *Davis v. Wakelee,* 156 U. S., 680, 692. The contention is not open to the plaintiff that the defendant held the goods under an agreement for adjustment and an implied understanding that no charge for storage would be made, when it had received a letter from defendant assuming an adversary position towards his claim and positively refusing to pay it, and he had actually brought suit to recover damages upon the theory, of course, that the agreement as to an adjustment of the controversy was at an end. These are inconsistent positions. The plaintiff could not, in this way, benefit by the legitimate services of the defendant and not pay the reasonable value of them as fixed by the law and the defendant's tariff schedules. 4 Ruling Case Law, p. 864, sec. 316, and pp. 868, 873. We have decided a case at this term, *R. R. v. Iron Works, ante,* 188, which fully sustains this view. *Justice Hoke,* referring to a dispute, where a shipment had been refused by the consignee, said

in that case: "The consignee is entitled to collect reasonable storage charges until, in exercise of its rights under the law, the goods could be properly disposed of and both parties thereby relieved of further charge concerning them. . . . It is urged for defendant that no storage charges should be allowed after defendant had in express terms refused the shipment, as plaintiff could have proceeded immediately to enforce its lien; but the position cannot be approved. The railroad company should not be required to take the risk of such a course, but is entitled to proceed in an orderly way to enforce its right, and the authorities are to the effect that a common carrier is not relieved of all responsibility by refusal of the shipper to receive the freight, but is required to store and properly care for the goods as warehouseman under established rules of law."

In that opinion attention is also called to the common-law rule giving a lien for storage, enforcible by action in the courts, and the change effected by our statute, under which the carrier may sell the goods after the lapse of a given time. Revisal, secs. 2637, 2638. The Court also held, in the same case, that the carrier was entitled to recover for storage, "not for the entire time which had elapsed since the shipment was refused, but is restricted to the time when he could have relieved himself of the charge by sale pursuant to the statute."

In respect to the time for which storage should be allowed, there is a distinction between that case (*N. and S. R. R. Co. v. New Bern Iron Works*) and this one. There the consignee rejected the goods altogether and out and out, while here the plaintiff claims the goods as his own in this very action, and having thus left his property in storage with the defendant, it is nothing but right, and it is the law, that he should pay the reasonable charges for keeping it. Compensation is allowed for storage because of the service rendered in taking care of the goods and the inconvenience to the warehouseman, and also the liability for their safe custody if proper care is not exercised. 4 R. C. L., sec. 316; *Miller v. R. R.*, 88 Ga., 563, 572; *R. R. v. Mfg. Co.*, 142 Ala., 322. It is said in the *Miller case, supra:* "It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them. Hutchison Carriers, 378; *Southwestern R. Co. v. Felder*, 46 Ga., 433." The carrier also has a lien for his freight and charges for storage, and may hold the goods until they are paid or properly tendered. 4 R. C. L., sec. 320. So that the defendant was entirely within its right in holding the goods, and the plaintiff was in the wrong for not taking them when it had the

opportunity to do so and reasonable time within which to do it. Having failed in his duty, he must pay the legal charges for storage. There is no point made in the brief as to the time for which storage should be allowed, and, therefore, if there had been any error in this respect, it would be waived under our rule.

There was no error in the rulings of the court.

No error.

P. T. ANTHONY v. R. O. JEFFRESS ET AL.

(Filed 9 November, 1916.)

1. Corporations—Gross Mismanagement—Directors' Liability.

Where the directors of a corporation appoint a committee to act with and in supervision of the manager in the conduct of the corporate affairs, and the directors have met only three times during the corporate existence of about two years, first to organize, second to declare a 10 per cent dividend, and the third to appoint a receiver, the dividend declared when its liabilities exceeded its assets, and largely with borrowed money: *Held*, the directors are individually liable in damages to creditors of the corporation thus managed, whether the directors had actual knowledge of the insolvent condition or not, by reason of their negligence, fraud, or deceit.

2. Same—Good Faith.

Good faith alone will not relieve the directors of a corporation from liability to its creditors for damages caused them by their gross mismanagement and neglect of its affairs.

3. Partnership—Principal and Agent—Corporations—Gross Mismanagement—Directors—Imputed Knowledge—Actual Knowledge—Burden of Proof.

The knowledge of one partner which will be imputed to the others of the partnership must have been acquired within the agency implied from the partnership relation; and where the partnership sells goods to an insolvent and grossly mismanaged corporation, in which one of them is a director, the knowledge of the corporate affairs will not be imputed to the other; and where, after a receiver has been appointed for the corporation, the director therein assigns his claim to his partner upon a sufficient consideration, the other may recover from the individual directors his proportionate share of the debt. Under the evidence in this case the burden of proof is on the plaintiff to show the want of actual knowledge and that he acted in good faith.

HOKE, J., dissenting; ALLEN, J., concurring in dissent.

CIVIL ACTION tried at May Term, 1915, of PITT, before *Whedbee, J.*

At the conclusion of the evidence the court sustained the motion to nonsuit. The plaintiff excepted and appealed.

Harry Skinner and Albion Dunn for plaintiff.
Harding & Pearce, F. M. Wooten, Ward & Grimes for defendants.

BROWN, J. This action is brought to recover from the defendants, directors of the corporation known as the Central Mercantile Company, damages for negligence in the management of the affairs of the corporation, and against the defendant Wooten, president of the corporation, for willful misrepresentation as to its solvency, upon the faith of which plaintiff alleges he sold a bill of goods to the company.

The evidence tends to prove that the corporation was organized in 1909 with these defendants as directors, or those that were not directors then, became so shortly after; that a finance committee was elected by the directors, composed of five members, which were paid for their services, and to that committee was largely entrusted the management of the company's affairs. The evidence shows that one J. F. Davenport was general manager and that he practically and almost exclusively ran the business. The directors, from the time the company was organized in 1909 until it became insolvent and went into the hands of a receiver, in January, 1911, met three times only; the first to organize, the second to declare a dividend of 10 per cent, and the third to have a receiver appointed. The finance committee met weekly, but made no investigations of the company's affairs, and always approved the report of the manager. When the dividend of 10 per cent was declared, in 1910, the liabilities of the company then largely exceeded its assets, and the money with which the dividend was paid, or the most of it, was largely borrowed.

It is useless to recapitulate all the evidence as to the mismanagement of the affairs of the corporation. A cursory reading of the record discloses it. The evidence tends to prove that at a time when this condition of affairs existed, the defendant Wooten represented to the plaintiff that the corporation was solvent, and upon that representation the plaintiff, being a member of the firm of Hooker & Anthony, sold the goods to the corporation. The account for these goods after the appointment of a receiver for the corporation was assigned by T. N. Hooker to the plaintiff. The evidence of negligence upon the part of the defendants, including Hooker, who was also a director, is too strong to need discussion.

It is immaterial whether the defendants were cognizant of the insolvent condition of the company or not. The law charges them with actual knowledge of its financial condition, and holds them responsible for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit. *Pender v. Speight*, 159 N. C., 616; *Townsend v. Williams*, 117 N. C., 330; *Soloman v. Bates*, 118 N. C., 315.

While the directors are not liable for losses resulting from mistakes of judgment such as are excused in law, they are liable for losses resulting from gross mismanagement and neglect of the affairs of the corporation. Good faith alone will not excuse them when there is lack of the proper care, attention, and circumspection in the affairs of the corporation which is exacted of them as trustees.

We are persuaded that the learned judge could not have dismissed this action upon the ground that there is no evidence of negligence. It must be, as stated on the argument, that he was of opinion that, inasmuch as defendant Hooker, a director, was a copartner of plaintiff in the firm that sold the goods to the insolvent corporation, the plaintiff was fixed by reason of such partnership with whatever knowledge Hooker had or ought to have had of the corporation's affairs. We cannot agree with that view. The negligence of the directors cannot be imputed to plaintiff solely because he was a copartner in business with one of them. There is no evidence whatever that at the time he sold the goods to the corporation the plaintiff had any knowledge of its financial condition. As for that matter, it seems that Hooker himself, although a director and secretary to the board, had little knowledge of the true condition of the corporation that he was supposed to serve.

We do not gainsay the general rule resulting from the unity of a partnership, that notice to an acting partner of any matter relating to the partnership affairs will operate as notice to the firm except in case of fraud. We do not dispute the established doctrine of the law that imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which the agent acquires while acting as such agent and within the scope of his authority. But those principles, in our opinion, ought not to apply to this case.

It is only where the partner is acting within the scope of the partnership business and within his authority that notice to him is notice to his copartners. Knowledge obtained by a partner outside of the scope of the firm business is not imputed to his copartners. Gilmore on Partnership, p. 319.

Although the principle of agency applies to copartners, yet it is only when it can be seen that a partner is in fact acting as an agent of his copartners that he can bind them. This question is very fully discussed by the New York Court of Appeals in *Bienenstock v. Ammidown,* 155 N. Y., 47, and it is there held that "Notice or knowledge of one member of a partnership acquired in transactions outside of the partnership business conducted for his individual benefit is not constructively imputable to his copartners and imposes no implied liability upon them through the partnership relation." See, also, Story on Partnership,

p. 414. Analogous decisions are to be found in respect to the liability of a corporation for knowledge acquired by a director.

A director in a corporation is one of its officers, a part of its governing body, yet it is well settled that the mere fact that he has knowledge of a fact does not charge the corporation with notice. In order to charge the corporation with notice, the director must have acquired the knowledge officially as a member of the board and in the course of business as director or for the purpose of being communicated by him to the board. *Bank v. Savery,* 82 N. Y., 291, and cases cited; *Bank v. Carman,* 37 N. Y., 320; *Bank v. Norton,* 1 Hill, 572.

This Court has held that a corporation is not bound by the acts or chargeable with the knowledge of one of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf and does not act in any official or representative capacity. *Bank v. Burgwyn,* 110 N. C., 267.

We have considered this case upon the theory that plaintiff was entirely innocent of all knowledge of the corporation's financial condition at the time he sold the goods to it. While the bad faith or negligence of plaintiff's partner must not be imputed to him, it at least throws upon the plaintiff the burden of proving to the satisfaction of the jury that in this matter he acted in good faith and without actual knowledge of the affairs of the corporation. *Randall v. Knevals,* 50 N. Y. Sup., 748.

Of course, the plaintiff, if he establishes the allegations of his complaint, cannot recover as damages the entire amount of the account for goods sold and delivered. He can only recover such damages as he has personally sustained by reason of the negligence of the defendant. For these damages his copartner Hooker is as much liable as any other of the defendants upon the evidence set out in this record.

The judgment of nonsuit is set aside.

Error.

HOKE, J., dissenting: I am unable to concur with the Court in the disposition made of this appeal, and believing that, by a misapplication of legal principles to the facts disclosed in the record, a grave injustice may be wrought to some of the parties litigant, I consider it not improper that I should state briefly the reason for my dissent.

In giving the controlling grounds for its conclusion, the *"ratio decidendi,"* the Court, in the close of the opinion, says: "We have considered this case upon the theory that plaintiff was entirely innocent of all knowledge of the corporation's financial condition at the time he sold the goods to it. While the bad faith or negligence of plaintiff's partner must not be imputed to him, it at least throws upon the plain-

tiff the burden of proving to the satisfaction of the jury that in this matter he acted in good faith and without actual knowledge of the affairs of the corporation. *Randall v. Knevals,* 50 N. Y. Sup., 748." And, to my mind, a casual perusal of the facts in evidence will show not only that plaintiff was not "entirely innocent of the corporation's financial condition," but that he is to be charged with full knowledge of it in so far as his right to recover on this account is concerned, and that these facts disclose further that the firm of Anthony & Hooker, in whose name and by whose right this account must be collected, if at all, did not extend its credit or make the account in reliance on anything that the defendants or either of them said about the corporation's business, but acted entirely on their own estimate of conditions.

Recurring to the record, it appears that in 1909 and 1910 and early in 1911 plaintiff and T. M. Hooker were copartners, doing a wholesale grocery business in the town of Greenville, N. C., and that during said period the Central Mercantile Company was a corporation doing a general supply business and having its store within two blocks of that of plaintiff; that the corporation had organized for its purpose in the latter part of 1908, and proceeded in the conduct of its business by electing nine directors, one of whom was plaintiff's partner, T. M. Hooker, who was chosen and served as secretary of the board; that these directors selected five of their number, styled a financial committee, who had general supervision of the business of the corporation, and one of them, J. F. Davenport, was made active manager at a salary of $1,000, and was required to give bond in the sum of $5,000 for the faithful performance of his duties, and the bookkeeper was required to give such bond in like sum. That the business went on with apparent success through 1909, the financial committee meeting once a week to examine into the affairs and management, a custom that continued during the life of the corporation, and, having appointed one of their number, regarded as a skillful accountant, to make a thorough examination of the books, he reported that his investigations disclosed a profit for the year of 17 per cent. The directors thereupon declared a dividend of 10 per cent, which was paid. The corporation continued its business through 1910, when, having become financially embarrassed, on proceedings instituted, a receiver was appointed, who collected and distributed its assets according to law. There are no facts in evidence from which the exact financial condition of the corporation at the time of declaring this dividend can be determined, but it subsequently developed that the business of the corporation did not justify a dividend at the time, and that the directors and their accountants were misled by the fact that quite a number of invoices of goods, purchased and

owed for, had not been entered on the company's books. That soon after the corporation commenced business the firm of Anthony & Hooker began selling it goods, and sold the company large quantities through 1909 and 1910, stated on the argument and uncontradicted, to amount to more than $30,000, and, at the time of proceedings instituted and receiver appointed, there was a balance due the plaintiff's firm of $2,272.50, reduced by dividend from receiver of $656.98, leaving a final balance of $1,615.52, for which this suit is brought seeking recovery against the president of the company, John L. Wooten, and the directors as individuals, for negligent management and fraudulent representations as to the company's financial condition. That on or about July, 1910, the company began to be slow in their payments, plaintiff's firm holding against it several protested checks, when Anthony, the plaintiff, and Hooker, his partner, conferring on the subject, Anthony suggested that Hooker should interview Wooten, the president, on the subject, and Anthony testifies that on coming from the interview Hooker reported to him that Wooten had given assurances that the corporation was good for any amount that would be sold it, and, as a result of such report, further sales were made, leaving on final account the balance due as stated. That in 1913, two years after appointment of receiver, Hooker having declined or being disinclined to join in the suit against the president and fellow directors, Anthony took over this account and allowed Hooker, in payment therefor, two old claims of the firm, also supposed to be bad, and entered suit, claming that he was uninformed of the business conditions and methods of the corporation and was induced to make these last sales by the assurances had from Wooten as reported to him by his partner, Hooker. There is no claim or suggestion that Hooker was endeavoring to circumvent Anthony in the matter. So far as the record shows, Anthony and Hooker are still friendly and doing business together, having become incorporated in January, 1911. Hooker himself testifies, among other things, that he acted as secretary of the board of directors, and the book containing the minutes of the meetings were kept in the safe of Anthony & Hooker. That he went into the supply store of the company almost every day, and occasionally examined their books and noted that they were not very well kept. That, as a member of the firm of Anthony & Hooker, he at first sought the business of the corporation, but when they became slow pay he and Anthony had a conference about it, and, as a result, Hooker interviewed Wooten, who told him "that the stockholders might lose something, but he did not see how the creditors could," and that he, thereupon, continued to make sales till or near the time the proceedings were instituted. That witness passed the place of business

of the company very often, at least once every day; that there was no effort made to prevent witness from learning the conditions surrounding the business of the corporation, and that, while it turned out that he did not have a full knowledge of such business, he made these sales on his own judgment, and that neither Wooten nor any of the other defendants were responsible for the giving of such credit, and that he had never concealed from Anthony, his partner, any of the facts. It further appeared that J. S. Wooten and his codefendants, other than Davenport, the manager, were men engaged in other business in the town, and that the active management of the company was, as stated, entrusted to J. S. Davenport, and he was under the supervision of the finance committee and acted under bond reasonably sufficient to insure the proper performance of his duties.

From this, a fair summary of the facts in evidence, I am of opinion that there is very little, if any, testimony to fix personal responsibility on the president and directors, and that any suit proceeding on the theory that plaintiff Anthony was entirely innocent of all knowledge of the corporation's methods and financial condition cannot for a moment be entertained. Even if he was not sufficiently put on guard by the slow pay of the company and the protest of several of its checks held by his firm when this account was made, his associate and partner was one of the corporate directors and secretary of the board, kept the book containing its minutes in the firm's safe, and knew as much or more about its affairs than the defendants, except Davenport, who was the active manager. He testifies, further, that he was in the corporation's store at least once every day, and occasionally examined its books, and that nothing was done to prevent him from looking fully into the company's affairs, and that he kept nothing back from his associate, Anthony. Under these circumstances, the knowledge possessed or acquired by Hooker was the knowledge of his firm, and Anthony, who is seeking to enforce collection of a firm debt, cannot be heard to say that the firm was entirely without notice or knowledge of conditions. In Lindley on Partnership, sec. 142, it is said: "In conformity with these principles, if a firm claims the benefit of a transaction entered into by one of its members, it cannot effectually set up its own ignorance of what that member knew, so as to be in a better position than he himself would have been in had he been dealing on his own account as a principal." And in George on Partnerships, p. 234: "As a general rule, notice to a principal is notice to all his agents, and notice to an agent of matters connected with his agency is notice to his principal. Consequently, as a general rule, notice to one partner of any matter relating to the business of the firm is notice to all the other members;

and if two firms have a common partner, notice which is imputable to one of the firms is imputable to the other also, if it relates to the business of that other. In conformity with these principles, if a firm claims the benefit of a transaction entered into by one of its members, it cannot effectually set up its own ignorance of what that member knew, so as to be in a better position than he himself would have been in had he been dealing on his own account as a principal." And Gilmore on Partnerships, p. 318, and Bates on Partnership, sec. 398, are to like effect. It is contended that knowledge of one partner that comes to him outside of the course and scope of his business is not always and necessarily imputed to his copartners, citing, among other cases, *Bank v. Burgwyn,* 110 N. C., 272. The case of *Bank v. Burgwyn* was that of an incorporated company, a separate entity, and the principle of imputed notice is not so insistent as in case of a partnership; but, conceding that the principle applies though in lesser degree to a partnership, this knowledge of Hooker came to him in the direct course and scope of his business. He was expressly commissioned to look into the company's affairs, and the firm acted on his judgment. It is no matter of surprise, therefore, that Hooker, conscious of the lack of merit in his claim, should be disinclined to join in any such suit as this, and the courts should not countenance it when entered by plaintiff, who took it over with full knowledge of conditions and paid for it with other bad debts of the firm. Again, it is well understood that for a recovery of this kind there should not only be a false representation, but that the claimant should have relied on it. *Tarault v. Seip,* 158 N. C., 363; *May v. Loomis,* 140 N. C., 350. There is, as stated, no claim or suggestion that Hooker endeavored to mislead or impose on Anthony in any way, and Hooker swears that, in making these sales, he acted on his own judgment and not on the representations of defendant Wooten or of any one else connected with the company. He testified, further, that when he interviewed Wooten, which he did after he and his partner Anthony had conferred about it, all that Wooten told him was that he did not see how creditors could lose anything. Anthony does not give any direct evidence in contradiction of this. True, he swears that his own partner, Hooker, told him more than this; but if he was misled, it was his own partner that did it. I think there is no aspect of this evidence that would justify a recovery, and that the judgment of nonsuit should be sustained, first, because there is very little, if any, evidence of negligence which justifies fixing the individual responsibility contended for; second, if it is otherwise, that plaintiff Anthony, if not sufficiently put on guard by the slow pay of the company and the protest of several checks given by the corporation to his firm, is charged

with notice and knowledge of the corporation's methods and financial condition by the knowledge acquired and possessed by his copartner, Hooker; third, because there is no direct evidence that the goods were sold in reliance on any representations made by defendants or either of them, but that Hooker, who had the matter in charge for the firm, acted on his own judgment in making the sales which constitutes the present account and which is now sued for.

ALLEN, J., concurring in dissenting opinion.

J. NICK WALKER v. DENNIS BURRELL.

(Filed 9 November, 1916.)

1. Deeds and Conveyances—Written Contracts — Mortgages — Foreclosure—Date of Payment—Interpretation.

Where a contract for the sale of lands reserves title in the vendor and provides for the payment of an annual sum of money, with accrued interest on the entire debt, for a period of ten years, and obligates to convey the property on tender of payment within six months thereafter, etc., the contract will be specifically enforced as made, without right of the vendor to foreclose within the period of ten years and six months, though he may recover judgments for the specified payments within that time as they fall due, and enforce payment out of the purchaser's other property subject to his exemptions.

2. Same—Intermediate Payments—Possession—Judgments—Exemptions.

Where under the vendor's contract for the sale of lands he may not foreclose for a long period of time, but has payments becoming due, from time to time, in the meanwhile, upon default of these intermediate payments, he may obtain judgment for them, and enter into the present possession of the lands when reasonably required for his protection and the proper enforcement of his claim, and conserve the same by appropriate remedies, unless the purchaser presently pays the amount of his obligations already matured and enters into a sufficient and satisfactory bond to pay his future obligations as they fall due under the terms of the contract.

CIVIL ACTION tried before *Devin, J.*, and a jury, at May Term, 1916, of ORANGE.

This action was to enforce collection of the purchase price of a tract of land which plaintiff, on 18 January, 1912, had contracted to sell and convey to defendant at the price of $3,000, payment to be made of accrued interest on the entire debt and $300 on the principal annually

on the 15th day of December for ten years till paid. The action was instituted to September Term, 1915, and there were allegations that defendant, at the time of action commenced, had made only one payment of $150, and that defendant was utterly insolvent and sale was necessary to enforce payment of plaintiff's debt or any part thereof.

Demand was also made for possession of the property, etc.

Defendant answered, admitting the insolvency, etc., and that only $150 had been paid, and in paragraph 5 of the answer alleged that at the time of the contract entered into between the parties there was an additional stipulation that plaintiff could remain in possession for ten years and six months, provided he cleared up a reasonable number of acres of said land and built tenant houses thereon; and, further, that if defendant made default in the annual payment, he was to have all the time he needed to make the same, provided it did not exceed the period of ten years and six months, etc., and that these stipulations were omitted from the contract by the mutual mistake of the parties.

On issues submitted, the jury rendered verdict as follows:

1. Were the matters set forth in paragraph 5 of the answer omitted by mutual mistake from the bond for title, as alleged? Answer: "No."

2. Did plaintiff agree to extend the time for payment on the land if improvements were put thereon by defendant? Answer: "No."

3. What was the value of the improvements put upon the land by defendant? Answer: "$500."

4. Did the defendant fail to make the payments called for in the contract and bond, as alleged in the complaint? Answer: "Yes."

5. In what amount is defendant indebted to plaintiff on said contract and bond? Answer: "$3,000, with interest, subject to a credit of $150."

There was judgment, foreclosure and sale for the entire debt, and defendant excepted and appealed.

S. M. Gattis, S. M. Gattis, Jr., for plaintiff.
C. D. Turner for defendant.

HOKE, J., after stating the case: The instrument, after setting out the bargain of sale at $3,000, payable annually $300, with accrued interest on the entire debt, contained further stipulations as follows:

"Now, therefore, if the said J. Nick Walker, on receiving the said purchase money, together with the interest thereon accrued, provided it be tendered any time within six months after the last payment falls due, shall well and truly at his own proper cost and charge make and execute to the said Dennis Burrell and his heirs a good, sufficient deed of conveyance with warranty and full covenant to convey and assure unto him, the said Dennis Burrell, and his heirs a good, sure, and

indefeasible estate of inheritance in and to said tract of land, with the privileges and appurtenances thereto belonging, free and discharged of any and all encumbrance whatsoever, then this obligation to be void; otherwise, to remain in full force and effect."

There is nothing in the other parts of the contract or in the pleadings or evidence that matures and hastens the maturity of these payments otherwise than as expressed in the stipulation, as stated, and where this is true our decisions hold that no right of foreclosure for the entire debt or for any part of the same will arise to the vendee except at the termination of the designated period of ten years and six months—not because this is the more desirable method for either one of the parties, but because this is the bargain they have seen fit to make concerning the property. "Provided the purchase money be tendered at any time within six months after the last payment falls due" is the time agreed upon, and the Court can only enforce specifically the contract as made. These cases further hold that the vendor may have judgment for the portion of his debt which has matured at the time of action commenced; he can sue from time to time as other installments become due, to be enforced out of the other property of the vendee, except to the extent protected by the exemptions allowed him by law; and, if reasonably required for his protection and the proper enforcement of his claim, he is entitled to the present possession of the property and to protect and conserve the same by appropriate remedies; but he cannot, meantime, except by further agreement between the parties, sell the principal property or any part of it for the payment of his claim or any portion of it, because, as stated, the parties have made other contract concerning it. These positions will be found approved in *Jones v. Boyd,* 80 N. C., pp. 258-...; *Harshaw v. McKesson,* 66 N. C., 266, and other cases; and, on the facts admitted in the pleadings and established by the verdict, the plaintiff is entitled to judgment against the defendant for the amount due at the time the action was commenced, apparently three payments of $300 each, and accrued interest on the debt, subject to the credit of $150, to be levied on the general property of defendant, subject, however, to the exemptions allowed him by law. And he is entitled, also, to judgment for immediate possession of the property, unless defendant shall presently pay the amount of plaintiff's debt already matured and enter into a sufficient and satisfactory bond to pay the installments of the purchase price as they shall fall due, pursuant to the contract.

This will be certified, that the judgment and verdict on the fifth issue shall be set aside and judgment entered in accordance with this opinion.

Modified.

INTERNATIONAL HARVESTER COMPANY v. ADDIE C. PARHAM, ADMINISTRATRIX.

(Filed 9 November, 1916.)

Contracts, Written—Vendor and Purchaser—Parol Evidence—Trials.

In an action on notes for $118 for a manure spreader, title reserved to vendor until payment made, with provision as to sale for nonpayment, and waiver of presentment, protest, etc., parol evidence was competent to show that as a bonus a knife sharpener was verbally agreed to be sent, but it was incompetent to prove a verbal agreement that if it was not sent the note was invalid. It was proper for the trial judge to deduct $3.50, the admitted price of the knife sharpener, from the purchase price of the manure spreader, and render judgment in plaintiff's favor for the difference.

ALLEN, J. dissenting; WALKER, J., concurring in dissent.

APPEAL by defendant from *Daniels, J.*, at July Term, 1916, of GRANVILLE.

T. Lanier for plaintiff.
Hicks & Stem for defendant.

CLARK, C. J. This is an action begun before a justice of the peace upon two notes, one for $60 and the other for $58, executed by the defendant under seal to the plaintiff and which recite in their face: "This note is given for one Low Spread Manure Spreader. I agree that the title thereto, and to all repairs and extra parts furnished, shall remain in said company, its successors and assigns, until this and all other notes given for the purchase price shall have been paid in money." There are further provisions as to sale for nonpayment, and waiver of presentment, protest, and so forth. The execution of the note was admitted. The defense set up is that there was a contemporaneous collateral oral agreement that a knife grinder was also to be delivered without further charge, which has not been done, and that the defendant refused to take the manure spreader on that account. The uncontradicted evidence was that the knife grinder was worth $3.50, and deducting that from the sum of the two notes the court gave judgment for the difference. In this there was no error.

It was competent for the defendant to show that there was a parol agreement that the plaintiff was to furnish a knife grinder, and that this was not done, and the court permitted the value of the knife grinder ($3.50) to be deducted from the amounts due on the two notes, but the court properly refused to permit the contemporaneous parol agreement to vitiate, alter, vary, or add to the terms of the agreement

that unless the knife grinder was furnished the plaintiff could not enforce the written contract of the defendant to pay for the manure spreader. This principle is so well settled that it requires no citation of authorities. *Evans v. Freeman,* 142 N. C., 64; *Cauley v. Dunn,* 167 N. C., 33.

The contract set out in the notes is full and complete and provides for the purchase of the manure spreader and the amount to be paid therefor, and for a lien by reserving the title until the purchase money is paid. To permit proof of the parol agreement that unless something else was done by the plaintiff the note was defeasible would contradict the written agreement. At this term, in *Copeland v. Howard,* the Court held that parol evidence that the date of the maturity of the note was extended was "properly excluded because in direct contradiction of the terms of the writing," citing authorities.

No error.

ALLEN, J., dissenting: If it was competent for the defendant to show that there was a parol agreement that the plaintiff was to furnish a knife grinder, which is conceded in the opinion of the Court, and if this does not vary the writing, I fail to see why the defendant cannot go further and show that the plaintiff agreed at the same time also to furnish the manure spreader; that one price was agreed on for both, and that the note and the delivery of both articles were to be concurrent acts.

As I see it, the only difference between the two propositions is in degree—the extent of the variance of the writing—and the application of the rule excluding parol evidence when there is a writing does not depend on how much the evidence varies the writing, but does it do so at all.

I think, however, the rule that parol evidence will not be admitted to vary a writing has no application here, for three reasons.

In the first place, the defendant offered evidence that the plaintiff reduced to writing the agreement to deliver the manure spreader and the knife grinder as the consideration for the note, and this appears in the written order.

In the next place, the defendant does not ask to vary or contradict the note, but to show that at the time it was executed there was a contemporaneous agreement to deliver two articles of property as the consideration for it, and that neither was delivered, which is competent under our authorities. *Evans v. Freeman,* 142 N. C., 64.

The note represents one-half of the contract (the obligation of the defendant's intestate), and the defendant ought to be allowed to prove the other half of the contract (the obligation of the plaintiff) by the

written order or by parol evidence; and if an agreement is established that the plaintiff agreed to deliver both articles concurrently, as the consideration for the note, and offered to deliver one and refused to deliver the other, and the defendant refused to receive one article without the other, there is an entire failure of consideration, and the plaintiff cannot recover.

Again, the question of introducing parol evidence is not presented, as there is no exception to the evidence.

What, then, does the evidence of the defendant tend to prove?

This is the question, because the issue was answered against the defendant under a peremptory instruction, and the evidence must therefore be considered in the most favorable light for the defendant.

The agent of the plaintiff delivered the manure spreader to one Critcher on trial, and told him if he bought he would give him the knife grinder, which was also delivered to him.

Critcher refused to buy, and the agent of the plaintiff then undertook to sell to the intestate of the defendant, and the following is all the evidence of this sale to the defendant's intestate:

T. P. Floyd, witness for defendant, testified: "Was a brother-in-law of George Parham; that he was at Parham's house when the notes were made. At the same time the notes were made there was an order written to Mr. Critcher for this manure spreader and knife grinder. Mr. Pearce wrote the note. He sold those to Mr. Parham and gave him an order on Mr. Critcher for them. The delivery to Mr. Parham was to be a manure spreader and knife grinder. Mr. Pearce either wrote the order, or had it written, and gave it to Mr. Parham for these goods. I did not hear any of the conversation between Mr. Parham and Mr. Pearce. I carried the order to Mr. Critcher. Mr. Parham gave the order to me and told me to get what the order called for, or not to bring anything. I left the order with Mr. Critcher. I did not take the manure spreader because he would not deliver the knife grinder."

If this evidence is true, it establishes these facts:

(1) That there was one contract for the purchase of the manure spreader and the knife grinder.

(2) That the delivery to the intestate of the defendant was to be a manure spreader and a knife grinder.

(3) That at the time the note sued on was executed the agent of the plaintiff gave to the intestate of the defendant a written order on Critcher for the manure spreader and the knife grinder.

(4) That the intestate sent Floyd with the order after the manure spreader and the knife grinder, telling him not to bring anything unless he got all.

(5) That Critcher refused to deliver the knife grinder, and the agent did not receive the manure spreader.

It also appears in the record that shortly thereafter the intestate of the defendant wrote the plaintiff demanding the return of his note because Critcher "refused to deliver all to me."

It is also a fair inference from the evidence, I think, that one sum was agreed on as the purchase price of both articles, as the evidence of the defendant shows that both were sold, and the plaintiff makes no claim except to recover the notes.

If these inferences can reasonably be drawn from the evidence, it was error to take the case from the jury.

The case of *Millhiser v. Erdman,* 98 N. C., 292, is, I think, in point. Millhiser offered to sell Erdman tobacco, "Terms: three, four, and five months notes." The offer was accepted and the tobacco shipped, but Erdman failed to send the notes, and it was held that the title to the tobacco did not pass, as the execution of the notes and the delivery of the tobacco were to be concurrent acts. The Court says: "Unquestionably, if the plaintiff had not shipped the tobacco in controversy to the defendant Erdman the latter would have had no title to nor, indeed, any right in respect to it, unless he had first tendered to the plaintiff the promissory notes which he had agreed to give it. This is so because a material and essential part of the contract was that the delivery of the notes on the part of Erdman to the plaintiff was to be done concurrently, simultaneously, with the delivery of the tobacco to him on the part of the plaintiff. The latter proposed to sell the tobacco to Erdman in consideration of his three promissory notes, running respectively to maturity at three, four, and five months, and the latter, by sending his order for it, obviously accepted the terms. The parties agreed to do material concurrent acts necessary to effectuate the sale, each dependent on the other, and neither effectual without the other. . . . No sale of the tobacco was consummated or made effectual under the contract. There was only an agreement to sell, which was not perfected. The plaintiff did not agree or intend to part with the title to his tobacco until he received the notes, and Erdman had no right to expect to get title to it until he sent the notes."

The evidence of the defendant also tends to prove one entire contract, which is not severable, and of such contracts the Court said in *Wooten v. Walters,* 110 N. C., 254: "A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. Hence, where there is a

contract to pay a gross sum of money for a certain definite consideration, it is entire, and not severable or apportionable in law or equity. Thus, where a particular thing is sold for a definite price the contract is an entirety and the purchaser will be liable for the entire sum agreed to be paid. And so, also, when two or more things are sold together for a gross sum the contract is not severable. The seller is bound to deliver the whole of the things sold, and the buyer to pay the whole price, in the absence of fraud. Hence, it has been held that where a cow and 400 pounds of hay were sold for $17 the contract was entire."

If the opinion of the Court stands, the plaintiff will recover the amount of two notes given for two articles sold at the same time under an agreement to deliver both, when the defendant's intestate has received neither article, and when his refusal to receive one was because of the breach by the plaintiff of its agreement to deliver both.

WALKER, J., concurs in this opinion.

W. M. KNIGHT v. VINCENNES BRIDGE COMPANY.

(Filed 9 November, 1916.)

1. Release—Contracts—Consideration—Fraud.

A receipt given by one who claims damages for a personal injury alleged to have been caused by the negligence of another, for a valuable consideration, and which in legal effect is a release not under seal, is a complete defense in his action to recover such damages, when it has not been procured by fraud and undue influence.

2. Same—Evidence—Burden of Proof.

The parties to a release from liability arising from a personal injury alleged negligently to have been inflicted may agree upon the consideration to be paid, and when the execution of the paper for the consideration is shown by the defendant in the action to recover damages, the burden is then on the plaintiff, where fraud is alleged, to prove the fraud or inadequacy of consideration, etc., when they are relied upon. The distinction between a consideration which will support a contract affecting only the parties and such as will affect creditors, etc., pointed out by ALLEN, J.

3. Release — Contracts — Consideration — Evidence — Inadequacy — Fraud — Trials—Questions for Jury.

The matter of inadequacy of consideration paid for a release from liability is one to be considered and passed upon by the jury, with other evidence of fraud relied on to set it aside; and while gross inadequacy may alone be sufficient upon this issue, it may not, as a matter of law, be declared to avoid the instrument.

4. Instructions—Expression of Opinion—Statutes.

In an action to recover damages for a personal injury, where a release is set up in defense, which the plaintiff attacks for fraud, involving the question of gross inadequacy of consideration, and there is evidence tending to show that defendant paid the plaintiff $7, and also $10 to his doctors, a charge which confines the inquiry before the jury to a consideration of $7 is an expression of opinion on the evidence forbidden by the statute.

CIVIL ACTION tried before *Webb, J.*, at March Term, 1916, of FORSYTH.

This is an action to recover damages, caused, as the plaintiff alleges, by the negligence of the defendant.

The defendant denies negligence, and pleads a release as a defense.

The evidence of the plaintiff tended to prove that he was in the employment of the defendant company as a laborer at a wage of $2.50 per day, and when injured was engaged in helping in the construction of a steel bridge over the Yadkin River in Forsyth County. The bridge consisted of eight spans. On the day the plaintiff began working for the defendant, the defendant was building a scaffold on nine poles, 25 or 30 feet long, resting on soft ground or made earth, a good distance from the river, at the fifth or sixth span beginning on the Forsyth side of the river. There were stringers on top of the poles and steel on top of that. The scaffold rested on four poles and on the scaffold were floor beams weighing 1,100 pounds each, about sixteen eye-beams weighing 300 pounds each, a lot of flooring and planks 6 inches wide and 3 inches thick, some heavy green timber, a concrete mixer made of steel, cast iron, and tin, weighing about 3,000 pounds. They were also hauling rock on the scaffold with a little dump cart, and four or five men were on the bridge when it fell. The plaintiff, together with a colaborer, one Charley Sheets, who was killed in the fall, were moving the concrete mixer at the time the scaffold gave way. The false work sank into the earth, the poles went down far enough to break the span, throwing the plaintiff and others down on the frozen ground near the creek about 100 feet or more from the edge of the river. The plaintiff's shoulder, as he fell, struck against some timber as he fell between two pine poles, one of the 300-pound beams fell upon him, striking his foot, and driving it into the frozen ground. Plaintiff remained in this condition until help arrived, and the timbers and beam were pulled off of him. Plaintiff's side was cut and a hole was cut in his head. Plaintiff was 35 years old and his regular occupation was that of a steel worker, for which he had been receiving from 56½ to 62½ cents per hour, but was working for the defendant company at the rate of $2.50 per day until he could secure work as a steel worker. As a result of the injuries sustained by the fall of the scaffolding the

plaintiff lost time, has been laid off from work a number of times, suffers from his injured leg, suffers pains in his head, and gets dizzy when he goes up high on buildings when engaged in steel work, and shortly after the injury he tried to pass a railroad examination, but could not pass the examination on account of his eyes, although he had passed such an examination prior to the injury.

The defendant introduced evidence in rebuttal, and among other things a receipt acknowledging the payment of $7 in full of the plaintiff's claim for damages.

It also introduced evidence tending to prove that it was not negligent, and that the injuries of the plaintiff were less serious than he contended; that he was not under the influence of whiskey when he executed the receipt or release; that he had then quit the employment of the defendant; that there was no fraud, and that it paid the doctor's bill of $10 for the plaintiff in addition to the $7 acknowledged to have been paid.

The plaintiff, in reply, offered evidence tending to prove that he was drinking at the time the receipt was signed; that he had gone to the agents of the defendant for a settlement for his labor; that the money paid him was for labor; and that he thought he was signing a pay-roll. He also relied on inadequacy of consideration as evidence of fraud.

His Honor charged the jury, among other things, as follows: "In passing upon that second issue, the court charges you that upon the question of whether or not the consideration set forth in the paper-writing was an adequate consideration, the burden of that is on the defendant company to satisfy you by the greater weight of the evidence that the consideration was an adequate consideration." Defendant excepted.

"If you find from this testimony, by the greater weight, that the plaintiff was injured, and if you find by the greater weight of the testimony that he was injured in the way and manner he says he was injured, and find that he suffered greatly in the way and manner which he says he suffered; if you find that to be the fact, then you will ask yourselves the question, 'Was $7 in payment of that injury an adequate consideration, or was it inadequate consideration, or was it so gross that it would shock the sense of the ordinary man, shock his conscience, and make him say that really the defendant company paid nothing?' If it did so, the law says that's a fraud, and you may consider these matters in passing upon that question—that issue as to fraud." Defendant excepted.

The jury returned the following verdict:

1. Did the plaintiff execute the paper-writing as alleged by the defendant in its answer? Answer: "Yes."

2. If said paper-writing was executed and delivered as alleged in the answer, was the same procured by fraud or undue influence of the defendant, as alleged by the plaintiff? Answer: "Yes."

3. Was there a valuable consideration paid by the defendant to the plaintiff in consideration of the execution of the said paper-writing? Answer: "No."

4. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

5. What damage has plaintiff sustained? Answer: "$200."

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant appealed.

Wallace & Walls and Holton & Holton for plaintiff.
Manly, Hendren & Womble for defendant.

ALLEN, J. The receipt introduced by the defendant, which is in legal effect a release not under seal, is a complete defense and bar to the cause of action of the plaintiff, if supported by a valuable consideration, and not procured by fraud and undue influence.

The burden was, in the first instance, on the defendant to prove a valuable consideration (*King v. R. R.*, 157 N. C., 52), and this it did when it proved the execution of the receipt by the plaintiff, acknowledging the payment to him of $7 in full of his claim for damages, because, in the absence of fraud, undue influence, or oppression, parties capable of contracting have the same right to agree upon the consideration as upon any other term of the contract, and "the value of all things contracted for is measured by the appetites of the contractors." 6 R. C. L., 678.

When the defendant proved the execution of the receipt, with the acknowledgment of the payment of $7, it established its defense, nothing else appearing, and the burden was then on the plaintiff to attack the receipt or release by proving fraud; and if he relied on inadequacy of consideration, gross or otherwise, as a circumstance on the issue of fraud, he assumed the burden of proving this circumstance.

It follows that it was error to charge the jury that the burden was on the defendant to prove that the consideration for the release was adequate, which he did twice.

Much of the confusion in regard to consideration arises from failure to note the distinction between the consideration which will support a contract, which only affects the parties, and a purchaser for value as against creditors and purchasers.

The difference between the two is clearly stated by *Ruffin, C. J.*, in *Fullenwider v. Roberts*, 20 N. C., 278. He says: "The opinion of his

Honor as to the effect of inadequacy of price was, probably, drawn from the doctrine that an agreement cannot be set aside as between the parties merely for that cause. But the reason of that is that if one will, without imposition, distress, or undue advantage, make a bad bargain with his eyes open, *he* must stand to it. His agreement is sufficient, because his interests alone are affected by it. The cases of his creditors, however, or persons claiming under a previous conveyance from him, admit a very different consideration. They fall within *Lord Hardwick's* fourth class of cases in *Chesterfield v. Jansen*—that of a fraud and imposition on third persons, not parties to the agreement. To the complaint of such third person it cannot be replied that he cannot call the consideration petty and inadequate, because he had assented to it. As against creditors and prior donees, the price must be sufficient in itself to sustain the deed, without the aid of their acceptance; for no such acceptance exists. Then it is to be inquired, What price will put the statute in operation, or what inadequacy will prevent its operation? We think that a *fair* and *reasonable* price, according to the common mode of dealing between buyers and sellers, was meant by the Legislature; and that at all events no case is within the statute in which the purchaser cannot with a good conscience claim to hold the estate upon the ground and for the sake of the price paid, and not merely upon the score of the vendor's agreement."

It was also error to charge the jury that if the consideration was "so gross that it would shock the sense of the ordinary man, shock his conscience, and make him say really the defendant paid nothing," the law would declare it a fraud.

The controlling principle established by our authorities is that inadequacy of consideration is a circumstance to be considered on the issue of fraud, and that if it is so gross that it would cause one to say that nothing was paid, it would be sufficient to be submitted to the jury without other evidence; but we have not said that a contract could be set aside as matter of law because of gross inadequacy.

In *Perry v. Ins. Co.*, 137 N. C., 407, the following charge was approved: "If the award is so grossly and palpably inadequate, that is, so grossly and palpably small and out of proportion to the amount of actual damage as to shock the moral sense and conscience and to cause reasonable persons to say he got it for nothing, then the jury may consider this as evidence tending to show fraud and corruption or strong bias and partiality on the part of the arbitrators"; and the Court said in *Leonard v. Power Co.*, 155 N. C., 16: "The settled rule, which is applicable not only to awards but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award, but if the inadequacy be so gross and palpable as to shock the moral sense, it is

sufficient evidence to be submitted to the jury on the issue relating to fraud and corruption or partiality and bias"; and in *King v. R. R.*, 157 N. C., 65: "When due weight is given to these matters, and there is evidence that the consideration is inadequate, it is a circumstance which, in connection with other circumstances, may be submitted to the jury, and if grossly inadequate it alone is sufficient to carry the question of fraud or undue influence to the jury"; and these cases were approved in *Causey v. R. R.*, 166 N. C., 5.

The rule amounts to this: The owner of tangible property or of a claim for damages may give it away or may sell it for less than its value, and the contract is valid in the absence of fraud, undue influence, or oppression; but if the contract is attacked as fraudulent, the inadequacy of consideration is evidence of fraud, and if gross, is alone sufficient to carry the case to the jury on the issue of fraud.

This part of the charge is also objectionable as an expression of opinion that the only consideration paid by the defendant was $7 when the defendant offered evidence tending to prove that it paid the doctor's bill of the plaintiff, amounting to $10, in addition to the $7.

New trial.

UNION GUANO COMPANY v. G. W. HEARNE, J. T. GIBSON AND WIFE, LAURA.

(Filed 9 November, 1916.)

Judgments—Excusable Neglect—Meritorious Defense.

Where two parties have signed a contract, jointly, for the purchase of fertilizer, upon the understanding and agreement that each of them would separately be charged with the part he received, but that the joint contract was to enable the shipment to be made in a car-load lot, the purchasers gave their separate notes, and upon demand of seller's attorney for payment and threat of suit, each for his own part said he would not resist judgment, and separate suits are brought, but thereafter consolidated with allegations affecting the personal integrity of the defendants, without the knowledge of either of them, and judgment is accordingly taken, the failure of the defendants to appear and answer is held to be excusable neglect, and a meritorious defense as to each having been shown, the judgment should be set aside.

THIS is a motion to set aside a judgment, heard by *Starbuck, J.*, in the County Court of Forsyth County. From an order setting aside the judgment, plaintiff appealed to the Superior Court. At September Term, 1916, of said court, *Long, J.*, reversed the order, and defendants appealed to Supreme Court.

The following are the facts found by *Judge Starbuck:*

1. On 18 May, 1915, the plaintiff instituted an action against the defendant G. W. Hearne, returnable to the June Term, served 22 May, 1915, he being the sole defendant named in said summons.

2. On 22 May, 1915, said plaintiff instituted an action against the defendants T. J. Gibson and his wife, Mrs. Laura M. Gibson, and the summons in said action, returnable to the June term, was personally served 24 May, 1915, T. J. Gibson and Laura M. Gibson being the only defendants named in said summons.

3. On 31 May, 1915, plaintiff filed the complaint in the record against all the defendants, said complaint being filed in the action brought against T. J. Gibson and Laura M. Gibson.

4. At the return term, beginning 14 June, 1915, the said action against G. W. Hearne was, on motion of the plaintiff, ordered consolidated with said action against T. J. Gibson and Mrs. Laura M. Gibson.

5. No answer having been filed, judgment by default and inquiry was rendered at said June term, as appears of record.

6. At the next term, being in the month of September, an issue was submitted to the jury and answered, and final judgment was rendered, all appearing of record.

7. No appearance was ever entered by said defendants or by counsel for them, and the defendants had no knowledge or information as to the consolidation of the actions or as to the nature of the complaint or the judgments rendered, until the transcript of the final judgment was sent to Richmond County to be docketed, 30 November, 1915.

8. Executions having been issued, the exemptions of said defendants were laid off 20 January, 1916.

9. On 20 January, 1916, defendants caused notice of this motion to be served on the plaintiff's counsel.

10. Four terms of the Forsyth County Court intervened between the September term, when final judgment was rendered, and the date of the service of this motion, the last term beginning 4 December.

11. Part of the fertilizer mentioned in the contract, which is made part of the complaint, was ordered by defendant Hearne, and the residue by defendant T. J. Gibson. The contract was executed by all the defendants, pursuant to representations made by plaintiff's selling agent to Hearne to the effect that he would be charged only with the fertilizers he ordered and would not be held responsible for that ordered by Gibson, but that the signing of one contract would be desirable, so that solid cars could be shipped, thereby getting lower freight rates, and pursuant to similar representations made by said agent to T. J. Gibson as to the effect of the signing of the contract by himself and wife.

11½. The secretary of the plaintiff company approved said contract, relying upon the financial responsibility of said Hearne, said Gibson being reputed insolvent, and a suit was then pending against him and his wife to set aside a conveyance in fraud of creditors.

12. The defendant Hearne executed and sent to the plaintiff his separate notes, which, in the aggregate, were equal to that part of the fertilizer shipments covered by the contract, which it was understood between him and the agent that he was having consigned to himself, and the defendant T. J. Gibson executed and sent to the plaintiff his separate notes, indorsed by his said wife, which in the aggregate were equal to the price of that part of the shipments which it was understood was to be consigned to T. J. Gibson.

13. Subsequently, and before the institution of said actions, the defendant Hearne paid and took up one of his said notes, leaving the balance due on his remaining notes of $324.48, with interest, and Gibson paid and took up one of his said notes, leaving the balance due on his remaining notes of $440.25.

14. Prior to the institution of the said actions, Mr. E. P. Yates, an attorney of the plaintiff, demanded of the defendant Hearne payment of his unpaid notes. Hearne stated he could not pay the notes at that time. Said attorney thereupon stated suit would be instituted against him to recover judgment, and was told by Hearne that he, Hearne, could not resist judgment, and that he would pay the judgment as soon as he could.

15. The said attorney made similar demand on the defendant T. J. Gibson, and a like conversation took place between them.

16. The defendants did not appear in said actions or resist judgment, for the reason that the defendant Hearne believed that judgment would be rendered against him only for the amount of the unpaid notes executed by him, and the defendant Gibson and his wife believed that judgment would be recovered against them only for the amount of the unpaid notes executed by said defendant T. J. Gibson and indorsed by his wife.

17. The defendant Hearne has a *prima facie* meritorious defense to the action in so far as it charges him with fraudulent misapplication or embezzlement, and seeks to hold him answerable for that part of the fertilizer consigned to Gibson, and the defendants T. J. Gibson and wife, Laura M. Gibson, have a *prima facie* meritorious defense to the action in so far as it charges them with fraudulent misapplication or embezzlement, and seeks to hold them answerable for that part of the fertilizer consigned to the defendant Hearne.

Louis M. Swink, Gilmer Korner for plaintiff.
A. R. McPhail for defendants.

BROWN, J. It will be seen from the statement of facts that plaintiff instituted two separate and distinct actions, one against Hearne and the other against Gibson and wife, evidently based upon two distinct and unrelated causes of action, viz., the notes referred to in findings 12 and 13. From the conversation referred to in findings 14 and 15 the defendants were undoubtedly led to believe that the purpose of the two suits was to collect the individual notes of defendants, upon which they were not jointly liable, and that separate and distinct judgments would be taken. That was a reasonable inference to be drawn from the statements of the plaintiff's attorney, and the court finds that defendants did not appear for that reason.

Instead of taking distinct judgments upon the notes against each defendant, the two actions were consolidated without their knowledge and a complaint filed against the defendants jointly, setting up a very different cause of action, and one affecting their personal integrity, upon which judgment was taken by default and the inquiry duly made at a subsequent term.

From the findings of fact it is manifest that the defendants were naturally misled by plaintiff's attorney (whether intentionally or not is immaterial), and thereby prevented from employing counsel and entering appearance. If they were reasonably misled by such conduct, in consequence of which they failed to appear, then it is excusable neglect. *Morris v. Ins. Co.*, 131 N. C., at p. 215.

The judge of the county court has found that defendants were excusable in their neglect, and that they have a meritorious defense, in which judgment we concur.

The judge of the Superior Court erred in reversing order of the county court.

Error.

J. B. MILLER AND GEORGE MARYLAND v. J. S. MATEER AND A. L. PAYNE.

(Filed 9 November, 1916.)

1. Deeds and Conveyances—Fraud—Evidence—Trials.

Evidence in this case is held sufficient to set aside a deed for fraud in its procurement which tends to show that the defendant induced the plaintiff to exchange lots in the city wherein he resided and conducted a small business for timbered lands situated 13 miles therefrom in the country, with which and the value of such lands he was ignorant, by the defendant's misrepresentations as to its value, upon which he relied,

without looking at the land; that defendant was conversant with the values of timbered lands, and with that of the lands in question, and thereby procured the plaintiff's land at a grossly inadequate price.

2. Same—Misrepresentations.

Where there is evidence of false representations sufficient to set aside a deed for fraud in its procurement, among other things, that the defendant paid $19,000 for the land, it is competent to introduce in evidence the deed to the defendant, reciting a consideration of $3,000, and also the value of the adjoining lands, to contradict the defendant's representation thereof made to plaintiff, who was unfamiliar therewith, upon the question of fraud in inducing plaintiff to make the trade.

3. Same—Recited Consideration.

The consideration recited in a conveyance of land is not contractual or an estoppel between the parties, and may be shown in evidence when relevant to the inquiry as to whether the grantee in the deed made fraudulent representations thereof in inducing another to purchase the lands.

4. Deeds and Conveyances—Fraud—Misrepresentations—Caveat Emptor.

One who knowingly makes false and material representations in procuring a deed to lands, and relied upon by the other party, and which induced him to make the transaction, cannot escape responsibility upon the ground that the other party was negligent in relying upon them, if in making the representations he resorted to conduct which was reasonably calculated to induce the other party to forego making the inquiry.

5. Equity—Deeds and Conveyances—Fraud—Admissions—Credits—Procedure.

In an action by A. and B. to set aside a conveyance by A. to defendant for fraud, it appears that the consideration for the deed was an exchange of town lots for country lands, in which the jury found fraud, and by admission A. was the potential owner of B.'s lot, and this lot was a part of the consideration to A. in making the transaction, which, under the verdict of the jury, was set aside for fraud: *Held*, it was not necessary to the adjustment of the equities in the case by the court that fraud be found in the procurement of B.'s deed, which was not attacked on that ground; and the jury having found that B. was not entitled to recover, and the value of B.'s lot and the price plaintiff had paid thereon being admitted, a judgment for this difference in A.'s favor was proper, less certain credits due to defendant; which, upon proper notice in the Superior Court, will be made a charge upon the defendant's land; and there being no findings as to the amount of defendant's credits allowed in the judgment, leave is given him to give notice in the Superior Court to have the true account ascertained upon evidence.

CIVIL ACTION tried at May Term, 1916, of FORSYTH, before *Webb, J.*, upon these issues:

1. Did the defendants or either of them, by false and fraudulent representations, procure the plaintiff J. R. Miller to execute to them the deed to the two lots in the city of Winston-Salem, described in the

first paragraph of the complaint, as alleged in the complaint? Answer: "Yes."

2. Are the defendants in the wrongful possession of the lots described in the first paragraph of the complaint? Answer: "Yes."

3. What damage, if any, has the plaintiff J. R. Miller sustained by way of rents and profits? Answer: "$114."

4. At the time of the execution of the deed by George Maryland to the defendant was it understood and agreed by and between them that the defendants would pay to him the further sum of $1,828.50? Answer: "No."

5. What amount, if anything, are the defendants indebted to the plaintiff George Maryland? Answer: "Nothing."

From the judgment rendered, the defendants appealed.

Holton & Holton, David H. Blair for plaintiffs.

Jones & Clement, W. T. Wilson, Louis M. Swink, Gilmer Korner for defendants.

BROWN, J. Two separate actions were instituted against these defendants, one by plaintiff Miller and one by plaintiff Maryland. It was admitted that both actions arose out of the same transaction, and by consent they were consolidated and tried together.

The defendants tendered certain issues and excepted to the refusal of the court to submit them to the jury. We think the material facts controverted in the pleadings are clearly presented in the issues submitted, and that the defendants had opportunity to present any material and competent evidence. *Redmond v. Mullenax,* 113 N. C., 505.

It is not alleged in Miller's complaint or in Maryland's that the execution of the deed to the lot on Old Town road by the latter to the defendants for an expressed consideration of $2,500 was obtained by fraud. Maryland sues to recover the alleged balance of the purchase price claimed by him, and that issue was submitted and found against Maryland.

As he obtained no judgment, and did not appeal, he is eliminated from the case. At the conclusion of the evidence defendants moved to nonsuit. The motion was properly overruled. The action by plaintiff Miller is brought to set aside a deed conveying two lots in Winston-Salem on Sixth Street and described in his complaint, alleging that the execution of the deed was obtained by the false and fraudulent representations of the defendants.

The evidence, taken in its most favorable light for plaintiff, tends to prove that he owned the said lots and was approached by defendant Mateer (the partner of defendant Payne) to exchange the lots for

timber land in Stokes County. Mateer told plaintiff that the land cost them $43 per acre, a total of $19,350, and he had been offered $50 per acre for it; that the land had over two million feet of merchantable pine timber on the 450 acres; that they had been offered $9,000 for the timber on the stump, but refused the offer, because it was not enough; that if he bought it, Mateer would put in a sawmill and cut the lumber, and Mateer assured Miller "the lumber there is worth more than the value of the land I priced it to you at," and that the adjoining lands were selling at $50 per acre. Mateer had been in the sawmill business all his life; Miller lived in Winston-Salem, about 30 miles from this land, was a barber, and ran a small livery business and worked in a tobacco factory, and knew nothing of timber or timber lands. He made practically no examination of the tract, but relied on the representations of Mateer, who stated that his partner, Payne, was worth $75,000 and that he was worth half that amount.

The evidence tends further to prove that defendants paid only $3,000 for the Stokes land; that the representation that adjoining land was worth $50 per acre was false; that there was not over 500,000 feet of timber in the land, instead of 2,000,000. According to the evidence of plaintiff, the net result of these transactions is that the defendants acquired the Sixth Street property of Miller, worth from $8,000 to $12,000, with encumbrances of $1,510.44, and George Maryland's property on Old Town Street, for which they agreed to pay $2,600 and which Mateer now says he values at $1,600 to $1,800, for $550 cash and a debt of $221.50 due the Building and Loan Association; and in addition to all of this, they have the notes of Miller for $6,934.18, secured by mortgage on the Stokes County land.

It is useless to discuss the evidence further than to say that, taken in its most favorable light for plaintiff, as must be done upon a motion to nonsuit, it abundantly justified the court in overruling the motion.

The jury seems to have given full faith and credit to plaintiff's evidence, which, if believed to be true, establishes a clear case of fraud upon the part of the defendant Mateer, whereby he obtained the execution of the deed from plaintiff Miller to himself and his partner, Payne.

We have considered the ten assignments of error directed to the evidence, and find them to be without merit. It was competent to introduce the deed of December, 1913, to defendants for the Stokes land, showing that the consideration was $3,000. The recital of the consideration for the purchase of land contained in a deed is not contractual or an estoppel as between the parties, but it is competent evidence as against all parties to the deed, for it is presumed that their deed recites the true consideration. The recital in this deed contradicts the defendant Mateer as to what price defendants paid for the land.

It was competent to admit evidence tending to prove the value of the adjoining lands for the purpose of contradicting Mateer, who, plaintiff testified, represented them to be worth $50 per acre. Such evidence tended to prove that Mateer made a false and fraudulent representation in respect to their value which was material in inducing plaintiffs to make the trade.

The following prayer for instruction was refused: "The doctrine of *caveat emptor* applies in the sale of real estate as well as in the sale of personalty; and if you find the representations were made as alleged in the complaint, but that the means of knowledge of the true facts were at hand, and equally available to both parties, and the subject-matter open to the inspection and subject to investigation of both parties alike, and there was no warranty of the facts as represented, the plaintiffs must show that they availed themselves of the information existing at the time of the trade before he will be heard to say that he has been deceived by the misrepresentations of the defendants."

There are cases in which the doctrine of *caveat emptor* has been applied in the sale of land, but we find no precedent for applying it in a case like this.

The plaintiff lived in Winston-Salem and is a colored barber and liveryman. He had no experience in the purchase of timber lands, and the defendants were experts in that business. The lands were situated at a considerable distance, in another county. The plaintiff had no available means of ascertaining the falsity of the representations, either as to purchase price, quantity of timber, or value of the adjoining lands. The plaintiff evidently relied upon the representations of defendants and listened with credulity to the glowing eloquence of Mateer. It is true, plaintiff was an easy victim, but he belongs to a class that unfortunately are sometimes the ready prey of sharpers of the superior race. Let it be said to the credit of the jurors of that superior race that they seldom if ever fail to right such wrongs when proven.

Upon this point the case of *Stewart v. Realty Co.* is very apposite; 159 N. C., 230. In that case it is held: "While in proper instances the doctrine of *caveat emptor* applies to transactions in land, relief will be afforded when it is shown by the buyer of real estate in a town where he was unacquainted with such values that he reasonably relied upon a false representation of an expert therein, in a sale made by him, that the owner had recently bought the property at $3,500, when in point of fact he had only paid $2,750 for it, and it is fairly to be inferred that the false representation was made with the intent to deceive the purchaser and induce him to believe he was making a good trade."

It is well settled that a person cannot escape responsibility for false representations on the ground that the other party was negligent in relying on them, if, in making the representations, he resorted to conduct which was reasonably calculated to induce the other party to forego making inquiry. 14 A. and E. Enc., 123; *May v. Loomis,* 140 N. C., 351; *Walsh v. Hall,* 66 N. C., 233; *Hill v. Brower,* 76 N. C., 124.

There are several assignments of error to the judgment as rendered by the Superior Court. The defendants except because the court "adjudged that the plaintiff recover of the defendants the sum of $1,828.50, balance due on the purchase money for said plaintiff's interest in the George Maryland lot, with interest thereon from 14 May, 1914; subject, however, to a credit of $270.44 as of this date, for taxes and interest advanced."

It is true that there has been no specific finding by the jury that the Maryland deed was obtained by the fraud of the defendants, but the plaintiff does not seek to recover that lot on the Old Town road, and there is no necessity for such finding. There is evidence tending to prove that the lot really belonged to Miller, subject to Maryland's interest of $550 and the building and loan mortgage of $221.50; that the lot was taken by defendants as part payment for the Stokes land at a valuation of $2,600; that, deducting those amounts, plaintiff's interest amounted to $1,828.50.

The jury found the issue against Maryland, and that he is not entitled to the $1,828.50. The testimony of defendants tends to prove that the lot is worth $1,600 to $1,800, while plaintiff values it higher. The defendant objects to the judgment because no finding has been made establishing the fact that the Old Town or Maryland lot was taken by defendants in part payment of the Stokes land at a valuation of $2,600. As this is admitted by the evidence of the defendants themselves, in adjusting the equities of the case the judge had a right to assume it to be a fact. Mateer testified to it, and so did Payne. The latter gives all the figures specifically, as follows: "I brought the money, $550, down to pay Maryland, and left it with Mr. Johnson. The final settlement was made in Johnson's office, final closing up of the trade and final settlement and everything paid and final balance sheet made up by Mr. Johnson of the whole transaction. We took their Sixth Street property at $13,000 and the Old Town road property at $2,600; that made a total of $15,600. We took two deeds of trust, aggregating $6,934.18, which made a total of $22,534.18. The Stokes County land was $20,250, and cash paid Maryland $550. The $550 went to Maryland in full of his interest in the transfer—transfer of his Old Town road property to us. We paid off judgment for $96.44

against J. R. Miller and assumed $221.50 on the Maryland property, and deed of trust on Sixth Street property of $1,414, and some record expense, $2.24; that totals $22,534.18 and balances the transaction. This statement I have given out, according to my understanding with Miller, was the final settlement of this whole transaction, and figures I have given were final, complete, and satisfactory settlement of the whole transaction as affecting George Maryland's property and J. R. Miller's—both of them."

The plaintiff offered in open court to pay to defendants the money they have paid out on the Old Town lot and take it back, but defendants refused. Without the finding of an issue of fraud in obtaining that deed, the court cannot compel defendants to make the conveyance, but it can charge them with the $1,828.50 that went to pay for the Stokes land. It would be against good conscience, in view of the admissions of defendants in their evidence, to permit them to retain the property and pay only $771.50 for it. The court very properly rendered judgment against them for the difference between that sum and the agreed price, $2,600, less a certain credit. The court should have charged the sum upon the Stokes land. That can be done now by motion in the Superior Court, upon notice.

The defendants further assign error that "the court, arbitrarily and without any evidence whatsoever, fixed a credit for interest and taxes at $270.91 upon the said judgment of $1,828.50 in favor of the defendants, and the defendants contended then, and contend now, that the interest, taxes, and other amounts expended by them upon the Sixth Street and Old Town road lots were largely in excess of the sum of $270.91 fixed by the court."

The court does not seem to have made a specific finding of the facts as to this credit claimed by defendants upon the $1,828.50, and we are unable to find in the record any admissions of defendants fixing the credit for taxes and interest paid out on the Sixth Street and Old Town lots at the exact sum of $270.91, the credit allowed in the judgment. If defendants contend there is error in the sum, and that it amounts to more than $270.91, they have leave to give notice and apply to the Superior Court to take evidence as to the credit claimed by them for taxes and interest on said lots, and have the true sum ascertained and the said judgment for $1,828.50 credited therewith.

The judgment of the Superior Court is

Affirmed.

MARY LYONS v. THE GRAND LODGE OF KNIGHTS OF PYTHIAS OF NORTH CAROLINA.

(Filed 9 November, 1916.)

1. Insurance, Life — Contracts — Prima Facie Case — Evidence — Burden of Proof.

In an action upon an endowment policy in a fraternal society, a prima facie right of recovery is established upon proof of the death of the member, presentation of the policy by the beneficiary, and denial of liability for the nonpayment of dues or other like default by the company, the burden of proof being on it to establish such defenses, if relied on.

2. Insurance—Contracts—Interpretation.

Where there is doubt and uncertainty as to the meaning of a contract of insurance, it should be resolved in favor of the insured when the language permits.

3. Insurance, Life—Fraternal Orders—Contracts—Constitution—By-laws.

A stipulation in a policy of endowment in a fraternal order requiring the member to be in good standing at the time of his death, and that "the records of the Grand Lodge shall sustain the same," must be construed in reference to provisions in the charter and by-laws of the order, that the member can only be suspended for failure to pay his dues for six months, of which notice shall be given him; and an order or suspension made in his absence will not have the effect of suspending him from benefits when there is no evidence that he had failed to pay his dues for the stated period or that notice had been given in accordance with the constitution and by-laws. *Wilkie v. National Council*, 151 N. C., 527, cited and distinguished.

CIVIL ACTION tried before *Long, J.*, at September Term, 1916, of FORSYTH.

Civil action tried in the county court of Forsyth County before his Honor, H. R. Starbuck, judge, and a jury, at February Term, 1916, of said court.

The action was to recover on an endowment policy in the sum of $300 issued by defendant order in case of Frank Lyons, a member who died on 6 March, 1915.

Plaintiff, his widow, having made demand and payment being refused, instituted present action, proved the death, demand for payment and refusal on part of defendant. Liability was denied on the ground, chiefly, that the decedent was not a member in good standing at the time of his death, as required by the terms of the policy.

On issue of indebtedness, it was shown that Frank Lyons died on Saturday, 6 March, as stated, and was buried, a representative committee of the Order, appointed for the purpose, taking part in the

funeral ceremonies. It was further shown that decedent had complied with all rules of membership dues to 1 January, 1915.

There was evidence on the part of the defendant tending to show that, after the first of January to the time of his death in March, decedent had not paid his monthly dues, and, further, that on 5 January, 1915, the local lodge had made an order suspending him from membership on that account. The facts showed that Frank Lyons was not present when this order of suspension was entered, and no evidence was offered tending to show that he had received any notice of the purpose to suspend nor of the action of the lodge in reference thereto, nor does it appear that Frank Lyons received any notice of being in arrears.

The policy contained, among other things, the stipulation that it was payable on condition "that the brother knight shall be a member in good standing in his subordinate lodge at the time of his death and that the records of the Grand Lodge and subordinate lodge shall sustain the same." As relevant to this question, the constitution of the subordinate lodge contained provision, Article 10: "In the event of the death of a member, who at the time of his death was in arrears for his fines, dues, and assessments, the funeral benefits shall not be paid: *Provided*, this section shall not prohibit appropriation for the decent interment of such member if his own property or means are insufficient," etc. And Article 10, section 6: "A member who is in arrears for six months dues or their equivalent, and has been notified to pay the same, shall be suspended by the chancellor commander in open lodge, and a record of such suspension shall be entered on the minutes of the lodge, and the keeper of records and seal is hereby required to notify the proper officer."

There was evidence on part of plaintiff tending to show that decedent had attended lodge meetings in January and February and had made payment on his dues in these months.

The court charged the jury, in effect, that if they believed the evidence, plaintiff was entitled to recover. Verdict for plaintiff, and judgment.

Defendant, having duly excepted, appealed to Superior Court of Forsyth County, and his Honor, *Judge Long*, being of opinion that record and case on appeal disclosed no error, affirmed the judgment of the county court, whereupon defendant again excepted and appealed.

Gilbert T. Stephenson for plaintiff.

J. C. Buxton, Raymond Parker, and Watson & Robinson for defendant.

HOKE, J., after stating the case: On proof of the death of the member, presentation of the policy by the beneficiary and denial of any liability by the company, a *prima facie* right of recovery is established, and defendant, claiming to be relieved by reason of nonpayment of dues or other like default, has the burden of proof in reference to such defenses. *Harris v. Junior Order, etc.,* 168 N. C., 357; *Wilkie v. National Council,* 147 N. C., 637; *Doggett v. Golden Cross,* 126 N. C., pp. 477-480.

The decisions also very generally hold that in case of doubt and uncertainty as to the meaning of a contract of insurance it shall be resolved in favor of the insured. *Jones v. Casualty Co.,* 140 N. C., 262; *Kendrick v. Ins. Co.,* 124 N. C., 315; *Bank v. Ins. Co.,* 95 U. S., 265; Vance on Insurance, p. 592.

A proper application of these recognized principles to the facts in evidence is in full support of the charge of the trial judge, "that, on the evidence, if believed by the jury, the plaintiff had the right to recover."

It is insisted for defendant that no recovery should be allowed because, at the time of his death, Frank Lyons, the member, was in arrears for monthly dues, and this was in violation of the stipulation in the policy, "that the brother knight shall be a member in good standing at the time of his death, and that the records of the grand lodge and of the subordinate lodge shall sustain the same." But, in our opinion, this stipulation for "good standing" in reference to the nonpayment of dues, etc., must be interpreted and controlled by the constitution and by-laws of the company, and a reference to these regulations shows that a member can only be suspended when he has failed to pay his dues for six months and has been notified to pay the same, and, on examination of the facts in evidence, there was no testimony offered as to any demand for these dues or of any notice of the action by the local lodge in reference thereto, and it furthermore affirmatively appears that at the time the order of expulsion was made the plaintiff was only in arrears for the space of five days, and, according to its own constitution, the local and subordinate lodge was without power or jurisdiction to make any such order, and plaintiff's right of recovery should in no way be affected by it—a position that is in accord with right reason and is well supported by authority. *Supreme Lodge v. Dalberg,* 138 Ill., 509; *Woman's Catholic Order v. Haley,* 86 Ill. Ct. App., 330; *Mulroy v. Knights of Honor,* 28 Mo. Appeals, p. 463.

The case of *Wilkie v. National Council,* 151 N. C., pp. 527-528, to which we were referred on the argument, is not to our minds in contravention of this view. In that case it was proved that the deceased

member had been in arrears for eight months and, on his right to recover, the policy contained stipulation that recovery was on condition that the member, at the time of his death, should be in good standing in the subordinate lodge and also a member in good standing of the financial benefit department, etc., etc., and the constitution and by-laws of the order in reference to these stipulations was shown to be as follows: "A member of the council who is thirteen weeks or more in arrears for dues forfeits all his rights and privileges except that of being admitted to the council chamber during its sessions." And, further: "Any brother who is thirteen weeks or more in arrears shall not be entitled to any sick benefits, nor shall he, in case of death, be entitled to death benefits."

It will thus be seen that in *Wilkie's case* the default was much more pronounced and the constitution much more exacting, or, rather, it is entirely different from the one before us.

There is no error, and the judgment on the verdict is affirmed.

No error.

PEASLEE-GAULBERT COMPANY, INC. v. R. L. DIXON.

(Filed 9 November, 1916.)

1. Banks and Banking—Bills and Notes—Place of Payment—Deposits—Order to Pay—Payment.

Where the bank of deposit of the maker of a note is the one specified as the place of its payment, and also the one to which the note is sent at maturity for collection, the maker's written order on the note to the bank to pay it from his deposits is sufficient; and where the bank accepts this order and retains the note without entry on its books for twelve days, then its doors are closed and a receiver appointed, the payee of the note is held responsible for the acts of its agency for collection, and a plea of payment is good. In this case the maker's deposits were barely sufficient at the time, but more than sufficient on the day following and then continuously so.

2. Banks and Banking—Bills and Notes—Place of Payment—Order to Pay—Statutes.

A note payable at the bank of the maker's deposit is, of itself, an order on the bank to pay the note at maturity for the account of the maker. Revisal, sec. 2237.

CIVIL ACTION tried before *Cline, J.*, at December Term, 1915, of CASWELL.

This is an action on a note, tried in the Superior Court, on appeal from a justice of the peace, on the following agreed facts, the plea of the defendant being payment:

1. That the plaintiff is a corporation located and doing business in the State of Kentucky.

2. That the defendant is a citizen and resident of the county of Caswell, State of North Carolina.

3. That on 15 September, 1914, the defendant signed and delivered to the plaintiff his promissory note in words and figures as follows:

15 September, 1914.

Sixty days after date I promise to pay to the order of Peaslee-Gaulbert Company, Inc., $100, for value received. Negotiable and payable without offset at the Bank of Caswell, Milton, N. C. We, the makers and indorsers of this note, hereby waive the benefit of our homestead exemptions as to this debt. (Signed) R. L. DIXON.

4. That the plaintiff deposited the note with its bank in Louisville, Ky., for collection, which said bank forwarded same directly to the Bank of Caswell for collection.

5. That said note was, on 16 November, 1914, presented to the defendant by Henry Hines, employee of and collector for the Bank of Caswell. The defendant wrote across the face of the note, "Charge to my account," and thereunder signed his name, "R. L. Dixon," and returned the said note to the said Henry Hines. The said Henry Hines accepted the indorsement of the defendant and took the note to the Bank of Caswell and delivered the same to the cashier, who received the note and looked at the indorsement placed thereon by Mr. Dixon, and said it was all right. The defendant heard nothing further from the bank about the note, nor received any information from the plaintiff or any other source that the Bank of Caswell did not make proper remittance to plaintiff, nor that said bank had not charged the same to defendant's account, until after the bank examiner took charge of said bank.

6. That on said 16 November, 1914, the defendant had to his credit in the Bank of Caswell the sum of $98.98, and on the next day, 17 November, 1914, he deposited the sum of $101, and later at different times made two other deposits thereafter in said bank, and at all times from and after 16 November, up to the time the said Bank of Caswell was taken in charge by the State examiner, to wit, 28 November, 1914, had more than sufficient funds in said bank to pay the said note.

7. That the said Bank of Caswell closed its doors on 28 November, 1914, the bank examiner taking charge thereof on the said 28 November, 1914, and said bank was placed in the hands of a receiver.

8. That S. A. Hubbard, bank examiner, found this note in the Bank of Caswell on 28 November, 1914, and returned it to the plaintiff.

9. That the said note was not charged to the defendant upon the books of the said bank, nor was there any entry on the bank books showing payment to the plaintiff.

10. That the defendant, in filing his claim against the receiver of the Bank of Caswell as a creditor, by reason of his deposits in the bank, deducted from the amount of his said claim against the bank by reason of his deposits the sum of $100, the amount of note sued on herein.

Upon the foregoing facts his Honor charged the jury as follows:

"The issue in this case which we are now trying is, 'Is the defendant indebted to the plaintiff, and if so, in what amount?' I instruct you, under the whole evidence, if you believe it all, as a matter of law following in connection with the evidence it would be your duty to answer this issue, 'No; nothing.'" Plaintiff excepted.

The jury having returned the verdict for the defendant, as set out in the record, his Honor entered judgment accordingly. Plaintiff excepted and appealed.

M. C. Winstead and Carver & Winstead for plaintiff.
Ivie, Trotter & Johnston for defendant.

ALLEN, J. His Honor sustained the plea of payment of the defendant, and the question for decision is whether this ruling is correct on the agreed facts.

The note was payable at the Bank of Caswell, and this was "equivalent to an order to the bank to pay the same for the account of the principal debtor thereon" (the defendant). Rev., sec. 2237.

In addition to this, the Bank of Caswell was the agent of the plaintiff for collection (3 R. C. L., 639; 7 C. J., 597; *Bank v. Floyd,* 142 N. C., 187), and when the note was presented to the defendant for payment he wrote on it a direction to the bank to charge to his account, which the cashier said was all right.

The note remained in the bank for twelve days, with this order indorsed thereon unrevoked, and while the amount to the credit of the defendant when the order was given was slightly less than the note, and the bank had no right without special authority to accept a part payment (7 C. J., 615), the defendant on the next day after the order was given deposited with the bank money amounting to more than the note, and thereafter kept more than that amount to his credit.

These facts, in our opinion, constitute a payment of the note.

The question has been decided in favor of the defendant by the courts of New York, which, like our State, has adopted the uniform

Negotiable Instrument Law, in an opinion supported by reasoning satisfactory to us, from which we quote at some length.

"The plaintiff knew when it sent the note to its agent that if the makers were in funds it would be paid by charging it to their account. Thus the subsequent transaction is to be viewed as though it had occurred directly between the plaintiff and the defendants, the latter being depositors of the former. What would constitute payment between the immediate parties should equally constitute payment though an agent for one intervened. The case in brief is this: A bank, the holder of a note, or the agent of the holder to collect, has funds in its hands upon which the makers are entitled to draw; after the note is due it is directed to charge the note against that credit, and says it will do so. All that is necessary to constitute payment is the intention to make the application, which may be evidenced in a variety of ways, *e. g.,* by bookkeeping entries, by canceling the note and surrendering it to the makers, by the drawing of a check by the makers and its acceptance in payment by the bank. It must be borne in mind that the plaintiff selected an agent to collect, knowing that in the usual course of business payment would be made by a mere transfer of credits. If the makers had actually gone to the bank and passed the necessary currency over its counter to pay the note, with a direction thus to apply it, that would plainly have constituted payment. (*Smith v. Essex County Bank,* 22 Barb. (N. Y.), 627.) If they had sent a check drawn on the bank to pay the note, the acceptance of it would have been *per se* an appropriation of the funds of the drawer, or, to be accurate, of the funds subject to the drawer's order, to the payment of the note. *Oddie v. National City Bank,* 45 N. Y., 735; 6 Am. R., 160; *Commercial Bank v. Union Bank,* 11 N. Y., 203; *Pratt v. Foote,* 9 N. Y., 463. The verbal order, with the statement of the president of the bank that it would be acted upon, was the equivalent in legal effect of a written order and its acceptance. It is to be noted that in the second of the cases just cited the bank to which payment was made was an agent to collect. That mere bookkeeping entries, or even the cancellation and surrender of the paper, is but evidence of and does not constitute payment is established by the cases holding that where payment is made by a draft or check which is not paid, the paper can be reclaimed and an action maintained upon it. See *Burkhalter v. Erie Second Nat. Bank,* 42 N. Y., 538, and cases cited. The converse must be true, that payment may be made without that particular evidence of it. . . . In considering the cases on the question of payment, it is essential to keep in mind the precise relation of the parties. The agency of the Watkins bank is the vital fact in this case. If it in fact

accepted an appropriation of the maker's credit with it in payment of the note, that should constitute payment in view of the fact that the plaintiff in sending the note to it for collection must have expected that payment would be made in exactly that way. That risk at least is taken in appointing a bank, where a note is payable, agent to collect it. It is not important how the bank evidenced its acceptance of the maker's verbal order, or whether it did anything to remit the proceeds to its principal. . . . The act and the evidence of it must not be confused. The act in this case was the acceptance of the maker's verbal order to charge the note to their account. Making the bookkeeping entries would merely have created evidence of that act. When that verbal order was accepted the maker's credit was irrevocably appropriated *pro tanto* to the payment of the note precisely as though a written order in the form of a check had been presented and accepted. . . . Thereafter it was of no concern to the defendants what bookkeeping entries were made by the plaintiff's agent or whether it remitted the proceeds of the note." *Bank v. Smith,* 215 N. Y., 76; 7 C. J., 627; *Shafer v. Olson,* 43 L. R. A. (N. S.), 762.

As was said in 3 R. C. L., 641, referring to the right of a collecting bank to receive a check on itself as a payment, the defendant should not have been required "to go through the idle ceremony of withdrawing the money from the bank and paying it back to the bank."

The defense of the defendant in this action is stronger than in the New York case because here the defendant gave a written order to charge to his account, and while this order was held by the bank, he paid in money more than the amount of the note to the bank.

No error.

LOWER CREEK DRAINAGE COMMISSIONERS v. R. H. KIRBY.

(Filed 9 November, 1916.)

Courts—Justices of the Peace—Appeal—Separate Transcripts—Cases Consolidated—Notice—Statutes.

Where there are two separate and distinct actions brought by the same plaintiff against one defendant, in a justice's court, and judgment by default is rendered in both of them, on notice of appeal aptly given, etc., it is the duty of the magistrate to send up two transcripts, one in each case wherein he rendered judgment (Revisal, sec. 1493); and where he, of his own motion, without notice, consolidates them and sends up the transcript accordingly, notice of appeal given by the defendant of the consolidated cases, without motion in the Superior Court to amend the return or to compel the magistrate to comply with the statute, is not sufficient, and the case should be dismissed in the Superior Court.

APPEAL from justices's court, heard at May Term, 1916, of CALDWELL, before *Lane, J.*

In apt time plaintiffs moved to dismiss the appeal because defendant failed to give and serve proper notice of appeal, and because the purported appeal is not properly docketed, no proper and sufficient transcript of appeal having been certified by the justice of the peace. The court overruled plaintiffs' motion and plaintiffs excepted. There was verdict and judgment for defendant, and plaintiffs appealed.

S. J. Ervin, Squires & Whisnant for plaintiffs.
Self & Bagby for defendant.

BROWN, J. There were two judgments rendered by the justice in favor of plaintiff and against defendant, one for $63.75 and one for $62.22, in two distinct actions. The defendant did not appear in person or by counsel in either case, but in apt time caused a notice of appeal to be served as follows: "Take notice that the defendant in the above entitled case appeals to the Superior Court from the judgment rendered therein by J. A. Bush, justice of the peace, on 10 January, 1916, in favor of the plaintiffs for the sum of $270 and cost of action. Said appeal is taken because the judgment is contrary to law and against the weight of the evidence in the case."

The justice did not send up two transcripts of appeal as required by the statute, one in each case in which he rendered judgment (Revisal, 1493), but without the knowledge or consent of the plaintiff undertook to consolidate the two actions and sent up only one transcript of appeal, certifying that he had rendered judgment for $251.94. The Superior Court denied plaintiffs' motion to dismiss and directed the clerk to docket the case as two cases. No further notice of appeal was given.

The motion of plaintiffs should have been granted. It was the justice's duty to certify up to the Superior Court two perfect transcripts of appeal, one in each case. He had no power after rendering judgment, to consolidate two appeals and certify both in one transcript. It was the justice's duty within ten days after the service of notice of appeal on him to make return in each case to the Superior Court, and to file with the clerk the papers, proceedings, and judgment in each case, with the notice of appeal served on him in each case. Revisal, 1493.

There was no motion made, as far as the record shows, to amend the return or to compel the justice to certify up a proper return in each case. The judge simply directed the clerk to docket the appeal as if two proper transcripts had been made. In this there was error. The motion to dismiss should have been allowed.

Error.

HAYWOOD ALSTON v. O. C. HOLT ET AL.

(Filed 9 November, 1916.)

1. Actions—Forma Pauperis—Orders—Costs—Time Extended—Court's Discretion—Appeal and Error.

Where suit in *forma pauperis* has been commenced, and thereafter, on defendant's motion, the plaintiff has been ordered by the court to secure the costs by mortgage on his realty, signed by himself and wife, within a certain time, and the plaintiff filed the mortgage signed only by himself, and the defendant subsequently renewed his motion, whereupon the court allowed further time to plaintiff, who did not comply, but tendered the fees for registration of his mortgage, and showed by affidavit that his wife refused to sign it: *Held*, the granting of further time to comply with the order was discretionary with the court, not reviewable on appeal, and the dismissal of the case was final.

2. Appeal and Error—Courts—Findings — Presumptions — Actions — Forma Pauperis—Costs—Orders.

It is presumed on appeal, in the absence of findings by the trial judge appearing of record, that he found facts sufficient to support his judgment dismissing a case for failure of the plaintiff to comply with his order to secure the costs of prosecuting it.

CIVIL ACTION to recover damages for personal injuries caused by defendant's negligence, heard by *Cline, J.*, at March Term, 1916, of GUILFORD.

Plaintiff was allowed to sue in *forma pauperis* upon proper application, and afterwards, upon it appearing that he owned real estate valued at from $350 to $600, it was ordered that he give security, make deposit, or execute a mortgage, with his wife, on the property to secure the costs. He deposited with the clerk a mortgage executed by himself alone, and this remained on file for some time. Afterwards, in February, defendant moved that he be required to comply with the order or that the action be dismissed, and he was allowed by the judge until the March Term, 1916, to comply with the order. He then tendered to the clerk $1.50 to pay probate and registration fees, which was sufficient for that purpose. At March Term plaintiff filed an affidavit to the effect that he was unable to make the required deposit or give the bond for costs, and that his wife had refused to sign the mortgage. Therefore, the judge, without finding any facts, except to state that plaintiff had failed to comply with the former order, dismissed the action, and then this appeal was taken.

John A. Barringer for plaintiff.
King & Kimball for defendants.

WALKER, J., after stating the case: It would seem that the question in this case is settled by the decision in *Dale v. Presnell,* 119 N. C.,

489, where it was held that the court may make it a condition precedent to the plaintiff continuing the prosecution of his action as a pauper that he shall either give bond to secure the costs or make a deposit or execute a mortgage on his land, with joinder of his wife, for that purpose, the judge having a discretion in the matter, and the court will not interfere with the exercise of that discretion where there is no gross abuse of it. We cannot tell in the present state of the record whether the judge has found as a fact that plaintiff cannot give the bond or make the deposit to secure the costs. If he had found that, by reason of his poverty, he could do neither, a serious question might by presented, as to whether, if the plaintiff had, in good faith, made effort to secure the joinder of his wife in the execution of the mortgage, he should not be entitled to go on with his suit upon giving a mortgage on his own interest in the land and paying the probate and registration fees, as this is all he could do. Whether, in that event, he would be entitled, as matter of law, to continue the prosecution of the action, or whether it would still be a matter of discretion, we do not decide, as the question, in that form, is not before us.

Defendants allege that this land is worth $600, and if so, it would seem that a mortgage upon plaintiff's interest would be a reasonably sufficient security for the costs. The judge at February Term continued the motion of the defendant to dismiss, so that plaintiff would have reasonable time to comply with the order then made that he file with the clerk a mortgage on the land, executed by himself and wife, with proper probate and privy examination, together with the fees to pay for the registration of the mortgage. The plaintiff already, under the prior order, had been allowed sufficient time to file a bond or make a deposit of money to secure the costs, and this extension of time was a mere favor of the court, which it could grant on the condition annexed, as we have seen, that plaintiff should give the mortgage. Plaintiff should have complied with the terms of this order, and not having done so, we cannot aid him in the matter, as, being a matter within the sound discretion of the court, the judge's action is not reviewable here.

If the facts had been found and stated, it may be that we would see more clearly that plaintiff has been deprived of a legal right, as contended by him; but in the absence of such a finding and statement, we must assume that the judge found such facts as would support the judgment, as we do not presume error, but he who alleges it must show it. *Gardiner v. May, ante,* 192; *McLeod v. Gooch,* 162 N. C., 122.

Whether plaintiff can bring another action upon complying with the law in regard to securing the costs, we are not called upon to decide at this time.

No error.

J. F. MOOSE ET ALS. v. BOARD OF COMMISSIONERS OF ALEXANDER COUNTY ET ALS.

(Filed 9 November, 1916.)

1. Taxation—Constitutional Law—Counties—Special Tax—Poll Tax.

Article V, section 1, of our Constitution, providing an equation between the property and poll tax, and requiring that "the State and county capitation tax shall never exceed $2 on the head," is related to and should be construed with sections 2 and 6 of the same article; and it is *Held*, that the limitation imposed is for a levy for the ordinary expenses of the State and county governments, which, under section 2, is to be applied, so far as it relates to the poll, to the purpose of education and the support of the poor; and that under section 6 taxes may be "levied by the commissioners of the several counties for county purposes in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

2. Same—Statutes—Equation—Bond Issues.

The limitation as to the levy on poll tax prescribed by Article V, sections 1 and 2, of our Constitution does not apply to the levy of a special tax by a county for road purposes, authorized by the Legislature under section 6 thereof, submitted to the vote of the electors of the county and duly approved by them; and where the statute authorizes an issue of bonds for such purpose upon the property and polls, providing that the equation between the property and poll tax be observed, and at the time the taxes of the county have reached the limitation imposed by Article V, sections 1 and 2, bonds issued in accordance with the provisions of the statute are not void on the ground that the statute authorizing them is unconstitutional for that the poll tax in the county would exceed $2, and the equation prescribed would make it impossible to separate the property special tax from the special tax on the poll.

3. Taxation—Counties—Special Tax—Statutes—Legislative Powers—Constitutional Law.

The constitutional power conferred on the Legislature to authorize counties to levy a special tax upon the property and poll for special county purposes is essential to the existence of the State, and in the exercise of this power the Legislature is supreme. The doctrine of *stare decisis* discussed.

4. Taxation—Counties—Special Tax—Polls—Elector—Disqualification.

Where the Legislature, in the exercise of its power (Art. V, sec. 6) confers on a county the authority to levy an additional tax in excess of the poll tax of $2 (secs. 1 and 2), a failure to pay this additional tax on poll does not disqualify the person failing to pay it to vote; for this only applies to the failure to pay the poll tax levied directly under the limitation of Article V, secs. 1 and 2.

5. Taxation—Counties—Roads—Necessaries.

A levy of taxes authorized by statute for road purposes of the county is for a necessary expense.

6. Taxation—Statutes—Bond Issues—Par—Resales.

Where a statute authorizes a county to issue special tax bonds at their face value, to bear 5 per cent interest, and time certificates of deposit for a short period of time bearing only 2 per cent are partly taken in exchange, the difference in the interest rate reduces the purchase price of the bonds to below par, and the transaction is void, requiring a resale in accordance with the terms of the statute.

BROWN, J., concurring; CLARK, C. J., dissenting; WALKER, J., dissenting.

MOTION made before *Harding, J.,* 14 January, 1916, to continue a restraining order to the hearing; from ALEXANDER.

This is an action brought by J. F. Moose and others, residents and taxpayers of Alexander County, against the board of commissioners of said county, to perpetually restrain said board.

1. From issuing and selling $150,000 of road bonds to Sidney Spitzer & Co., pursuant to the terms of a certain contract.

2. To perpetually restrain said board from levying a special tax upon the taxable property and polls in said county, which, when added to the general tax levy for necessary State and county purposes, would exceed 66 2/3 cents on the hundred dollars valuation of property, and $2 on each taxable poll.

3. That said board be perpetually restrained from appropriating any funds raised by general taxation for necessary county purposes to the payment of the principal or interest of said bonds, if issued.

4. That said board be perpetually restrained from performing the contract with Sidney Spitzer & Co., by which the board undertook to pledge the revenues of said county, derived from general taxation, to the payment of the principal and interest of said bonds.

5. That said board be perpetually restrained from contracting with Spitzer & Co. to bind future boards of commissioners of said county to continue to levy special taxes upon the property and the polls in said county, in excess of that authorized by the bond act above referred to, construed in connection with Article V of the Constitution.

The General Assembly of 1915 passed a good roads act for Alexander County (ch. 27, Pub. Local Laws), by the terms of which the commissioners of the county, under the restrictions and limitations contained in said act, were authorized to issue and sell $150,000 of road bonds of the county. These restrictions are as follows:

Section 1 of the act provides: "That none of the bonds authorized by this act shall be disposed of, either by sale, exchange, hypothecation, or otherwise, for a less price than their face value."

Section 17 of the act provides, among other things: "The board of commissioners of the county shall offer for sale, at such time or times,

such number of said bonds as may be determined by the good roads commission . . . and the *proceeds of the sale* of said bonds shall be delivered to the treasurer of the county."

Section 11 of the act creates the good roads commission of the county, declares it shall be composed of the board of commissioners and the board of education of the county, which, when organized, shall take the oath of office, etc. Other sections of the act places the supervision and control of the construction and repair of roads entirely in the hands of this commission.

Section 1 of the act also provides that: "The said board of commissioners may divide the said issue (of bonds) into three series."

Section 4 of the act provides: "In order to pay the interest of said bonds, create a sinking fund for taking up said bonds at maturity . . . the board of commissioners of Alexander County . . . shall annually compute the levy, at the time of levying other county taxes, a sufficient special tax on all polls, all real estate and personal property . . . always observing the constitutional equation between the taxes on the property and the taxes on the poll: *Provided,* there shall not be at any time levied in the county of Alexander for the purposes of road improvement . . . a tax greater than 33 1/3 cents on the hundred dollars valuation of property and $1 on each poll."

The act also provides that said bonds shall not be issued until authorized by a majority vote of the qualified voters of the county at an election to be called and held for that purpose.

At an election called and held for the purpose aforesaid, a majority of the qualified voters of the county voted in favor of the bond issue. Thereafter, the board of commissioners, on 6 April, 1915, advertised for the sale of said bonds in three series of $50,000 per series.

No satisfactory bids having been offered for such bonds, the said board thereafter, without advertisement, on 1 November, 1915, entered into a contract with Sidney Spitzer & Co., by the terms of which they undertook to sell said bonds in seven series, and to accept in payment thereof $5,000 in cash and seventeen certificates of deposit of the American National Bank of Wilmington, N. C., due from three to nineteen months thereafter, and bearing 2 per cent interest.

This contract provided that it "is based upon the legality of the issuing of said bonds and the right to levy a tax under the act upon which they are issued . . . and that the terms of this sale be in accordance with the provisions of said act."

His Honor dissolved the restraining order theretofore issued, and the plaintiffs appealed.

A. C. Payne and Cansler & Cansler for plaintiffs.

L. F. Klutz, W. D. Turner, and Tillett & Guthrie for defendant.

ALLEN, J. The tax on the poll and on property of the value of $300 is now $2 in the county of Alexander for ordinary State and county purposes, and the General Assembly has by statute authorized the county to issue bonds in the sum of $150,000 for the purpose of constructing and maintaining roads, with provision in the statute for the levy of a poll and property tax in excess of $2, to be used in paying the principal and interest of the bonds.

Is this statute constitutional?

The question is presented in the most favorable aspect for sustaining the constitutionality of the statute, as the bonds are to be issued for constructing roads, which is a necessary expense (*Hargrave v. Comrs.*, 168 N. C., 626); the statute has the approval of the General Assembly, and it has been ratified by popular vote; and if under these conditions this statute cannot be upheld, no tax levy by the county exceeding $2 on the poll and property can be valid for any purpose.

The question is all important and vital, involving as it does the setting aside of an act of the General Assembly, and saying to the people that they have not the power under the Constitution to impose a tax upon themselves even for a necessary expense.

It may also have an important effect upon the credit of the State, and may prevent future development in the counties, because according to the report of the Tax Commission for the year 1914, there were then fifty-eight counties in which the poll tax exceeded $2, and ninety-seven in which the property tax exceeded that amount, and the total indebtedness of these counties, not including the indebtedness of special districts in the counties, was $10,196,363.26.

Bonds cannot be issued and sold unless supported by valid tax levies, and if the statute now before us is unconstitutional, not only are the taxes invalid which are now being collected in these counties to pay the principal and interest of the indebtedness, but the people of the counties have no power to impose on themselves additional taxes if their roads and bridges are swept away by floods or their courthouses, jails, and county homes are destroyed by fire.

If, however, these conditions arise from a proper and legitimate construction of the Constitution, we must abide the result. As was well said by *Associate Justice Walker* in the concurring opinion in *Collie v. Comrs.*, 145 N. C., 179, "When the people have clearly ordained what shall be done, we, as judges, have nothing to do but to obey and to execute their will. Whether the particular provisions in question are wise or unwise is not for us to determine."

The section of the Constitution directly involved is the first section of Article V, which reads as follows: "The General Assembly shall

levy a capitation tax on every male inhabitant of the State over 21 and under 50 years of age which shall be equal on each to the tax on property valued at $300 in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed $2 on the head."

Related to this section, and bearing on its construction, are sections 2 and 6 of the same article, which are in the following language:

Section 2. "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than 25 per cent thereof be appropriated to the latter purpose."

Section 6. "The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

Three contentions are made as to the construction of the first section of Article V.

1. That the limitation of $2 on the poll and $2 on property of the value of $300 applies to all taxes for all purposes, and that this amount cannot be exceeded on the poll or on property, although the tax may be levied for a special purpose and with the special approval of the General Assembly.

2. That the limitation on the poll is absolute and can never be exceeded for any purpose, but that the limitation upon property may be exceeded for a special purpose with the special approval of the General Assembly.

3. That the limitation on the poll and on the property applies only to taxes levied for the ordinary expenses of the State and county governments, and that the limitation on the poll and on property may be exceeded for a special purpose with the approval of the General Assembly.

If either of these constructions, except the last, is adopted, the statute is invalid in its entirety, because, after directing a levy on the poll and property tax, it links the two together and makes it impossible to separate them, by providing, "always observing the constitutional equation between the taxes on the property and the taxes on the poll."

In arriving at a correct conclusion, the subject being dealt with in the Constitution (taxation) and the nature and purpose of the Constitution itself may be considered.

"The power to tax is an attribute of sovereignty so vital and so necessary to the existence of a State that it cannot be held to have been for-

bidden as to any particular subject except where the policy obviously commends itself to our sense of justice or is most clearly expressed." *Pullen v. Comrs.*, 66 N. C., 363.

"The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the Government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their Government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse." *McCulloch v. Maryland,* 4th Wheat., 316.

Of course, this principle is subject to the qualification that the power to tax cannot be exercised when prohibited in the Constitution; but it serves the purpose of showing that the power, which belongs to the legislative branch, is essential to the existence of the State, and that in its exercise the Legislature is supreme, except as the Constitution limits its power.

We find this scheme of taxation in a constitution, and while we would not subscribe to the doctrine of Napoleon that "constitutions ought to be short and obscure," a constitution is permanent in its nature, deals with the future, and as its framers cannot foresee and anticipate conditions that may arise in the growth and development of the State, it deals largely in general principles and not in details.

"A constitution, unlike a statute, is intended not merely to meet existing conditions, but to govern the future. It has been said that the term 'constitution' implies an instrument of a permanent nature. Since it is recognized that its framers could not anticipate conditions which might arise thereafter in the progress of the Nation, and could not establish all the law which from time to time might be necessary to conform to the changing conditions of a community, as a rule a constitution does not deal in details, but enunciates the general principles and general directions which are intended to apply to all new facts that may come into being, and which may be brought within these general principles or directions. It has been said that it would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur, and that it would have deprived the Legis-

lature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." 6 R. C. L., 16.

"A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it." *Cohens v. Virginia,* 6 Wheat., 264.

Story, J., speaking of the Constitution of the United States in *Martin v. Hunter,* 1 Wheat., 304, uses language which is applicable to all constitutions. He says: "The constitution unavoidably deals in general language. It did not suit the purpose of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the Legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests should require."

If, therefore, the scheme of taxation, necessary to the existence of the State, is provided for in the Constitution, if the Constitution is permanent in its nature and deals with the future, if its purpose is to deal in general principles and not in details, is it not the natural and reasonable conclusion that the framers of the Constitution were only intending to place limitations on the exercise of the power of taxation as to those expenses of government which they could reasonably foresee and anticipate—the ordinary expenses—and not as to extraordinary expenses for special purposes arising from time to time and far beyond human vision and foresight?

They might form a reasonable estimate of the ordinary expenses of the Government for the future and be willing to fix a maximum of taxation for that purpose, but they would have been rash indeed to have limited the power of their posterity to deal with exigencies and emergencies, which arise in the life of a State, which they could not conceive or imagine.

This, as it seems to us, has been the construction placed on this section of the Constitution—that it applies only to the ordinary expenses

of government and not to those for a special purpose—by the Legislative, Executive, and Judicial Departments, and by the people.

By the Legislative in enacting hundreds of statutes authorizing the levy of taxes for general purposes on polls and property in excess of the limitation; by the Executive in collecting and expending these taxes; by the Judicial in declaring this to be the true meaning of the section; and by the people in voting for the taxes in many instances and paying them.

Let us now turn to the language of the Constitution and to the decided cases and see how far the statement is sustained that the construction of the Constitution has been definitely settled by judicial decision.

In sections 1 and 2 the poll tax is referred to as "the State and county capitation tax," and this language must receive the same construction in both sections. In section 1 it is declared that the poll tax "shall be equal on each to the tax on property valued at $300" and that "the State and county capitation tax shall never exceed $2 on the head," and in section 2, that "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor." The words "shall be applied," in section 2, "shall be equal" and "shall never exceed," in section 1, are equally imperative, and if the poll tax cannot exceed $2 for a special purpose under section 1, neither can any part of it be applied to a special purpose, under section 2, nor can it be greater or less than the property tax.

The first section establishes the equation of taxation to be maintained between property and poll, and if the section applies to all taxes it must be maintained in all cases and cannot be disregarded when taxes are levied for a special purpose; and it also declares for the principles of a limitation of taxation on property and the poll in the first part of the section and fixes the amount of the limitation on both in the concluding sentence; and if this limitation applies to all taxes it cannot be exceeded for a special purpose.

The authorities show that the limitation applies to property and poll.

"It is too plain to admit of argument that the intent of this section was to establish an invariable proportion between the poll tax and the property tax, and that as the former is limited to $2 on the poll, so is the latter to $2 on the $300 valuation of property." This was said by *Rodman, J.*, a member of the Convention which framed the Constitution, in *R. R. v. Holden*, 63 N. C., 427.

This section commands two things:

"1. That the poll tax shall always be equal to that on $300 valuation of property. This has been called the equation of taxation.

"2. That the State and county poll tax shall not exceed $2. This fixes the limit of taxation on polls, and consequently on property.

"These two directions are equally definite and positive; they are in no wise inconsistent with each other; it is impossible that one has any more favor or sanctity than the other merely because it comes earlier or later in the sentence; they must be equally binding on the Legislature." *Rodman, J.*, in *Winslow v. Weith*, 66 N. C., 432.

"It is well settled that, for the ordinary expenses of government, both State and county, the first section of Article V of the Constitution places the limit of taxation and preserves the equation between the capitation and the property tax—the capitation tax never to exceed $2, and the tax upon property valued at $300 to be confined within the same limit." *Board of Education v. Comrs.*, 111 N. C., 580.

It has not only been held that the limitation is on property and poll, but also that property is the standard for ascertaining the amount of the poll tax. *Kitchin v. Wood*, 154 N. C., 565.

If, therefore, these sections refer to taxes levied for all purposes, it follows that the equation of taxation and the limitation upon property and the poll must always be maintained, and that the poll tax can never be applied to purposes other than education and the support of the poor; and that if the sections only deal with taxation for the ordinary expenses of the State and county, and not to those for special purposes, there is no limitation upon this power of the General Assembly in authorizing the levy of taxes on property and the poll for special purposes, except that of submitting the question to a vote of the people if not for necessary expenses.

The authorities sustain the latter view by stating clearly and definitely that section 1 applies only to taxation for ordinary expenses, by sustaining levies for special purposes which did not maintain the equation and exceeded the limitation, and by declaring legal the application of the poll tax to special purposes.

In *Jones v. Comrs.*, 107 N. C., 248, *Merrimon, C. J.*, after discussing several sections of the Constitution, says: "We are therefore of opinion that the equation and limitation of taxation established by the Constitution (Art. V, sec. 1) applies only to taxes levied for the ordinary purposes of the State and counties"; and this language is quoted and approved by *Hoke, J.*, in *Perry v. Comrs.*, 148 N. C., 524.

In *Wingate v. Parker*, 136 N. C., 370, *Clark, C. J.*, says, after citing section 1 of Article V: "It is clear that this section applies solely to State and county taxation," and he then quotes with approval from *Jones v. Comrs., supra*, as follows: "But it is settled by many decisions of this Court that it (Art. V, sec. 1) does not establish an exclusive

system or scheme of taxation applicable and to be observed in all cases and for all purposes; that, on the contrary, it applies only to the revenue and taxation necessary for the ordinary purposes of the State and the several counties thereof."

In *Collie v. Comrs.*, 145 N. C., 182, *Walker, J.*, in his concurring opinion: "The general limit of taxation is fixed, of course, at 66 2/3 cents on the $100 in value of property, as I have already indicated, by the provision in regard to the equation, and the maximum of the poll tax, which is $2 on the $300 of property at its true value in cash. Const., Art. V, sec. 1. All the above provisions were evidently intended to apply to taxes laid for general State and county purposes."

The decisions are equally clear and definite in establishing the principle that the equation and limitation of taxation apply only to taxes levied for ordinary expenses, and have no application to taxes levied for a special purpose, and that poll taxes levied for special purposes may be applied to that purpose and not to education and support of the poor.

The case of *R. R. v. Comrs.*, 148 N. C., 220, and *R. R. v. Comrs.*, 148 N. C., 248, decide unequivocally that the equation need not be observed when the tax is for a special purpose; and *Board of Education v. Comrs.*, 137 N. C., 310, and *Crocker v. Moore*, 140 N. C., 432, are equally positive in holding that a part of the poll tax may be applied to special purposes and not to education and the support of the poor.

In the last case *Clark, C. J.*, answering a constitutional objection to the statute then being considered, says: "In that the act applies a part of the county capitation tax to the use of the public roads in violation of the Constitution, Art. V, sec. 2, which appropriates the State and county poll tax 'to the purposes of education and the support of the poor.' But that provision applies to the levy of taxation for general, not special purposes. *Board of Education v. Comrs.*, 137 N. C., 310."

The leading case on the power to exceed the limitation on *property and the poll* for special purposes is *Herring v. Dixon*, 122 N. C., 422, in which the present *Chief Justice* not only gives a valuable analysis of section 1 of Article V of the Constitution, but he also answers specifically the objection that the tax on the property and the poll cannot exceed $2, as follows:

"2. The plaintiff, however, further contends that the levy is unconstitutional because when this special levy is added to the levy by the State and the ordinary county levy, the total exceeds $2 on the poll and 66 2/3 cents on the $100 value of property. This tax, however, is authorized by the Constitution, Art. V, sec. 6, since it has the special approval of the General Assembly and is for a special purpose, that of

raising funds by which the county can put the roads and bridges in better condition than could be done within the constitutional limitation upon taxation. *Brodnax v. Groom,* 64 N. C., 244; *Williams v. Comrs.,* 119 N. C., 520; *Evans v Comrs.,* 89 N. C., 154; *Halcombe v. Comrs.,* 89 N. C., 346. Article V, section 6, confers upon the Legislature power to authorize a county by special act and for a special purpose 'to exceed double the State tax.' As the State tax is 43 cents, this would have empowered the Legislature to authorize the county to go far beyond the point to which this tax reaches, and, as the greater includes the less, authorizes this levy, which is well within that limit, though exceeding the limitation of 66⅔ cents to the $100 and $2 on the poll."

If this is the law, it answers every objection of the plaintiffs to the statute before us, because *it sustains a tax levy on the poll and on property for roads,* "though exceeding the limitation of 66⅔ on the $100 and $2 on the poll"; and that this was a point decided and not a dictum appears from the opinion of *Connor, J.,* in *R. R. v. Comrs.,* 148 N. C., 237, where he says: "In *Herring v. Dixon,* 122 N. C., 420, the only question presented and decided was whether a tax for working the public roads was for a special purpose for which the Legislature could authorize the levy of a property and poll tax beyond the limitation."

The case has never been questioned and, on the contrary, it has been approved in twelve decisions of this Court, notably, in *Hargrave v. Comrs.,* 168 N. C., 627, where after citing *Herring v. Dixon,* and other decisions, *Clark, C. J.,* says: "We know of no reason to question the correctness of these decisions."

Following the case of *Herring v. Dixon* is *Tate v. Comrs.,* 122 N. C., 812. The facts in this case are that the taxes on *property and the poll* had reached the constitutional limit in Haywood County, and under this condition the General Assembly passed an act requiring the commissioners of the county to levy an additional tax on the poll and on property to be used in building and maintaining roads and providing in the act, "the constitutional equation to be observed at all times." The commissioners refused to levy the taxes, upon the ground that the statute was unconstitutional, and the action was instituted to compel them to do so by the writ of mandamus.

This Court held, *Clark, C. J.,* writing the opinion, that the statute was constitutional; that the constitutional limitation did not apply, and directed the mandamus to issue compelling the levy of the taxes.

Note that the statute required the equation of taxation to be observed, and that, therefore, the tax on property could not be valid if the tax on the poll was invalid, and that the Court ordered mandamus to issue to compel the levy of a tax on the poll and on property, in

excess of the constitutional limitation, for the purpose of constructing and maintaining roads.

If this case was correctly decided (and it has been approved more than twenty times, and in *Hargrave v. Comrs.*, 168 N. C., 627, the Court, after citing it and other cases, says: "We know of no reason to question the correctness of those decisions"), it settles the constitutionality of the statute before us, because in both the taxes are on the poll and on property, the taxes on both are in excess of the limitation, the purpose for levying the taxes is the same, and the same safeguards are around both, except in this: we have a vote of approval by the taxpayers themselves, which was absent in the *Tate case.*

In *Crocker v. Moore*, 140 N. C., 432, approving *Tate v. Comrs., Clark, C. J.*, says: "The language of the act authorizing the levy of a special tax for these roads is almost identical with that sustained in *Herring v. Dixon*, 122 N. C., 420, and *Tate v. Comrs., ibid.*, 812. The Legislature can authorize a county to exceed the constitutional limitation for necessary purposes, and working the roads is a necessary purpose."

This not only approves the principle declared, but also the decision on the facts, because he says the language of the two statutes "is almost identical."

There are expressions in *R. R. v. Comrs.*, 148 N. C., 220, contrary to this view, and some in its favor, but it was not decided in that case that the poll tax could not exceed $2 for special purposes, and the point could not have been decided, because neither in that case nor in the subsequent case by the same name in the same volume did the statute before the Court authorize the levy of a poll tax.

On the contrary, in the *Mecklenburg case* the statute forbade the levy of a poll tax in excess of $2, and in the *Buncombe case* authority was only conferred to levy the taxes on "taxable property," and the only questions raised and decided were whether the equation of taxation must be observed in levying taxes in excess of the limitation for special purposes; and whether the levy on property could exceed the limitation.

As no poll tax was levied in these cases, and there was no attempt to do so, and as the statute did not authorize the levy of a poll tax, how can it be said that the *Court* then *decided* that the limitation on the poll could not be exceeded for a special purpose and with the special approval of the General Assembly?

If, however, it had been so decided, the decision is greatly weakened if not destroyed by the subsequent case of *Perry v. Comrs.*, 148 N. C., 521, in which it was held to be valid to levy a poll tax in excess of the constitutional limitation in a school district. It did not appear in the case that the school district did not have a four months school, and the

section of the Constitution relied on in *Collie v. Comrs.*, 145 N. C., 170, was not invoked in support of the decision, which was not limited to schools. This appears clearly from the concurring opinion of *Connor, J.*, who says on page 530: "Fortunately, in this case the tax goes to the support of the public school; but there is nothing in the Constitution, as we interpret it, by which such taxation may be confined to this purpose."

Justice Hoke, writing the opinion for the Court, quotes from *Jones v. Comrs., supra*, that "The equation and limitation of taxation established by the Constitution (Art. V, sec. 1) applies only to taxes levied for the ordinary purposes of the State and county," and finally rests the decision upon the ground that by cutting off a part of the county into a special district it is made a quasi municipal corporation, and as such falls under Art. VII, sec. 7, of the Constitution, and is not bound by the constitutional limitation on the poll.

It is therefore decided in that case that a poll tax in excess of the limitation may be levied and collected in a school district, and the principle, as shown by the opinion of *Connor, J.*, is not confined to school districts, but extends to districts such as roads.

If so, and a county cannot do so under *R. R. v. Comrs.*, we have the situation under the Constitution of a part of a county having authority to levy and collect taxes when the whole county is forbidden to do so for the same purpose; and a further result is that the General Assembly may divide a county into the two districts and incorporate them, and authorize a valid tax on the poll in excess of the constitutional limitation in each when it cannot permit and direct it in the county as a whole for the same purpose.

These three cases of *R. R. v. Comrs. of Mecklenburg*, 148 N. C., 220; *R. R. v. Comrs. of Buncombe*, 148 N. C., 248; and *Perry v. Comrs.*, 148 N. C., 521, were correctly *decided*, and are in harmony with the principle which underlies this opinion, to wit, that the equation and limitation of taxation prescribed by Article V, section 1, of the Constitution apply only to taxes for the ordinary expenses of the State and county government, and that the levy of taxes for special purposes is committed by the Constitution to the discretion of the General Assembly, which may, as to such taxes, exceed the limitation on the poll and on property, and may levy the tax on the poll and property, or on property alone, without observing the equation, subject to the qualification that if the tax is not for a necessary expense it must be submitted to a vote of the people.

The opinions in the first two of these cases were written by the same judge, and as the questions were the same, the leading opinion was written in the *Mecklenburg case.*

The action was brought to restrain the collection of certain taxes on property in excess of the limitation, upon the ground that a corresponding poll tax had not been levied, or, in other words, because the equation of taxation had not been observed.

The commissioners replied that they were acting under a statute which provided that: "The equation of taxation prescribed in the Constitution applies only to taxation levied for the ordinary purposes of the State and county, and no poll tax shall be levied, except as hereinafter provided, in excess of $2 for State and county purposes combined; and all acts levying or authorizing the levy of taxes for special purposes which contain authority to levy a poll tax in excess of $2 in the aggregate for all purposes are hereby repealed or modified so as to restrict and provide that the poll tax for State and county and special taxes combined shall never exceed $2."

The question for decision, therefore, in the *Mecklenburg case* was as to the equation of taxation, while the question before us is as to the limitation of taxation.

It was not whether the commissioners could levy more than $2 on the poll, or the Legislature authorize them to do so, but could they levy a tax on property and refuse to levy a tax on the poll, when the Legislature had said no poll tax should be levied?

The single inquiry, then, before the Court was, Has the General Assembly the power to authorize the levy of a tax on property for a special purpose in excess of the limitation, and at the same time command that no corresponding poll tax should be levied? and it was answered, as we hold, in the affirmative, while the inquiry now is, Has the General Assembly the power to authorize the levy of a tax for a special purpose on the poll and on property in excess of the limitation?

The doubt expressed by the learned judge then writing for the Court was whether the first of these questions had been answered by the previous decisions of the Court, and not as to the second, and he makes this clear as he proceeds with the discussion. He reviews many of the cases, and among other things says: "In *Herring v. Dixon*, 122 N. C., 420, the only question presented and decided was whether a tax for working the public roads was for a special purpose for which the Legislature could authorize the levy of a property and poll tax beyond the limitation. No question of equation was presented, because the poll tax was levied. The same is held in *Tate v. Comrs.*, 122 N. C., 812."

Language could not be clearer or more unequivocal, and it commits the Court, all of the members having concurred, to the positive statement that the question *presented* and *decided* in *Herring v. Dixon* and in *Tate v. Comrs.* was whether a tax for working the public roads was

for a special purpose for which the Legislature could authorize the *levy of a property and poll tax beyond the limitation;* and that is the only question now before us.

He concluded that the two cases cited were not authority for the position the Court was then considering as to the equation of taxation, saying: "No question of equation was presented because the poll tax was levied."

He was evidently fearful that in the midst of an elaborate discussion of a vexed question he might say something outside of the case, and to avoid binding the Court, if he did so, he took the precaution before the conclusion of his opinion to state the precise point of discussion. He said: "We decide that the commissioners of Mecklenburg acted in accordance with the statute in failing to levy more than $2 on the poll, and that the statute is a valid exercise of power by the Legislature. This conclusion renders it unnecessary to discuss the much vexed question as to what is or is not a special purpose within the meaning of section 6, Article V."

In other words, he says it was decided that the commissioners performed their duty in failing to levy more than $2 on the poll, because the Legislature had said in the act before the Court that no poll tax in excess of $2 should be levied for ordinary expenses of the State and county *and for special purposes*, and that this was a valid exercise of legislative power, because as to these taxes it was not necessary to observe the equation of taxation, and he adds: "This conclusion renders it unnecessary to discuss the much vexed question as to what is or is not a special purpose within the meaning of section 6, Article V." which we now have to decide.

If, therefore, there are expressions in the opinion relating to the limitation of taxation, they do not come within the rule of *stare decisis,* which has for its purpose uniformity, certainty, and stability in the law.

"The doctrine of *stare decisis* contemplates only such points as are actually involved and determined in a case, and not what is said by the Court or judge outside of the record or on points not necessarily involved therein. Such expressions, being *obiter dicta,* do not become precedents. It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles

which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. It cannot be reasonably expected that every word, phrase, or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arise as to the effect of a decision will be practically avoided." 7 R. C. L., 1000, 3, 4.

The case of *Perry v. Comrs.*, decided five months after *R. R. v. Comrs.*, presented the question of the limitation on taxation on the poll and property in a special school-tax district.

A tax of 20 cents on property of the value of $100 and 60 cents on the poll in excess of the constitutional limitation was levied, and the action was brought by the plaintiff, who was subject to the poll tax, to restrain its collection upon the ground that it was unconstitutional; but the Court declared the tax to be legal, which is in direct conflict with the decision in *R. R. v. Comrs.*, if it means, as now contended, that Article V, section 1, of the Constitution applies to all taxes, and that the poll tax can *never* exceed $2 for any purpose.

If the prohibition in the Constitution applies to all taxes, it is of little avail to deny it to the counties and to permit subdivisions of counties, cities, and towns to disregard it at pleasure; and this is the condition that will exist if we adopt the construction placed on *R. R. v. Comrs.* by the plaintiffs and *Perry v. Comrs.* stands.

The learned judge who wrote the opinion in *Perry v. Comrs.* first discusses the cases from Mecklenburg and Buncombe and other cases, and then follows this comment, in which all the judges concurred: "True, these decisions are directly on the question of the equation of taxation established by Article V, but every reason for the ruling on the question of the equation bears in full force on the subject of this restriction on the amount of the poll tax, with the additional and conclusive reason that such restriction in express terms is confined to the 'State and county capitation tax.'" What can this mean except that the question for decision in the Mecklenburg and Buncombe cases was whether the equation of taxation must be observed in levying taxes for special purposes, and that "every reason" for holding that the

equation did not apply, as was done in those cases, "bears with full force" on the subject of the restriction on the amount of the poll tax, with the "additional and conclusive reason that such restriction in express terms is confined to the 'State and county capitation tax.'"

Again, *Justice Hoke* gives the reason which induced the framers of the Constitution to restrict the limitation to taxes for ordinary expenses of government. He says: "Anticipating, as the result has proved, that the general State and county taxation would very generally reach the limit of $2, the framers of the Constitution did not deem it well to place an arbitrary restriction on all local efforts in communities whose enterprise might suggest and financial condition justify a greater amount of taxation than that followed by the general law. And it was no doubt further considered that the restriction contained in section 7, forbidding the levy of any unusual tax, except when sanctioned by a majority of the qualified voters of a given district, would operate as a wholesome check against excessive taxation or extravagant expenditure. Certain it is that, with the exception of the restraints indicated, the matter is not further affected by the Constitution, but is referred entirely to the legislative will. As to taxation within these special districts, it is theirs to observe or disregard the equation established by Article V in reference to State and county taxes and to exceed or abide by the limit established in said article in reference to general taxation."

These cases, therefore, instead of being in conflict with the position of the defendant, support it, in that:

1. It is decided in *R. R. v. Comrs.* that it is not necessary to observe the equation of taxation in levying taxes for special purposes, and it is said in *Perry v. Comrs.* that there is stronger reason for holding that the limitation does not apply to such taxes.

2. The cases of *Herring v. Dixon* and *Tate v. Comrs.* are recognized as authority, and that they decide that the limitation on the poll and on property may be exceeded for roads, a special purpose.

3. It is held in *Perry v. Comrs.* the poll tax may exceed $2 in a subdivision of a county, notwithstanding the constitutional provision that the State and county capitation tax shall never exceed $2.

We are therefore of opinion that the statute is constitutional and that it is within the power of the General Assembly to authorize a levy of taxes for special purposes on property and on the poll in excess of the limitation prescribed in Article V, section 1, of the Constitution, and that as to such taxes it is not compelled to maintain the equation between property and the poll.

The construction gives force and vitality to the language in section 6 of Article V, "except for a special purpose and with the special

approval of the General Assembly," which otherwise would have no practical operation, because if this section means that the counties can never exceed double the State tax for ordinary purposes, but may do so for special purposes, *within the limitation, however, of section 1,* there has been no time since the Constitution of 1868 was adopted, except possibly one year, when the State tax and double that amount, if levied by the counties, for ordinary expenses, would not exceed the limitation, leaving nothing for special purposes.

It must be assumed that the men who wrote the Constitution at least knew of conditions then existing; and still, at the first session of the General Assembly after its adoption a State tax of $1.05 on the poll and 35 cents on property of the value of $100 was levied (Laws 1868-9, ch. 108), and it is significant that the statute says: "This tax shall be levied in addition to such special taxes as are authorized by the General Assembly."

Under this article, and giving effect to section 6 of Article V, the counties could not levy double the State tax for ordinary expenses, and within the limitation of section 1 no taxes could be levied for special purposes, although it would seem the General Assembly thought it had authority to authorize this to be done.

If none of these positions can be maintained, the tax provided in the statute is valid, as counties as well as cities and towns are embraced in Article VII, section 7, of the Constitution, and it was so held in *Pritchard v. Comrs.,* 159 N. C., 636, in which there was a levy on polls and property for roads; and corporations within that article of the Constitution may exceed the limitation on the poll and property when authorized so to do by the General Assembly, as was held in *Perry v. Comrs., supra,* and in other cases.

The language of this section is, "No county, city, town, or other municipal corporation shall," etc., and the only authority for the levy of special taxes for schools in special school districts is that they come under the designation "municipal corporations."

If, therefore, a municipal corporation may exceed the limitation on the poll and property under this section of the Constitution, as was held in *Perry v. Comrs., supra,* why may not a county do so?

Hoke, J., said in the *Perry case,* after reviewing the authorities: "From these authorities it is clear that the tax in question (the 60 cents in excess of the $2 already levied for State and county purposes) is not within the restriction of Article V, section 1, of the Constitution, but that the same is a tax imposed for a definite purpose by a special taxing district, coming as a public quasi corporation under the provisions of Article VII of the Constitution, and subject only to the limitations and restrictions contained in that article, notably, in

section 7, that no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein; and of section 9, to the effect that all taxes levied shall be uniform and *ad valorem*. In aid of the construction we place upon the provision of the Constitution bearing upon this question, good reasons could be suggested for the distinction in the two classes of taxation. Anticipating, as the result has proved, that the general State and county taxation would very generally reach the limit of $2, the framers of the Constitution did not deem it well to place an arbitrary restriction on all local effort in communities whose enterprises might suggest and financial condition justify a greater amount of taxation than that allowed by the general law. And it was no doubt further considered that the restriction contained in section 7, forbidding the levy of any unusual tax, except when sanctioned by a majority of the qualified voters of a given district, would operate as a wholesome check against excessive taxation or extravagant expenditure. Certain it is that, with the exception of the restraints indicated, the matter is not further affected by the Constitution, but is referred entirely to the legislative will. As to taxation within these special districts, it is theirs to observe or disregard the equation established by Article V in reference to State and county taxes, and to exceed or abide by the limit established in said article in reference to general taxation."

Counties, cities, towns, and municipal corporations are mentioned in the section; the same authority to levy taxes is conferred on each; and if the municipal corporation may exceed the limitation on the poll and property, the same power cannot be denied to the counties.

It would seem that all of the authorities may be reconciled upon the ground that Article V of the Constitution provides for the ordinary expenses of the State and county, excepting therefrom, as to counties, special purposes, and that Article VII provides for all the expenses of municipal governments, including counties with the limitation that special taxes must have the approval of the General Assembly.

The learned judge who wrote the opinion in *R. R. v. Comrs.*, 148 N. C., 220, seems to have reached this conclusion, and also that the equation and limitation in section 1 do not apply to taxes levied for special purposes, as he says in the valuable work on the Constitution by Connor and Cheshire, page 258, commenting on Article V, section 1:

"This equation and this limitation on taxation have no application to taxes levied for a special purpose under Article V, section 6, nor

to taxes necessary to meet an obligation assumed under Article VII, section 7. *Board of Education v. Comrs.*, 137 N. C., 310; *Jones v. Comrs.*, 107 N. C., 248; *R. R. v. Comrs.*, 148 N. C., 220."

In coming to this conclusion, if it was proper in any case for us to be influenced by the earnest and eloquent plea of counsel for the plaintiffs in behalf of the man who owns no property and is only liable for a poll tax, we could not consider it when, as in this case, there is no allegation in the complaint that either of the plaintiffs is in this class, and when the grievance complained of is that the levy and collection of the tax "would cast a cloud upon the title of the real and personal property now owned by these plaintiffs and the other taxpayers in said county."

It is probable that the man who is only liable for a poll tax is content, as he will be relieved from six days work on the public roads by the payment of $1 under the new system of working the roads in Alexander County.

Under the old system of working the roads in Alexander County all able-bodied males between the ages of 18 and 45 were liable to work on the roads six days in each year (Rev., sec. 2725), but this has been superseded by the new system, and a poll tax not greater than $1 has been substituted for six days labor.

Nor need there be any fear that any additional restrictions or burdens will be placed on the right of suffrage.

This right is carefully guarded, and it is specifically provided in Article VI, section 4, that the poll tax which the voter is required to pay is the one "prescribed in Article V, section 1," which is the one for ordinary expenses of the State and county, and which cannot exceed $2.

This was held in *Perry v. Comrs., supra,* where *Hoke, J.,* says: "It is suggested that the construction we give to the Constitution will in certain instances make it possible, by the levy of an exorbitant poll tax, to deprive many citizens within a special district of the right to vote, and this by reason of the provision of the Constitution, 'That no person shall be allowed to vote unless he shall have paid his poll tax for the previous year.' But not so. The language of Article VI, section 4, of the Constitution, being the article relating to and regulating the right of suffrage, provides that no one shall be entitled to vote unless he has paid his poll tax for the previous year, 'as prescribed by Article V, section 1, of the Constitution,' thus providing that on payment of the poll tax allowed and established in Article V the right of suffrage in this respect is established; and this poll tax, as we have seen, can *never exceed* $2."

This disposes of the principal question involved in the appeal.

The plaintiffs, however, insist that if the bond issue and the taxes are valid, that the contract for the sale of the bonds is illegal because not, as required by the statute, for their face value; and as we construe the contract of sale, this position is well taken.

The statute requires the bonds to be sold at their face value, and under the contract the purchaser gets the bonds drawing interest at 5 per cent and pays therefor $5,000 in cash and time certificates of deposit running from three to eighteen months, with interest thereon at 2 per cent, and when the difference in interest is considered, this would reduce the purchase price to $97 or $98 for a bond of $100.

"In disposing of bonds, municipalities are frequently prohibited from selling them 'at less than the par value thereof.' The words 'par value,' when so used, mean a value equal to the face of the bonds and accrued interest to date of sale. When the bonds draw interest from their date and are disposed of after their date, with accrued interest attached, their face or 'par value,' within the meaning of the statute, is the sum of the principal and the accrued interest. Persons purchasing the bonds from the municipality are bound to take notice of the power of the municipality in this respect, and a sale of the bonds at less than par is absolutely void *inter partes*, as expressly prohibited by law. Neither party to the contract is bound thereby, and it cannot be the subject of a valid claim by either against the other." 2 Dillon Mun. Corp. (5 Ed.), sec. 895 (p. 1400).

In the leading case of *Dalafield v. State of Illinois,* 26 Wend., 132, the facts were strikingly similar to the facts in the case at bar, the act under which the bonds were issued stating that they 'should not be sold for less than their par value.' As a matter of fact, the purchaser agreed to pay par for the bonds, but was to do so by honoring and paying time drafts drawn by the State upon him, which time drafts bore no interest. In holding that this was a violation of the provision of the act above quoted, the New York Court said: "But the actual sale is made on terms which on the $300,000 sale gave the appellant an advantage of 130 days interest, and on the $283,000 sale of about ten months. I cannot, upon any understanding of the words, consider this as a sale at par value, any more than if there had been an undisguised discount at the same rate. . . . In giving these double advantages of credit and of gain of interest to Delafield, I can see that the agents exceeded their specific and limited authority, and in the latter case assumed a risk far beyond the bounds of ordinary prudence, since it was done on the personal credit of the purchaser alone, unaccompanied by any security." (Page 225.)

This will not prevent another sale of the bonds upon the terms of the statute.

We are therefore of opinion that the bonds are valid and that the taxes named in the statute can be legally levied and collected, and that the contract of sale is invalid.

The order and judgment of the Superior Court will be modified in accordance with this opinion.

Let the costs of the appeal be divided between the plaintiffs and the defendant.

Modified and affirmed.

BROWN, J., concurring: I think the exhaustive opinion of the Court by *Justice Allen* demonstrates conclusively that Article V, section 1, of the State Constitution, establishing an equation between property and poll tax and prescribing a limitation upon the latter, applies only to taxes levied for general purposes by the State and county governments, and does not apply to county taxes levied for a special purpose with the approval of the General Assembly.

It necessarily follows from this construction of the Constitution that the levying of special county taxes is within the sound discretion of the General Assembly, and may be levied upon property exclusively, or upon both poll and property, as is the case in the act under consideration.

In my opinion, this construction, which has been given to the Constitution by this Court in the several cases cited in the opinion, and by every General Assembly which has met in this State for the past forty years, is not only the natural meaning and purport of the instrument, but it is that construction which is absolutely essential to the maintenance of our system of county governments and to sustaining their good faith and credit. It has been held that if the poll tax is limited to $2 the property tax must be likewise limited to $2 on $300 worth of property. *R. R. v. Holden,* 63 N. C., 427.

By the express requirement of the Constitution, the poll and property tax are linked together and cannot be divorced, and the former is to be measured by the latter. This is expressly stated by *Chief Justice Clark* in his opinion in *Russell v. Ayer,* 120 N. C., 191, who adds: "This provision was inserted in the Constitution of 1868 as a guarantee to the property holders of the State that they would not be oppressed by inordinate taxes laid by representatives elected by newly enfranchised blacks, who had small property to be taxed and whose representatives might otherwise be tempted to levy excessive taxes on property."

If the limit of taxation is $2 on the poll, the same limit must apply to $300 worth of property. If this applies to special taxes for county purposes, as well as general taxes, there can be no special taxes, and it was idle to provide for them, for the General State and county taxes always exhaust the limit. The members of the Convention evidently foresaw that counties must of necessity need large sums of money for the construction of necessary public improvements, such as courthouses, jails, bridges, and roads, and they provided the special taxes to meet such emergencies, and evidently did not intend that the equation and limitation should apply to them, but that the manner of their levy should be left to the sound discretion of the representatives elected by the people to the General Assembly. That is the reason they are termed *"special"* as distinguished from *general* taxes.

Relying upon this construction of the Constitution, two-thirds or more of the counties of the State, by legislative authority, have been compelled to levy special taxes in order to pay their current expenses. They have also borrowed millions of dollars with which they have erected courthouses and jails, constructed roads and bridges, and otherwise added to the material wealth and prosperity of their citizens. Purchasers of these bonds in every part of the United States have relied upon the decisions of this Court to protect their investments. If we repudiate this well settled legislative and judicial construction and strike down these special taxes, the counties of the State will have to "go out of business"; their credit will be ruined and that of the State itself seriously impaired. We may well pause before reaching a conclusion that will inevitably produce such disastrous results.

The case of *R. R. v. Comrs.*, 148 N. C., 220, is relied on to support the contention of the plaintiff. There may be some expressions in the opinion that, taken by themselves, have such tendency, but they are mere *dicta*. The question decided in this case was not presented, because in that case no poll tax was levied—only a property tax that exceeded the limitation of $2 on $300 worth of property. The statute then under consideration, instead of authorizing a poll tax, forbade it in express terms. The only question decided in that case is that the equation of taxation need not be observed in levying taxes for special purposes—a legislative construction of the Constitution directly in accord with our decision in this case. If the equation need not be observed, why should the limitation? It is evident from the subsequent writings of *Judge Connor*, who wrote the opinion in *R. R. v. Comrs.*, that he fully concurs with the majority of this Court. In the Commentaries upon our Constitution he says: "It seems that the proportions and limitations here placed upon taxation apply in all cases of

State and county taxation, except provisions (1) for the public debt as it existed when the Constitution was adopted, (2) for casual deficits, insurrection and invasion, and (3) for *county taxation for special purposes.*" Connor and Cheshire on Constitution of North Carolina, page 258.

The case of *Perry v. Comrs.*, 148 N. C., 521, is cited by plaintiffs and strongly relied upon by defendants. In my judgment, it is a direct authority sustaining the opinion of the Court in the case under consideration. It decides that a quasi-municipal corporation may under Article VII, section 7, of the Constitution exceed the limitation on the poll and on property in levying taxes for a *"special"* purpose when the tax levy has legislative sanction. That section of the Constitution uses the words, "county, city, town, or other municipal corporation," and declares that a county is on a par with all other municipal corporations. If under that decision a municipal corporation may exceed the limitation on poll and property for a special purpose, why may not a county do so? I agreed to both of these decisions, and see no reason to change my opinion.

I emphatically deny that this Court is "striking out two provisions from the Constitution," or amending them. We are but following the construction placed on the Constitution by this Court nearly twenty years ago in *Herring v. Dixon*, 122 N. C., 420, and in *Tate v. Comrs.*, 122 N. C., 812, in which it was clearly and distinctly held by a unanimous Court that the limitation on the poll and property can be exceeded for a *special* purpose with the sanction of the Legislature, and that the construction of public roads is a special purpose. We are but following *Crocker v. Moore*, 140 N. C., 432, citing the above named cases, and holding that notwithstanding Article V, section 2, which appropriates the State and county poll tax to the purposes of education and support of the poor, a part of the poll tax may be applied to the construction of roads with the permission of the Legislature, as that section of the Constitution does not apply to a poll tax levied for such a "special" purpose. These precedents have been cited and approved by this Court in over a dozen cases cited in the annotated edition, 122 N. C., 815.

The opinions in the three cases above cited not only expressed the well considered judgment of a unanimous Court, but were written by as profound a jurist as *Chief Justice Clark*. Because their learned author has in recent years seen fit to change his personal views is no reason why those cases should be overruled. I prefer to follow the strong and convincing reasoning of his former opinions rather than his recent utterance. Judicial decisions should not be lightly set aside. They should be stable and not change with the ebb and flow of every tide.

The doctrine of *stare decisis* is especially applicable to those judgments of the Court that expound the Constitution and give a construction to it which has been acted upon by the State and its counties for many years. Such judgments should not be reversed except from overruling necessity.

It is surprising, in view of the decisions of this Court, that the majority should be gravely charged with an attempt to amend the State Constitution by judicial decision so as to divert a special poll tax from educational and charitable purposes to the construction of public roads. If the Constitution needed amending to accomplish that result, it has been done by the decisions of this Court in which four of its present members concurred.

In *Board of Education v. Comrs.*, decided in 1904, and concurred in by the *Chief Justice* and *Mr. Justice Walker*, it was decided in an opinion by *Mr. Justice Connor* that "Poll taxes collected under a special act of the General Assembly for highways can not be diverted to schools and the support of the poor."

In *Crocker v. Moore, supra*, decided in 1906, by a unanimous Court, four of whose members are still on it, it was held that "The objection to the constitutionality of the act of 1903, chapter 538, in that the act applies a part of the county capitation tax to the use of the public roads in violation of the Constitution, Article V, section 2, which appropriates the State and county poll tax to the purposes of education and support of the poor, cannot be sustained, as that provision applies to the levy of taxes for general, not special purposes."

If these decisions do not sustain the conclusion of the majority of this Court in this case, then the English language has failed of its purpose. It has been said that "consistency is a jewel," and also that it is the "hobgoblin of weak minds." I think that in the construction of organic law, consistency and stability are important judicial attributes tending greatly to the proper administration of the State Government.

It may be, as suggested, that political agitation will bring about an abolition of the poll tax entirely. That is not a matter for our consideration, and such threats have no effect on us. The wisdom of levying a poll tax is for the people themselves. Such tax has been levied in this State from time immemorial, and no one has stated the reasons for levying such tax stronger and more lucidly than the distinguished *Chief Justice* of this Court. *Russell v. Ayer, supra.*

There are thousands of wage earners, artisans, and others in this State who earn fair salaries and wages who have seen fit to acquire but little taxable property. Those persons get the full benefit of the educational facilities of the State and the protection and benefits of

our Government. All that many of them pay for these blessings is a small poll tax of a few dollars per annum. Those persons are not crying out against such taxation. They are not raising a hue and cry against the poll tax. They have too much personal pride and self-respect to desire the benefits of our Government for nothing, and are more than willing to pay the small tax assessed against them for the benefits they and their children receive.

It should be remembered that we have not decided that the General Assembly must levy a poll tax in excess of $2 for *special* purposes. We simply held that under the previous decisions of this Court the General Assembly has the constitutional power to do so in certain instances if it sees fit. It need never levy a poll tax in excess of $2.

It may confine special county taxation to property exclusively. It is a matter within the sound discretion of the Representatives and Senators who come directly every two years from the people. If they can be trusted to levy taxes upon the property of those who elect them, can they not also be trusted not to be oppressive in levying the tax upon the poll? They are directly responsible to the people, and can be trusted to carry out the will of their constituents.

In this case the poll tax was levied by the voters of Alexander County, a large majority of whom are liable to poll tax. The same can be said of practically all the counties of the State, with one or two exceptions, that have voted for special taxes for the construction of good roads and other public improvements. The special poll tax has not been forced on them by the General Assembly, but it has been levied by the votes of those citizens who believe in the great benefits accruing to their county from good roads and other public improvements.

I see no reason why this Court should deprive them of that right which they have exercised continuously for nearly forty years. To do so will effectually put a stop to all public improvements in this State. It is very significant that the several actions that have come to this Court involving the validity of the poll tax have not been brought by those who pay the poll tax and but little else, but by property holders who were endeavoring to keep down the taxes on their property by pleading the equation between the property and poll tax.

We have all given this case that careful study and reflection its importance deserves, and I believe that the conclusion reached by the majority is not only in accord with the precedents, but is the construction the framers of the Constitution intended should be placed on it. If I regarded this an open question, I should hold as I now do, for where two constructions are permissible, I feel bound to adopt that which in my judgment is absolutely essential to the material prosperity and upbuilding of the State and to the maintenance of its credit.

CLARK, C. J., dissenting: The Constitution at Halifax in 1776 made no reference to the poll tax, and it was unknown in England, where it had been tried only in the very distant past, and, having caused two insurrections, had soon been repealed. Even in that country, which was then far more ruled by the classes than now, taxation of the poll was not tolerated.

In the Revised Statutes in 1835 the poll tax was 20 cents and was levied also upon slaves, who were not taxed *ad valorem,* as well as on whites. In the Revised Code of 1854 the poll tax was 40 cents, and it is current history that it was levied largely because slaves were not taxed according to their value as property.

When the Constitution of 1868 was adopted a poll tax was authorized up to $2, but it was restricted by two explicit provisions. Art. V, sec. 1, provided: "The State and county capitation tax combined shall *never* exceed $2 on the head." Another section, Art. V, sec. 2, provided: "The proceeds of the State and county capitation tax shall be applied to the purpose of education and the support of the poor, but in no one year shall more than 25 per cent thereof be appropriated to the latter purpose."

The Court has no more power than the Legislature to strike out those two provisions from the Constitution. They could not be made more explicit. The whole subject was thoroughly reviewed by this Court in an unanimous opinion, *R. R. v. Comrs.,* 148 N. C., 220, in which all the cases on the point were reviewed, and the Court held that only one of the previous cases, *Board of Education v. Comrs.,* was in conflict with the result then reached. The very able and exhaustive opinion, written by *Connor, J.* (now the distinguished Federal judge of the Eastern District of North Carolina), held that the wording of the Constitution, "'The State and county capitation tax combined shall never exceed $2 on the head' is imperative and prohibits the levy of any tax upon the poll *for any purpose in excess of that sum;* that section 2 applies the poll tax to the purposes of education and the support of the poor and withdraws it from any other purpose," adding (p. 245): "This question cannot again arise."

This opinion was repeated in *R. R. v. Comrs.,* 148 N. C., 248, written by the same judge, and *Perry v. Comrs.,* 148 N. C., 521, by *Hoke, J.* These decisions have never since been questioned till now. Four of the judges who concurred in those opinions are still on the Bench. There is but one member of the Bench now who was not on the Court at that time, and if the change in personnel of one-fifth of the Court authorizes the reversal of these able and thoroughly considered opinions upon a grave constitutional question in accordance

with the express language of the Constitution, as all men may read it, then reliance can no longer be placed upon any opinion whatever, for the views of the Court, so liable to change, have become

"As variable as the shade
By the light quivering aspen made."

If precedents are to govern, these last three opinions reviewing the whole subject are conclusive. If the Constitution itself is to control, its language, "The State and county capitation tax shall *never* exceed $2," and "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor," can admit of no other construction than the plain and explicit pledge therein given to the laborers and men of small means that they shall not be taxed for the mere privilege of breathing the air more than $2 per year, and that that sum shall be applied to no other purposes than "education and the support of the poor."

It is true that Article V, section 1, does provide that the capitation tax shall be equal to the tax on property valued at $300 in cash, but there is no provision that the tax on $300 worth of property shall never exceed $2, and hence the Court has repeatedly held that this equation only extends and is to be observed up to $2, and, therefore, when the tax on property exceeds $2 the equation ceases, because the poll tax "can *never* exceed $2."

This does not invalidate any bonds heretofore issued in which a capitation tax has been authorized, because the purchasers of such bonds are fixed with notice that the State Constitution forbids the levy of a capitation tax in excess of $2, and that such tax can only be applied to education and the poor. The holders of such bonds have the right to have the levy of taxes upon property for the payment of their bonds, but they have no interest in the poll tax, which cannot be applied for such purpose; and whenever the aggregate poll tax provided for in all the statutes authorizing a tax levy for bonds or other purposes reaches $2 the board of commissioners must stop. They cannot go beyond that figure.

The language of the Constitution is too plain to admit of discussion, and it is of no value to criticise or compare previous decisions of this Court. The last three decisions quoted from 148 N. C. above are equally conclusive. The unanimous Court gave to the public the pledge, as explicit as that in the Constitution, that the poll tax should never exceed $2, and said, four of the present Bench concurring: "This question can never again arise."

In *R. R. v. Comrs. Judge Connor* quotes Judge Cooley: "Capitation taxes are not a common resort in modern times, and only in a few cases could they be just or politic," and cites from other States showing

that only a few States levy a poll tax. In fact, in 36 States, as in England, no poll tax at all is levied, and in the other 12 it cannot exceed $1, and that is applied to the public schools.

In California, one of the States which allowed this small poll tax, an amendment to the Constitution, striking it out, was adopted last year by 125,000 majority. In our State the county and municipal poll tax combined has frequently reached the oppressive figure of $6, $7, and even $8. And, as stated in *R. R. v. Comrs.*, 148 N. C., 253, "This is criticised by Hollander on State Taxation, 104, who points out that in this State, in which 60 per cent of the taxes are paid by persons owning less than $500, the result is that the small taxpayer, if he pays a poll tax, also pays nearly double the rate of the larger taxpayers."

In our State, also, the amendment ratified in August, 1900, provides that every person "before he shall be entitled to vote shall have paid, on or before the first day of May of the year in which he proposes to vote, his poll tax for the previous year." As *Judge Connor* forcibly said in *R. R. v. Comrs.*, 148 N. C., at p. 242, "It is a strange anomaly to say that while the right to vote is restricted by the payment of a poll tax which 'shall never exceed $2,' the voter may be disfranchised for failure to pay a poll tax the amount of which is left to the discretion of the General Assembly, the Constitution thus guaranteeing to every citizen otherwise qualified the right to vote by paying a poll tax of $2, and by construction giving the General Assembly the power to increase it to any amount they may deem proper."

It is true that formerly the roads were worked by conscription of labor. This was a most unjust provision, enacted by the influence of the landowning class, at a time when no one could vote for State Senators unless he owned 50 acres of land. The property owners who used wheels over the roads paid very little of the cost of making the roads, while those who only walked by the side of them worked the roads for those who used them.

The inefficiency as well as the injustice of this system, in France, where they were called *Corvées*, was one of the chief causes of the great French Revolution. In this State the progress of civilization and the impossibility of getting effective roads by that system, as well as a sense of its inherent injustice, has caused the almost universal adoption of the present method of working the roads by taxation; but this does not justify the violation of the pledge in the Constitution by increasing the burden on the head of the laborer beyond the $2 limit pledged by the Constitution. Under the guise of working the roads by taxation this is placing part of the cost of working the roads back on the laborer by taxing his head in excess of the constitutional limitation.

The Constitution cannot be misunderstood when it pledged the laborer and the man of small means that no tax should be laid on his head in excess of $2, and that this should be applied solely to education and the poor.

The tendency of the age is towards a more equitable levy of taxation upon the superfluity of the wealthy, and therefore Congress has levied a graduated income tax, exempting those under $4,000 and ranging from 1 per cent on that sum to 13 per cent on larger amounts. In like manner there is a graduated tax on inheritances, exempting small estates. The State has also adopted the same policy of graduated taxation upon incomes and inheritances. The sense of justice and the political economy of this age require a more equitable distribution of the public burdens by putting the heavier tax on those most able to bear it instead of the reverse, as is the case under an unlimited poll tax.

The practical effect of this decision is to strike out of the Constitution by a vote of 3 to 2 of the members of this Court the protection against excessive capitation tax and thus to leave it without any limitation whatever. The effect will be necessarily to precipitate, from a public sense of justice, an agitation, as in California, to strike out the capitation tax entirely. No people can stand an unlimited poll tax, and will not tolerate it when there is a solemn constitutional pledge and previous unanimous decisions of this Court that the poll tax can never exceed $2, and shall be applied to no other purpose than education and the poor. The holders of these bonds are entitled to have their principal and interest paid by a levy on the property of the county, but they cannot tax the polls of those who create its wealth and who should be protected, according to the Constitution, from paying any poll tax for other purposes, and in any larger amount than therein specified.

The General Assembly must be construed to have understood the Constitution and to have intended to conform to it. In *Jones v. Comrs.*, 107 N. C., 248, it was held that "The equation and limitation of taxation apply only to taxes levied for the ordinary purposes of State and county." This has been sustained ever since. It means that the equation must be observed up to the $2 limitation for ordinary purposes, but when a tax is levied for a special purpose it can exceed the $2 limitation on property, but, in the language of the Constitution, "The State and county capitation tax can never exceed $2"—that is, *for no purpose and on no occasion.* There is no such limitation as to the taxation of property. The bondholders have no interest in the poll tax exceeding $2, for in no event can any part of the capitation tax be applied to any other purpose than education and the poor. The Constitution forbids it.

Section 4 of the act before us, providing for "a *special tax* on all polls, real estate and personal property . . . always observing the constitutional equation between the taxes on the property and the taxes on the poll," is a constitutional act, but it must be construed, within the terms of the Constitution, to mean that all the taxes levied on the polls, including that provided in this act, shall not exceed $2 on the poll, nor be applied to any other purpose than education and the poor. Thus construed, it conforms to the Constitution and to all our decisions as reviewed, and was so held by a unanimous Court in *R. R. v. Comrs.*, 148 N. C., 220; *R. R. v. Comrs., ib.*, 248; and *Perry v. Comrs., ib.*, 521.

The Constitution is so plain and explicit and all our authorities have been so clearly reviewed and summed up in those cases that it is simply a waste of time and a "threshing over of old straw" to go over and review them again. The plain letter of the Constitution is the guide by which we must go, and that cannot be changed by placing upon our precedents a different construction from what has been done in the three cases in which this matter has already been fully and carefully discussed and settled.

This Court is without authority to amend the Constitution by striking therefrom the guarantee given the toiling masses and men of small means, that the "State and county capitation tax shall never exceed $2," and that it shall be applied only "to education and the poor." If by ingenious argument it could be shown that any previous decisions have held that this can be done (but they have not), so much the worse for those decisions. The argument would merely show that judges are not always infallible, and sometimes make mistakes. It would not authorize us to amend the Constitution to conform to those decisions.

The public will feel slight interest in any argument claiming such precedents. But it will deeply concern them that faith should be kept with the masses to whom the constitutional pledge was given that the poll tax should be limited to $2 and applied only "to education and the poor." It will be a serious matter, by a strained construction placed on the Constitution by a bare majority of this Court, to repeal those provisions, thus making the poll tax subject to no limitation and applicable to all purposes, with the effect that those already sufficiently burdened with an undue share of taxation shall have their pro rata increased and themselves disfranchised if unable to pay an unlimited capitation tax.

As construed by this Court heretofore, the "equation" held only till the poll tax reached $2. As the tax on the poll could *"never* exceed $2," the equation necessarily then ceased, for thereafter taxation could be

laid only on property. *Jones v. Comrs.*, 107 N. C., 248, and numerous cases since.

Can a majority of this Court amend the Constitution? The Constitution guaranteed that the State and county poll tax "shall *never* exceed $2." As now amended by the vote of three judges, the Constitution must henceforth read: "There shall be no limit on the poll tax."

The Constitution as written by the Convention and adopted by the people reads, the poll tax "shall be applied to the purposes of education and the support of the poor." As now amended by a majority of the Court, it must henceforth read as if written: "The poll tax shall be applicable to any and all purposes." This is a complete reversal of both propositions, by judicial construction. As now amended, the poll tax being laid without limitation and applicable to any purpose, there was no purpose to be served by putting any reference to it in the Constitution.

This judicial construction, which by a bare majority of the Court now makes the poll tax unlimited and gives its proceeds to those bondholders, will likely bring about its abolition—especially as a slight change in another decision will disfranchise every voter who does not pay an unlimited poll tax for the benefit of bondholders.

In Hollander on State Taxation, 104, it is said: "The poll tax of North Carolina is clearly a regressive tax of a very heavy kind. It amounts frequently to doubling the rate on small property owners. Let us suppose, for instance, two property owners, one owning property worth $10,000, and another owning property worth $300. If we levy on each a property tax of 1 2/3 per cent (an average municipal tax in North Carolina) and a poll tax of $5, this amounts to taxing the richer man at a rate slightly above 1 2/3 per cent, while the poorer man has to pay $10 tax, or at the rate of 3 1/3 per cent. If a poor man has no property, and thus escapes the payment of the extra poll tax, the very existence of this tax is an inducement to him never to acquire any property, since from his first savings the State, county, and city take away as much as the savings bank would pay him if he had $300. If he only saves $100, they take away far more than such bank would pay him. That this is a real and an important consideration is revealed by statistics from Wake County given by the Auditor in his report for 1896. Over 60 per cent of the taxpayers of this county pay on less than $500 of real and personal property, and the Auditor estimates that 80 per cent of the taxpayers of the entire State pay on less than $500 worth of property. On such persons the poll tax weighs heavily. The richer man does not feel it; the man with no property largely escapes it; but upon the small property owner it hangs as an

incubus. It is not a tax proportioned to ability. It is not even, according to the theory of the general property tax, proportioned to wealth. In what manner its advocates would justify the retention of the tax is not clear."

If the burden on this class is to be increased by making the poll tax unlimited, and applying it for the benefit of bondholders, such change should be made by a constitutional amendment and a clear expression by the people at the ballot box, and not by judicial construction in a divided Court.

The Constitution in a separate section, Article V, section 2, provides that the poll tax shall be applied solely "for the purposes of education and the poor." This is in no wise connected with the equation or limitation, and, therefore, when the poll tax is levied, whether within or beyond the limitation, no bondholder has any interest in the poll tax; whether its assessment in this act be stricken out or not by its limitation to $2, the bondholder can in neither event have any interest in its proceeds, and failure to collect it because in excess of $2 in no wise concerns him. It follows that the bonds issued for any valid purpose are valid, though the poll tax in excess of $2, out of respect for the Constitution, is not collected.

The three cases in 148 N. C., above cited, the last on the subject, reviewed all the authorities, including *Herring v. Dixon, Tate v. Comrs.*, and by a unanimous Court it was held that no case (except one) conflicted with the doctrine therein again laid down, that the poll tax could not exceed $2. and should be applied only for education and the poor, and asserted that this question "cannot again arise."

If the poll tax is unlimited, why did the Constitution provide that it should "never exceed $2"? If the poll tax can be levied and collected to an unlimited extent for the benefit of bondholders, why did the Constitution pledge that it should be applied only for education and the poor, and why was the whole subject reviewed and the constitutional provision sustained by a unanimous Court in the three latest cases on the subject?

The poll-tax payer was not "the forgotten man" when the Constitution was enacted and submitted for adoption.

WALKER, J., dissenting: Concurring in so much of the Court's opinion as annuls the contract between the defendants and Spitzer & Co., I am compelled to dissent from so much of the decision by the Court as holds that the bonds are valid, and especially from that part which affirms the power in the State and county to levy a poll tax exceeding $2, even with the special approval of the General Assembly.

to pay the bonds and interest. The poll tax, in my opinion, can never exceed $2 for any purpose, ordinary, general, or special, and the proceeds of it can be applied to no purpose other than education and the support of the poor. I do not deem it necessary to discuss any feature of the case except the one relating to the levy of the poll tax, in view of the admission in the opinion of the Court, which receives my full concurrence, that if the second of the "three contentions, as to the construction of section 1 of Article V," is adopted, the statute under which it is proposed to issue these bonds is ineffectual (as to this tax) "in its entirety," because, after directing a levy of a poll and property tax, it links the two together and makes it impossible to separate them, by using the words "always observing the constitutional equation between the taxes on the property and the taxes on the poll." The second of these three contentions is thus stated in the opinion: "That the limitation on the poll tax is absolute and can never be exceeded for any purpose, but that the limitation upon property tax may be exceeded for a special purpose with the approval of the General Assembly." My purpose will, therefore, be to maintain that the second of said contentions, so far as the poll tax is concerned, should be adopted now, as it has been before, and this can be done, in my judgment, both easily and successfully, by a recurrence to the plain and emphatic language of the Constitution and the recent decisions of this Court.

Whatever may be gathered, if anything stable or reliable, from the decisions of this Court prior to 1908, it is very certain that in the year named we passed upon the very question after full consideration and an elaborate discussion of it by *Justice Connor* in *Southern Railway Co. v. Board of Commissioners of Mecklenburg County,* 148 N. C., 220. The personnel of the Court was the same *then* as now, with one exception, and we *all* surely thought at that time that the question was ripe for a decision, or if any one was of a contrary opinion he gave no expression to it. If it was not then properly before us, we consumed uselessly a great deal of valuable time and labor in the discussion of a moot question.

In order to show clearly that the question of the maximum of the poll tax was involved in that case (148 N. C., 220), we need only to say that the opinion of the Court shows manifestly that it was considered and treated not only as a question in the case, but as the main question presented by the record, and that it was, in fact, involved, as appears by this language of the Court at p. 245: "We decide that the commissioners of Mecklenburg County acted in accordance with the

statute in failing to levy more than $2 on the poll, and that the statute is a valid exercise of power by the Legislature. This conclusion renders it unnecessary to discuss the much vexed question as to what is or what is not a special purpose within the meaning of section 6 of Article V." The question was whether the commissioners could levy more than $2 on the poll, or the Legislature could authorize them to do so. It further appears from the following language of the Court, if more is required: "We are brought to the conclusion that the act of 1905, ch. 840, is in accordance with the correct interpretation of the Constitution; that the last clause in section 1, Article V, 'and the State and county capitation tax combined shall never exceed $2 on the head,' is imperative and prohibits the levy of any tax upon the poll *for any purpose* in excess of that sum; that section 2 applies the poll tax to the purposes of education and the support of the poor, and that this language withdraws it for any other purpose. We are not inadvertent to the fact that the conclusion in the last respect is not in harmony with what was said in *Board of Education v. Board of Commissioners*, 137 N. C., 310. As we have said, in that case the tax had been collected, and the only question was which of two contradictory provisions should control. Under the construction which we give Article V, the question cannot again arise." We should not overlook the fact that in the outset of the opinion in *R. R. v. Comrs.* a carefully formed doubt is expressed as to "whether the question (now) raised upon the record has been decided by this Court," and this is the conclusion: "It is evident that the question is regarded as an open one, and must be settled upon some permanent basis." The Court then proceeded to settle, finally and forever, this vexed question of taxation which for so long had been the subject of variant individual opinions expressed by the judges. The Court not only held that the question as to the constitutional limit of the poll tax was raised in that case, but it was actually presented, as one point was whether the Legislature, in giving its assent to the levy, was bound to require the equation to be observed, so that a poll tax would be levied with the property tax, even though no poll tax in the county had reached the limit of $2, the railroad company contending that the Legislature was compelled to do so or discriminate against it as a taxpayer. The Court decided that it was not required, as the poll tax limit could not be exceeded. It cannot be successfully contended that the question was not directly involved in *R. R. v. Commissioners of Buncombe*, heard at the same term, 148 N. C., 248. The language of the Court is too plain for misunderstanding, and conclusively shows that it was. It is there said: "The defendant board of commission-

ers, at the time of levying said taxes, were advised and believed that they had no right, under the Constitution, Art. V, sec. 1, and all the acts mentioned in the complaint, to (levy) a capitation tax in excess of $2. His Honor, being of the opinion that the levy of the several taxes set out on the property, without the levy of a corresponding tax upon taxable polls in Buncombe County, was illegal and void, and that the taxes charged to the plaintiff are for that reason illegal, made an order continuing the injunction to the hearing. Defendant board of commissioners appealed." Again it was said: "The question, therefore, upon which the plaintiff's right to maintain its action depends is whether section 1, Article V, makes it imperative upon the Legislature to impose a poll tax in excess of $2, when a property tax in excess of the same amount is levied upon property for any and all purposes, or whether the words, 'that the State and county capitation tax combined shall never exceed $2 on the head,' prohibit a poll tax in excess of that sum for any purpose. We have given the subject our best thought and investigation in the *Mecklenburg case,* and reached the conclusion therein announced." After commenting on the excessive poll tax already levied, the Court further said: "This is significant of the operation of the Constitution, when the imperative command that the capitation tax shall never exceed $2 on the head is disregarded." In that case the decision was placed on what the Court held had been presented, fully discussed, and finally adjudicated in the *Mecklenburg case, supra,* that the poll tax could *never* exceed $2 for any purpose. In the *Buncombe case* the Superior Court had held that the poll tax must be levied, even if it did exceed the limit and was for a special purpose, and that ruling was reversed, for the only reason, as the Court said, that the poll tax could not go beyond the constitutional limit of $2. Again, in *Perry v. Comrs.,* 148 N. C., 528, *Justice Connor,* who wrote the opinion in *R. R. v. Comrs., supra,* said in a concurring opinion: "My investigation, however, in *R. R. v. Comrs., ante,* 220, impressed upon my mind the conviction that the framers of the Constitution of 1868 did not anticipate that any poll tax should be levied for other than 'State and county purposes,' and for those it should not exceed $2, and should be applied only to the purposes of education and the support of the poor." And the Court itself, through *Justice Hoke,* was very pronounced in the expression of its opinion as to what was presented and decided in *R. R. v. Comrs., supra.* There is no uncertain sound or discordant note in what I am about to quote from *Perry's case,* but it rings clear and true, and leaves no peg upon which to hang a doubt as to what was meant. I will italicize the important words. Here it is, as taken literally from the

opinion of *Justice Hoke* in *Perry v. Comrs.,* 148 N. C., at pp. 522, 523:

"While the question presented in this appeal is one of commanding interest and far-reaching importance to the entire State, its correct solution, in our opinion, is readily deducible from decisions of this Court heretofore made and which bear upon the subject with more or less directness. Article V, section 1, of the Constitution, after direction that the General Assembly shall levy a capitation tax on every male inhabitant of the State over 21 and under 50 years of age, and that this poll tax on each shall be equal to the tax on property valued at $300, provides that the State and county capitation tax combined shall never exceed $2 on the head. Section 2 of the article provides that the State and county capitation tax shall be applied to the purposes of education and the support of the poor, and that not more than 25 per cent of such tax in any one year shall be appropriated to the support of the poor. Section 6 of the same article provides that the taxes levied by the board of commissioners for county purposes shall be levied in like manner as the State taxes, and shall never exceed the double of the State tax, except for a special purpose and with the special approval of the General Assembly. *Construing these sections,* the Supreme Court, at the last term, in *Railway v. Board of Commissioners of Mecklenburg County* and *Railway v. Board of Commissioners of Buncombe County,* held that this restriction on the amount of the poll tax contained in section 1 shall be given the *significance* which its terms *clearly* import—that the State and county capitation tax combined shall never exceed $2 on the head, and that this limit fixed on the poll tax for the purposes indicated, that is, for the State and county, shall be always observed, notwithstanding that a given tax may be for some special purpose and with the special approval of the General Assembly."

What does all this mean, if not that the question as to the limitation of the poll tax for *all* purposes was presented in *R. R. v. Comrs.,* and decided?

Surely, it was not intended to say that the Court by a mere dictum had "construed those sections" (Art. V, secs. 1, 2, and 6) and "held" that the amount of the poll tax cannot in any case exceed $2, as the learned justice said that is the "*significance* which its terms clearly import." I am not referring to these as the views of only one justice, but as those of all of them, reinforced by a separate concurring opinion of *Justice Connor,* who spoke for the Court in *R. R. v. Comrs.,* as to what was then before us by the concurrent testimony of all the judges, and as to what was decided, and intended to be written into

his opinion, which was afterwards unanimously accepted and approved by this Court. The personnel of the Court when *Perry's case* was decided was the same as when *R. R. v. Comrs.* was decided, and as it is now, with one exception as heretofore noted.

So far I have attempted to show, and, I think, have shown, by the words of other judges with whom I concurred, that this question as to the maximum limit of the poll tax had been before the Court recently in the cases cited, and had been decided. It was decided in *Perry's case,* for the general question of taxation was there open for discussion, and especially the question as to the extent of the power to tax both in State, counties, and municipalities. What was said by *Justice Hoke* was clearly pertinent to the question in hand, and was a clear-cut decision of it.

In *R. R. v. Schutte,* 103 U. S., 118 (26 L. Ed., 336), the Court said on the doctrine of precedents: "Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, the decision was in no such sense a dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much part of the judgment of the Court as was that on any other of the several matters on which the case as a whole depended." *R. R. v. R. R.,* 199 U. S., 160.

This brings me to the important question as to what was decided in those cases, and in regard to this there can be no reasonable doubt, if the words are given their plain and unmistakable meaning. In *R. R. v. Comrs., supra,* the Court says at pp. 240 and 241: "The suggestion that after that limit ($2 on $300 worth of property) was passed, the amount of poll tax is left to the uncontrolled discretion of the General Assembly, we do not think finds support in the language of the Constitution, but is excluded by the positive command that 'the State and county tax combined shall never exceed $2 on the head,' and the further provision limiting its application to the purposes of education and the support of the poor." Reviewing the two different constructions of the tax provisions in the Constitution, the Court then proceeds as follows: "If we adopt the other construction we confine the poll tax 'for all purposes' to $2, as provided by the Constitution, and apply it to the purposes directed—education and the support of the poor—and 'to no other purpose.' It makes the capitation tax uniform throughout the State, thus restoring the principle incorporated in the

Constitution of 1776 as amended in 1835. It conforms to the express declaration of the people, as expressed in the amendment ratified in August, 1900, which provides that 'every person presenting himself for registration shall pay, and before he shall be entitled to vote he shall have paid, on or before the first day of May of the year in which he proposes to vote, his poll tax for the previous year, as prescribed by Article V, section 1, of the Constitution.' It is a strange anomaly to say that, while the right to vote is restricted by the payment of a poll tax which 'shall never exceed $2,' the voter may be disfranchised for failure to pay a poll tax the amount of which is left to the discretion of the General Assembly, the Constitution thus guaranteeing to every citizen otherwise qualified the right to vote by paying a poll tax of $2, and, by construction, giving the General Assembly the power to increase it to any amount they may deem proper. Whatever may have been the construction prior to 1 January, 1901, we find in this amendment, which then became a part of the Constitution by the vote of the people, a construction which gives full force and effect to the provision that the State and county capitation tax combined shall never exceed $2, as prescribed in Article V, section 1." And finally the Court decided that Article V, section 1, is mandatory in the prohibition of any poll tax for any purpose whatsoever beyond $2, and that the proceeds of the tax, when levied and collected, must be applied to the specific purposes designated in section 2, and to no other.

How the Court could have expressed itself with less ambiguity, I am at a loss to conceive. There is but one meaning that can be given to such plain and unmistakable language, namely, that $2 is the *ne plus ultra* of poll taxation, as clearly indicated in the Constitution by the use of the word "never," which is the universal adverb of negation. But, as we have shown, when discussing another branch of the subject, the Court afterwards deliberately construed the opinion in *R. R. v. Comrs.*, if we may speak of something which is perfectly clear as having been construed—and thus stated its view of that case: "It was *held* that this restriction on the amount of the poll tax contained in section 1 shall be given the significance which its terms *clearly* import—that the State and county capitation tax combined shall *never* exceed $2 on the head, and that this limit is fixed on the poll tax for the purposes indicated—that is, for the State and county —shall be always observed, notwithstanding that a given tax may be imposed for some special purpose and with the special approval of the General Assembly." Summing up the matter, we find this to have been held in *R. R. v. Comrs.*, 148 N. C., 220:

1. That the question had not been decided before, but was then an

open one, ready to receive an authoritative consideration and final settlement of it upon a permanent basis.

2. That the State and county poll tax can never for any purposes, or for all purposes, exceed $2.

3. That the poll tax must always be applied to the purposes of education and the support of the poor.

That decision, in respect to the poll tax, was unanimous, with four of the justices now sitting in the Court. The question was involved in the case, because the Court said it was, and was at great pains to decide, it being one of great importance, and the learned justice who wrote the opinion reviewed all the pertinent authorities at some length, because the question was in the case for decision, and after unanswerable argument the Court arrived at the conclusions which I have just stated, and it was then said that the question was finally closed and could not arise again. Could language be more clear, direct, and emphatic than it was in that case, and in the subsequent case of *Perry v. Comrs.?*

It is unnecessary to discuss previous cases, as it is the last utterance of the Court that counts, and gives the binding rule of action. If other rulings have been made of a character to justify reliance upon them as settling the law, and individuals have entered into contracts because of them, the latter may be valid under another principle; but so far as the present case is concerned, where no such thing can possibly have occurred and no vested right has been acquired, or other right which is under the protection of the Federal or State Constitution, and as the transaction is still *in fieri,* no sound reason can be advanced for our not being controlled by the last decisions, even if it be conceded that there are others of prior date to the contrary. The last word in such a case is, and should be, the prevailing one. There may have been a variety of opinions expressed or intimated in former cases, many if not all of which were dicta, in the true sense of that word; but whether so or not, those cases were reviewed carefully and minutely by this Court in *R. R. v. Comrs., supra,* and held not to conflict with the decision in that case, as it was stated by the Court that the question had not been closed, but was still open for debate and final decision, and the Court then proceeded to establish finally the true rule and to foreclose the controversy so that it cannot arise again.

The Court in that case did not limit itself to a discussion of the question as to how much poll tax could be levied for what has been called "ordinary expenses," but the opinion took a much broader sweep, and resulted in a *decision* as to what was the extreme limit of the poll tax for all purposes—"ordinary" and "special"—and the con-

clusion was that no greater sum than $2 could be levied for the two combined, or for any and all purposes, that being the only permissible meaning of the words of Article V, section 1, "the State and county capitation tax combined shall never exceed $2 on the head." The framers of the Constitution used the most intensive and at the same time extensive word within the English vocabulary in order to set an impassable limit to the poll tax, which would apply to all cases of taxation, and the term, "shall *never* exceed $2," allows of no exception, but is as broadly inclusive as any words could possibly be. The section says that the *State* and *county* tax combined shall never exceed $2. Is a tax any less a county tax because it is levied for a special purpose? Is not a tax for road purposes of any kind a county tax? How, then, could any term employed to express the will of the people in forming their organic law be more all-embracing? Besides, there is no authority to be found in any other article or section of the Constitution for levying a poll tax, except in section 1 of Article V. There is no mention of a poll tax in section 6 of that article or elsewhere, except in section 2, Article V, which provides how the proceeds of the poll tax shall be applied; and this answers the suggestion that the amendment of 1900 (Const., Art. VI, sec. 4), prescribing the qualification of voters, refers only to the payment of the poll tax provided for in Article V, section 1. The latter section is the only one which authorizes any poll tax for State and county purposes of whatever kind, and therefore the reference to it embraces the entire range of taxation on the poll for those purposes. The quotation in the opinion of the Court from *Perry v. Comrs.* with reference to this matter does not militate against this view, but rather supports it. The learned justice who wrote the opinion was referring altogether to taxation by a school district and not by a county, and when he mentions the State and county poll tax authorized by Article V, section 1, he says, as he had said before in the same opinion, "This poll tax, as we have seen, can never exceed $2." *Justice Connor* also adopted this view for the Court in *R. R. v. Comrs., supra,* and at the risk of some repetition, but in order to make the point perfectly clear, I will again quote that part of his language relating to this feature of the case: "It is a strange anomaly to say that, while the right to vote is restricted by the payment of a poll tax, which 'shall never exceed $2,' the voter may be disfranchised for failure to pay a poll tax the amount of which is left to the discretion of the General Assembly, the Constitution thus guaranteeing to every citizen otherwise qualified the right to vote by paying a poll tax of $2, and, by construction, giving the General Assembly the power to increase it to any amount they may

deem proper. Whatever may have been the construction prior to 1 January, 1901, we find in this amendment, which then became a part of the Constitution by the vote of the people, a construction which gives full force and effect to the provision that the State and county capitation tax combined shall never exceed $2, as prescribed in Article V, section 1." This conflicts with the view of the Court in this case upon the subject. Article V, section 1, established the ratio of taxation between poll and property, and section 6, the ratio between the State and the county tax, but all authority to levy the poll tax is derived from Article V, section 1, and its maximum is thereby fixed at $2.

Nothing can be gained for the argument of the Court by a reference to Article VII, section 7. That section does not confer any power to tax upon counties, for they already had the power under Article V; but it merely restricts the power to tax, so as to require a vote of the people where the proposed tax is not for necessary expenses. It is not an enabling but a disabling clause; not creative, but clearly restrictive. Its words are those of prohibition instead of authorization, at least as to counties, who already had been invested with the power of taxation. Why give it to them again, if they already had it? This Court has always regarded that section as giving no new or additional power, but as curbing that already given to counties, and this our decisions will show. Municipal corporations, such as cities, towns, school districts, etc., have, with respect to their power of taxation, been placed on a different basis from the State and its counties, as our decisions will show.

If taxes have been levied in the past, beginning in 1868-9, in violation of the plain words of the Constitution, it is no good reason for changing its meaning by judicial construction to meet the exigencies of the hour.

Judge Cooley, the eminent author and expounder, in his treatise on Constitutional Limitations (7 Ed.), at p. 75, says: "The Constitution of the State is higher in authority than any law, direction, or order made by any body or any officer assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity. But no mode has yet been devised by which these questions of conflict are to be discussed and settled as abstract questions, and their determination is necessary or practicable only when public or private rights would be affected thereby. They then become the subject of legal

controversy; and legal controversies must be settled by the courts. The courts have thus devolved upon them the duty to pass upon the constitutional validity, sometimes of legislative and sometimes of executive acts. And as judicial tribunals have authority not only to judge but also to enforce their judgments, the result of a decision against the constitutionality of a legislative or executive act will be to render it invalid through the enforcement of the paramount law in the controversy which has raised the question." If we give full rein to every other department of the Government in the construction of the Constitution, we would soon be confronted by the very evil which it was adopted to prevent. While we will treat with proper deference and consideration any established departmental practice or usage, as perhaps indicating, by the impression made upon those who have followed it, what the Constitution means, where the custom has been continued throughout a series of many years, we are not bound by it, and, as Judge Cooley says, the courts must, at last, determine what that meaning is as expressed therein. The Court cannot abdicate its right to construe the Constitution, or assign it to any one else. It may be that in the enormous growth, progress, and development of the State we may find a potent reason for enlarging the limit of taxation adopted in 1868. This can be done though, not by us, whose province is to interpret only what has been written, but by one of the two methods prescribed by the Constitution itself, which would require the assent of the people. (Art. XIII.)

Something has been said about the advantage to the citizen, under the statute now being construed, in the new system of repairing the roads over the old; but the question involved here is much broader, and more far-reaching in its results, than is anything contained in the statute under consideration. It concerns the general power of the counties to tax the poll, with the consent of the Legislature, without any limit and for any special purpose, and is not restricted to a poll tax of 35 cents and a property tax of $1.05, which are the limits fixed by this statute. Under the Constitution an unlimited power of taxation was not intended to reside anywhere. The framers of the Constitution could no more estimate what rate of taxation would be required for the "ordinary" usual or "everyday" expenses of a county than they could for its other expenses. Some counties would require more than others, and therefore one rate was fixed for all, which was supposed, at the time, to be sufficient for the government of the counties, if economically administered. If they miscalculated, we are not at liberty to correct the error.

My conclusion is that the poll tax provided for in this statute is not authorized by the Constitution, and, if it is, that the proceeds thereof

cannot be paid on the bonds, or the interest, but should be applied, as directed by the Constitution, Art. V, sec. 2, to the purposes of education and the support of the poor. This being so, the statute in question is invalid, upon the principle stated in the majority opinion, that the statute must stand or fall in its entirety, because after directing a levy of a poll tax and a property tax, it links the two together in such a manner as to make them indissoluble, by providing that the constitutional equation between the two kinds of taxes shall always be observed. It is impossible for me to see why this is not the logical and inevitable result, if my position is correct, that the levy of the poll tax is void. This invalidates the entire statute, as the one tax cannot exist without the other, but both must coexist; being united as it were by an inseverable ligament. We applied the same principle most recently in *Keith v. Lockhart,* 171 N. C., 451. It was there said by *Justice Hoke* for a unanimous Court: "It is insisted for defendant that only the proviso being unconstitutional, this can be eliminated and the statute authorizing a special tax upheld. It is the recognized principle that 'Where a part of the statute is unconstitutional, but the remainder is valid, the parts will be separated, if possible, and that which is constitutional will be sustained.' In Black on Constitutional Law the rule is said to be: 'If the invalid portions can be separated from the rest, and, if after their excision there remains a complete, intelligible, and valid statute capable of being executed, and conforming to the general purpose and intent of the Legislature as shown in the act, the same will not be adjudged unconstitutional in toto, but sustained to that extent.' The position, however, is not allowed to prevail when the parts of the statute are so connected and dependent, the one upon the other, that to eliminate one will work substantial change to the portion which remains. Thus, in Black's work the author further says, page 63: 'And if the unconstitutional clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole statute must fall.' Speaking to the same subject in the first of the Employer's Liability Cases, 207 U. S., pp. 463-501, the present *Chief Justice White* said: 'Equally clear is it, generally speaking, that when a statute contains provisions which are constitutional and others which are not, effect must be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that what is indivisible may be divided. Moreover, even in a case where legal provisions may be severed in order to save, the rule applies only when it is plain that the Legislature would have enacted the legislation with the unconstitutional provisions eliminated. Citing *Illinois Central R. R. v. McKenonill,* 203 U. S., 514."

Another reason is that the tax scheme in this statute is and was intended to be an entire and indivisible one, and if any essential part of it is stricken from it, and the remainder enforced, it would result in doing something which was never contemplated, or authorized to be done, and, therefore, lack legislative sanction. Having reached the conclusion that the statute in its present form is void, I need not discuss the other phases of the case, as the one reason assigned for my view is all-sufficient to sustain it, if I am right in the conviction that the poll tax is limited by the Constitution, for all purposes, to $2, or, in the language of the instrument itself, can *never* exceed that amount. *Justice Rodman* thought that the poll and property tax were so proportioned that each class of taxpayers might exercise a restraint upon the other, and for this reason they were inseparably linked together. *R. R. v. Holden,* 63 N. C., 410. And the same was said in *Russell v. Myer.* 120 N. C., 180. *Justice Clark* said very truly that the poll and property tax, as fixed by Article V, section 1, are standards for each other, whatever the poll is, placing a limit on the property tax, and the property tax creating the equation between the two. Under this adjustment the property tax on $100 worth of property could not exceed one-third of the poll tax, and the entire poll tax must be equal to and never exceed three times the property tax on a like amount of property. This was supposed to fairly apportion the burden on these two subjects of taxation—polls and property; and out of this adjustment there resulted a balancing of the two opposing forces, by which one is protected against oppression by the other.

We cannot suppose that the levy in this statute of one $^{5}/_{100}$ dollars on the poll and 35 cents on property was intended to be otherwise than additional to the tax which had already been levied in Alexander County up to the limit of $2, because the statute expressly says it shall be. There is no way, therefore, of reconciling this levy with the constitutional mandate as to the amount of the entire poll tax, and no escape from the conclusion that if it is void the statute falls with it. We cannot argue that it shall stop at $2 when the statute expressly provides to the contrary.

It will be seen, therefore, that I agree with the *Chief Justice,* that in no event can the poll tax exceed $2 for any or for all purposes; but I concur with the majority that if this be so, the statute is nugatory (as to this tax), as there was one entire and indivisible scheme of taxation contemplated by the Legislature, which is composed of poll tax and property taxes at the rates designated in the statute, and which must stand or fall as a whole.

I may properly add that the quotation from my opinion in *Collie v. Comrs.,* 145 N. C., 183, made in the opinion of the Court, had refer-

ence to the particular question then before us, as to the school tax under Article IX of the Constitution, and when read with the context will be found to harmonize, in every respect, with the views herein stated. I said then that the poll tax could not exceed $2, except, perhaps, under Article IX, and my reasons for so holding were fully given and need not be repeated here.

It has not been denied that there are some ill-considered dicta, favoring the view of the majority, which may be picked up here and there, like flotsam and jetsam, from the current of judicial opinion; but they were jettisoned long ago, and in 1908 this Court through *Justice Connor*, reviewed, as he said, "every case from which any light may be found upon this difficult question" (148 N. C., 239), and most exhaustively (naming all of those cited by the majority), and deliberately concluded, first, that the poll tax can never exceed $2 for any purpose, ordinary, general, or special, and, second, that the proceeds of the poll tax must be applied to the purposes mentioned in the Constitution and to no other, in the latter respect repudiating what was said in *Board of Education v. Board of Commissioners,* 137 N. C., 310, decided in 1904, and upon which the majority rely and from which they quote. "We are not inadvertent to the fact that our conclusion, in this last respect, is not in harmony with what was said in *Board of Education v. Board of Commissioners,* 137 N. C., 310," is the exact language of the Court, by *Justice Connor,* in the *Mecklenburg case* (148 N. C., at p. 245), and the "last respect" to which he referred was "that Constitution, Article I, sec. 2, applies the poll tax to the purpose of education and the support of the poor, and this language withdraws it for any other purpose." The distinct question in the *Mecklenburg case* (148 N. C., 220) was whether a poll tax above $2 could be levied, the railroad company insisting that it should be, so as to prevent unjust discrimination against it, and the Court held that the poll tax, for any and all purposes, was absolutely restricted to $2. So that the question was *there* undoubtedly presented and decided, if such a thing was possible. And in the *Buncombe case* the issue was, if anything, more clear-cut and pronounced, and the decision more emphatic. The point, and the single point, was whether the Superior Court held correctly that the poll tax could exceed $2 in any case. *Justice Connor* thus stated the one and only question to be: "Whether the words, 'that the State and county capitation tax shall never exceed $2 on the head,' prohibit a poll tax in excess of that sum for any purpose," and the answer was that they do, and that was the *ratio decidendi.* The great value of the discussion in the *Perry case* is that the Court told us, in the most explicit and unmistakable language, what the *Mecklenburg*

and *Buncombe cases* had decided, as to the limit of the tax, both in respect to ordinary and special purposes.

The three cases in 148 N. C., therefore, are the latest authoritative decisions and precedents upon the distinct subject of this appeal, and for that reason I follow and feel bound by them. I dissented in *Hargraves v. Comrs.*, as the record shows, but by inadvertence my dissent was not entered in the official volume (168 N. C., 628) of the reports. This question was not discussed or decided in that case. The decision there was based upon a question entirely foreign to this discussion.

It remains only for me to say that the meaning of a Constitution—statutes and other instruments as well—is fixed at the time they are written, and is not changed by subsequent events. Construction, therefore, should be confined to the written word, and it is utterly immaterial how individual judges may *apparently* have assented to dicta, the question finally being whether we should follow as binding precedents the well considered and final judgments of this Court, which were rendered in 1908, upon this very question, or reject them. It is obvious that what is said in *Perry v. Comrs.* about taxation by subdivisions of a county, such as school districts, can have no bearing upon the limitation of the State and county capitation tax, as it does not apply to that form of taxation, and, therefore, there can be no possible conflict between *Perry's case* and the *Mecklenburg case.*

We are concerned not with results or consequences, but only with what the law is. Expediency has nothing to do with the question. Suspension of business and ultimate bankruptcy are not ordinarily products of frugality. "Live within your means" is the safest rule in public as well as in private affairs, and was commended to us by this Court in *French v. Comrs.*, 74 N. C., 692, when discussing this same question of taxation, as one of great practical wisdom.

I deem it of the utmost importance that we should adhere to what has already been deliberately and solemnly adjudged, *stare decisis* being not only a wise but a wholesome maxim of the law, to which strict observance is due, and changes in construction should not be made except for the most cogent reasons. The power of expounding the laws—which includes the great and responsible duty of deciding whether legislatures, State and municipal, have transcended in their past action the limits of their authority as defined by the Constitution—belongs to the judiciary. Sedgwick St. and Const. Law, p. 253. If it turns out that any change in the law is necessary for the public welfare, and to meet new conditions which require an extension of the legislative power, let it be done by the people in the regular exercise of their sovereign will, and not otherwise. Until it is thus done, I

must read the Constitution as, in my opinion, it is plainly expressed, and endeavor to enforce its provisions accordingly, for such is my duty. In performing this duty, though, I will always regard and consider with respect and deference the opinions of my learned brethren.

It may be that my brethren of the majority are right, and that I am wrong; but however this may be, their decision shall hereafter be the law with me, as I have a strong conviction that a question of construction touching the organic law of the State should be settled once for all, and not be subjected constantly to the varying opinions or the personal notions of the judges. It should be made to rest upon a permanent and unchangeable basis. As said by one of my predecessors, in a similar case, "my only object in expressing my views at all has been to call attention to the subject, so that, if deemed necessary, steps may be taken to make the law perfectly free from doubt, one way or the other," and thus entrench and secure it firmly against the alternation of opinion.

PER CURIAM. Since the opinions in this case were handed down our attention has been called to the objection made to the form of the bonds. The objection is made that the form of the bonds is not in accordance with the statute. The defendants contend that the bonds are proper in form and payable as required by the statute.

We are of opinion that the form of the bonds is correct and that they are issued and payable substantially as required by law.

The judgment of the Superior Court in that respect is

Affirmed.

MYRA T. JENKINS ET AL. v. GRAHAM H. LAMBETH ET AL.

(Filed 15 November, 1916.)

1. Estates—Contingent Remainders—Vesting of Interests—Donor's Death—Trusts—Deeds and Conveyances—Interpretation.

The general rule, applying to deeds in trust as well as wills, that when a testator, after a prior limitation of his property, makes, in present terms, a disposition of the same in remainder to his own heirs or right heirs, these heirs, nothing else appearing, are to be ascertained and determined on as of the time of his death, favored by the courts because it has the tendency to hasten the time when the ulterior limitation takes on a transmissible quality, is not a rule of substantive law which the courts are imperatively required to follow, but a rule of interpretation adopted to ascertain correctly the intent of the donor, and may be departed from where a different meaning is disclosed from a proper perusal of the entire instrument.

2. Same—Right Heirs—Distribution.

The donor conveyed, in 1875, certain of his lands in trust for the sole and separate use of his wife for life, upon her death for the use and benefit of their children or the representative thereof living at her death, in trust to be conveyed in fee to such as may be living at the death of the donor; but should the wife die before the donor, her husband, without leaving such children or representatives thereof, then the trustee to convey the lands to the donor, his heirs and assigns, in fee; and should the wife die after her husband, the donor, leaving no such child or representative, then the trustee shall convey the lands in fee to the right heirs of the donor, whosoever they may be, their heirs and assigns. The donor predeceased his wife, who is still living without child or representative thereof, and she and the "right heirs" of the donor are the only persons interested. Construing the entire instrument as of its date to effectuate the evident intent of the donor, it is *Held*, the distribution of the estate was postponed until the death of the wife, the life tenant, at which time only can the designated heirs or true owners be ascertained and determined.

CIVIL ACTION heard on motion for final judgment before *Bond, J.*, at March Term, 1916, of PASQUOTANK.

The action was to procure a sale of certain real estate conveyed in 1875 by R. C. Jenkins, now deceased, in trust for his wife, Myra T., one of the plaintiffs, for life, with remainders over, etc. The land having been sold under decree in the cause and the sum of $8,000 realized and held for distribution, on this, a motion for final judgment, plaintiffs or some of them contended that, as shown by decree, the proper disposition of the fund in question is controlled by the terms of the deed of R. C. Jenkins, the former owner, and that under said deed and subject to the life estate of said Myra T., the life tenant, the remainder in the fund is owned by the right heirs of R. C. Jenkins, these heirs to be ascertained as of the date of his death, and defendants contending that by correct construction of said deed the ascertainment of these heirs is postponed till the death of the life tenant. On the hearing, his Honor being of opinion with the defendants, judgment was so entered, and the plaintiffs, some of the present heirs at law, excepted and appealed.

J. B. Leigh for guardian ad litem.
Aydlett & Simpson for appellant.

HOKE, J., after stating the case: From the pleadings and admitted facts it appears that in March, 1875, Dr. R. C. Jenkins conveyed the property in question to Palemon John, Esq., in trust, as follows:

"First. For the sole and separate use and benefit of Myra T. Jenkins, wife of said R. C. Jenkins, the party of the first part, for and during her natural life;

"Secondly. Upon the death of said Myra T. Jenkins, the said R. C. Jenkins, surviving, then to hold the same for the sole use and benefit of such child or children of the said R. C. and Myra T. Jenkins or the representative of such child or children as may be living at the death of said Myra T. Jenkins, in trust to convey the same in fee to such child or children of the said R. C. and Myra T. Jenkins, or the representatives of such as may be living at the death of said R. C. Jenkins, share and share alike, that is, to each child living and the representatives of such child as may be dead, one share;

"Third. Should the said Myra T. Jenkins die leaving no child or children or the representatives of such by her said husband, the said R. C. Jenkins, and also leaving her said husband surviving her, or should she die leaving child or children, or the representatives of such, and they should die before said R. C. Jenkins, then in either of these events the party of the second part, his heirs or assigns, shall convey the land herein described to the said R. C. Jenkins, his heirs and assigns, in fee;

"Fourth. Should the said Myra T. Jenkins die after her husband, the said R. C. Jenkins, leaving no child or children by him, or the representatives of such child or children, then in this event the said P. John, the party of the second part, shall convey in fee the land herein conveyed to the right heirs of the said R. C. Jenkins, the party of the first part, whosoever they may be, to them, their heirs and assigns forever."

That Myra T. Jenkins, the life tenant, is still living; that the grantor, R. C. Jenkins, died before the institution of the suit, and that there was no child or representative of such child surviving, and that the parties interested in the fund under the will are the said life tenant and the "right heirs" of R. C. Jenkins, present or prospective, as the case may be.

It is undoubtedly the general rule that when a testator, after a prior limitation of his property by will, makes, in present terms, a disposition of the same in remainder to his own heirs or right heirs, these heirs, nothing else appearing, are to be ascertained and determined on as of the time of his death. This is not only the primary meaning of the word heirs, but the position is said to be favored by the courts because in its tendency it hastens the time when the ulterior limitation takes on a transmissible quality. *Newkirk v. Hawes*, 58 N. C., 265; *Rives v. Frizzle*, 43 N. C., 237; *Jones v. Oliver*, 38 N. C., 269; *Welch v. Blanchard*, 208 Mass., 523; *Wallace v. Diehl*, 202 N. Y., 156, reported also in 33 L. R. A., n. s., pp. 1 and 9, where the general question is treated in a full and instructive note by the editor. As said in some

of the cases on the question, however, notably in *Heard v. Read,* 169 Mass., 216, and others, this is not a rule of substantive law which the courts are imperatively required to follow, but is a rule of interpretation adopted as tending to ascertain correctly the intent of the testator, and may be departed from where a different meaning is disclosed from a proper perusal of the entire instrument. And, considered in that view, the same rule of interpretation should prevail in construing a deed of trust where the ultimate disposition in remainder is to the heirs or right heirs of the grantor; but, as in the former case, the rule should yield when, construed by accepted principles, the intent and meaning of the deed is to clearly postpone the time for ascertainment of the heirs to a later period.

In the present case, all of the interests contemplated and provided for in the deed having disappeared except that of the life tenant and the right heirs of the grantor, and he being now dead, under the general rule referred to the claims of these parties might and should be very well disposed of as vested interests (Tiedeman on Real Property, sec. 403), but for the language of the fourth limitation, that being the clause which is now controlling on the question, "Should the said Myra T. Jenkins die after her husband, the said R. C. Jenkins, leaving no child or children by him or the representatives of such child or children, then, in this event, the said P. John, the party of the second part, shall convey in fee the land herein conveyed to the right heirs of the said R. C. Jenkins, the party of the first part, whosoever they may be, to them, their heirs and assigns forever."

This deed of trust, made in 1875, to provide a life estate for the wife, then in support of certain contingent estates with the ulterior limitation, as recited, must be construed as of the time when made. What did the grantor then convey, according to the true intent and meaning of the instrument? When, in providing for the return of the estate to his own right heirs, he specified that on the death of his wife the trustee should convey to his own right heirs, he contemplated that there should then be an act *inter partes* between the trustee and them; and when he specified further that this conveyance should be to his own right heirs, "whosoever they should be," he clearly intimated those of his heirs who were such at the time indicated—at the termination of the life estate. The deed, then, by its terms and meaning having fixed upon the death of the life tenant as the time when the heirs of the grantor should be ascertained, under our authorities his Honor was right in holding that the limitation is still a contingent one, the person to take being uncertain, and the distribution of the fund must be postponed until the true owners can be properly determined

on and their interest declared. *Rees v. Williams,* 165 N. C., 201; *same case,* 164 N. C., 128; *Latham v. Lumber Co.,* 139 N. C., 9; *Bowen v. Hackney,* 136 N. C., 187, citing *Hunt v. Hall,* 37 Me., 363; Fearne on Contingent Remainders, Class 4.

We find no error in the record, and the judgment of the court below is Affirmed.

WALKER, J., concurring in result.

PITTSBURG LIFE AND TRUST COMPANY v. JAMES R. YOUNG, COMMISSIONER OF INSURANCE.

(Filed 15 November, 1916.)

1. Taxation—License Tax—Foreign Corporations.

Foreign corporations do business here by comity of the State, and the latter may impose a license tax as a condition upon which such corporations may do business here under the protection of our laws, where such is not an interference with interstate commerce, or the tax otherwise invalid.

2. Same—Gross Earnings.

A license tax imposed as a condition upon which a foreign life insurance company may do business here may be fixed by a percentage upon its gross earnings within our borders.

3. Same—Statutes, Interpretation.

The various statutes contained in Schedule B of our revenue laws, taxing gross earnings within our borders of foreign life insurance companies, brought forward in section 5175 of the Revisal and subsequent statutes, and section 4515 of the Revisal, codifying and classifying the insurance laws, should be construed as a whole as constituting one scheme of taxation, and, thus construed, it is *Held,* that the tax imposed upon the gross earnings of such companies derived within the State is a license or occupation tax.

4. Same—Direct Remittance.

Where a foreign life insurance company has acquired business by reinsurance from other foreign companies, the policies being on the lives of residents of this State, who remit their premiums direct to the home office, the company by receiving remittances in this manner may not escape taxation to that extent upon its gross earnings, derived within the State, for the license tax imposed by the statutes is not a tax upon the receipts, but a tax equal to 2½ per cent on their gross amount, and not confined to cash received or collections actually made within our borders.

5. Taxation—License Tax—Gross Receipts—Constitutional Law—Commerce.

The license tax imposed upon the gross receipts of insurance companies on business written within the borders of our State, Revisal, secs. 5175, 4515, is not in contravention of the fourteenth amendment to the Constitution of the United States, as to due process and the equal protection of the law, nor a burden upon interstate commerce, being restricted to intrastate commerce, and not extending beyond the boundaries of the State.

CIVIL ACTION tried before *Bond, J.*, at July Term, 1916, of WAKE.

The suit was brought to recover certain license taxes which had been paid by the plaintiff, under protest, to the defendant for the privilege of carrying on its business in this State, and was heard upon demurrer to the complaint, which, in substance, is as follows:

The plaintiff, complaining, alleges:

1. That it is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office and place of business in the city of Pittsburg, where it is conducting, among other things, a life insurance business.

2. That the defendant, James R. Young, is Insurance Commissioner for the State of North Carolina.

3. That in the year 1906 the plaintiff took over and assumed a large number of policies of life insurance which had been issued from time to time to residents of the State of North Carolina by the Security Trust and Life Insurance Company, a corporation organized under the laws of the State of Pennsylvania and having its home office in Philadelphia, Pennsylvania; that in the year 1908 the plaintiff took over and assumed a large number of policies of life insurance which had been issued fom time to time to the residents of the State of North Carolina by the Washington Life Insurance Company, a corporation organized under the laws of the State of New York and having its home office in New York City; that at the time of the said reinsurances this company was not licensed to transact business in the State of North Carolina and was not transacting business therein, and contracts of reinsurance between the said two companies and this plaintiff were executed and delivered beyond the boundaries of the State of North Carolina, one contract being executed and delivered in the State of New York and the other contract being executed and delivered in the State of Pennsylvania; that in the year 1910 the plaintiff applied to the Insurance Commissioner of the State of North Carolina for a license to transact business in the said State, and received a license so to do 1 April, 1910, and thereafter it has continued to be licensed and has transacted business in the said State of North Carolina, and

from time to time it has issued policies of life insurance to residents of the said State; that by the terms of all of the said policies so issued by the plaintiff and issued by the companies reinsured the premiums are payable at the home office of the company issuing the same.

4. That, as it is advised and believes, and so alleges, it was, under the laws of the State of North Carolina, liable for a license tax on the 31st day of December and on the 30th day of June of each year of 2½ per cent only on the premiums collected by it in said State from its policyholders, including policyholders whose policies had been reinsured as heretofore stated, residing in said State of North Carolina, and that it was not liable for said license tax upon the premiums collected by mail at the home office from its policyholders.

5. That the said Insurance Commissioner required it to pay to him a license tax upon all premiums collected by it from its policyholders residing in the State of North Carolina, whether collected within the State of North Carolina or collected by it at its home office by mail, upon the penalty of the revocation by him of its license to do business in North Carolina if it should fail to pay the same.

6. That in the years 1912, 1913, and 1914 plaintiff paid to the defendant, under its protest that the execution of the same as part of its license tax was illegal, the aggregate sum of $2,561.52, having theretofore paid to him the full amount of the said license tax admitted to be due, and that the payment of that part of the tax claimed to be illegal was paid by plaintiff under protest to prevent a revocation of its license, which was threatened by the defendant.

7. That, as plaintiff is advised and believes, and so alleges, the demand by the State from the plaintiff of a tax measured by premiums received in Pennsylvania on policies issued by other companies to residents of North Carolina and assumed by the plaintiff before it was licensed to do business in this State is a violation of the fourteenth amendment to the Constitution of the United States, and that likewise a tax measured by the premiums received in Pennsylvania on any policy issued by the plaintiff to residents of North Carolina after it was licensed to do business in this State is a violation of the said fourteenth amendment.

8. That, as the plaintiff is advised and believes, and so alleges, it is entitled to recover from the said Insurance Commissioner the aggregate sum of $2,561.52.

Wherefore, the plaintiff demands judgment that it recover against the defendant the sum of $2,561.52, and the costs and disbursements of this action.

JOHN W. HINSDALE,
Plaintiff's Attorney.

In order to get a precise understanding of the question involved in this appeal, it will be necessary to set forth here those parts of our statute law relating to the subject. The provisions of the Revisal 1905 are as follows:

Section 4715 (2): "All of said companies shall pay a tax of 2½ per centum upon the amount of their gross receipts in this State."

Section 4719: "Every general agent shall, within the first thirty days of January and July of each year, make a full and correct statement, under oath of himself and of the president, secretary, or some officer at the home or head office of the company in this country, of the amount of the gross receipts derived from the insurance business, under this chapter, obtained from residents of this State, or on property located therein, during the preceding six months, and shall within the first fifteen days of February and August of each and every year pay to the Insurance Commissioner the tax imposed by this chapter upon such gross receipts."

Section 4720 provides: "That every policyholder shall, on demand of the Commissioner, furnish information of all insurance held by him, to enable the Insurance Commissioner the better to enforce the payment of the taxes imposed by this chapter."

Section 4806: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein; and all contracts of insurance the application for which is taken within this State shall be deemed to have been made within this State, and shall be subject to the laws thereof."

The above extracts are taken from the chapter in the Revisal on Insurance.

It is provided by the Public Laws of 1911, ch. 46, sec. 26, and by Public Laws of 1913, ch. 201, sec. 26 (known as the Revenue Act), as follows: "Taxes in this schedule shall be imposed as license taxes for the privilege of carrying on the business or doing the act named, and nothing in this act contained shall be construed to relieve any person or corporation from the payment of tax as required in the preceding schedule [property tax schedule]. The license issued under this schedule shall be for twelve months and shall expire on the thirty-first day of May of each year. Such license thus obtained shall be a personal privilege, and shall not be transferable nor any abatement in the tax allowed; and unless otherwise provided in the section levying the tax, the tax levied for the use and benefit of the State shall be collected in the county in which the business is conducted."

Each of said acts has this provision in it: "All of said (insurance) companies shall pay a tax of 2½ per centum upon the amount of their

gross receipts in this State," which clause is taken from section 67 of chapter 46, and chapter 201 (Schedule B) above mentioned. The same provision also appears in Revisal, sec. 5175, it being a part of Revisal, chapter 110, entitled "Revenue Act," and of paragraph V, entitled "Schedule B, Licenses."

Sections 4719 and 4720 require general agents of insurance companies within the first thirty days of January and July of each year to make "a full and correct statement, under oath, of the amount of the gross receipts derived from their business, obtained under said chapter 110, from residents of this State," and to pay to the Insurance Commissioner within the first fifteen days of February and August the tax upon such gross receipts.

At the hearing of the case the court sustained the demurrer, and the plaintiff appealed.

John W. Hinsdale and Frank Ewing for plaintiff.
T. W. Bickett and T. H. Calvert for defendant.

WALKER, J., after stating the case: The right of a State to lay a tax on a foreign corporation, or to impose other burdens as a condition of its entering its borders for the purpose of conducting its business or a part of it there is well established by the authorities. No State is bound, except as a matter of comity, to recognize corporations created by other States or to permit them to transact business within its limits; and therefore each State may impose such conditions and burdens, in respect to taxation, as it may choose, upon foreign corporations desiring to establish business within its borders, exploit its resources, enter its markets, and enjoy the benefits and protection of its laws, subject only to the restriction that its tax laws must not operate as an interference with foreign or interstate commerce, or unjustly discriminate between different foreign corporations of the same class after they have been admitted to do business within the State and complied with the conditions originally imposed. 36 Cyc., 857, 858.

There are some limitations on the powers of a State with reference to imposing burdens upon a foreign corporation which have been recognized by the courts, but they need not be discussed here, as no such question arises in this case.

It is within the power and discretion of each State to impose an annual or other license or privilege tax on all foreign corporations doing business within its limits; and it is no valid objection that such tax is higher than that imposed on similar domestic corporations. Although a tax of this kind is often spoken of as a franchise tax, it is to be observed that the State cannot tax a foreign corporation in respect

to its franchise of corporate existence, the right to be a corporation, but that the privilege of doing business in a given State, in its corporate character, may be considered as a franchise and taxed as such.

A license or privilege tax on foreign corporations may be graduated according to the amount of their capital stock, and so much of the capital of a corporation as is employed in a given State may be there taxed. 37 Cyc., 860 and 861. It is held that "a tax on the gross earnings or receipts within the State of a foreign corporation is a proper and legitimate exercise of the taxing power, as it is in reality a tax on the privilege of doing business within the State measured by the volume of business transacted; but the Legislature must provide some method of ascertaining the amount of the gross receipts and prescribe the rate of taxation." 37 Cyc., 863 and 864, and note containing many cases on the subject.

It is well settled, then, that a tax for the privilege of carrying on business in a State, or a franchise tax, may be imposed by the latter upon a foreign corporation, and the amount of it may be fixed on the basis of a percentage of its gross receipts from business or property, provided the business is transacted in the State from which receipts are derived or the property is located there. *So. B. and L. Assn. v. Norman,* 98 Ky., 294 (*s. c.,* 31 L. R. A., 41; 56 Am. St. Rep., 367, and note at p. 374); *Pacific Exp. Co. v. Seibert,* 142 U. S., 339.

The questions then recur as to whether the tax laid by the statute upon the "gross receipts in this State" of the plaintiff is a license or franchise tax, and whether the term employed restricts the tax to moneys actually received in this State or extends to such portions of plaintiff's earnings on business in this State as are remitted directly to it in Pittsburg, Pa., by checks of its policy-holders given for premiums and mailed to it there. This is stating the latter question as broadly for the plaintiff as it could desire.

That the tax is for the privilege of doing business in this State appears conclusively from a consideration of the history of this clause as it appears in the various statutes on the same subject, and which constitute as a whole one scheme of taxation. The expression, "gross receipts in this State," originated in the Revenue Act many years ago, and is found in that act as brought forward in the Revisal as chapter 110 (sec. 5175) and subsequent statutes. It was also placed in the insurance laws, which were brought forward and codified as chapter 100 (sec. 4715), so that the entire body of insurance law might be consolidated; but this did not change, and was not intended to change, the nature of the tax as one for the privilege of doing business in this State. As found in the Revenue Act, it is in Schedule B, which

embraces only license and privilege taxes, and it is so declared in the preamble or caption of the act, and the manner of laying the tax itself shows the intention that it should be nothing more than a privilege or business tax. The mere fact that it was measured by the amount of gross receipts does not make it any the less a privilege tax, but that is only the adoption of a fair and just standard by which to gauge its amount, and it is not at all unusual to graduate such a tax by the extent or volume of the licensee's business in the particular locality. Besides, the companion statutes above set forth clearly indicate the purpose of the Legislature that it should be an occupational tax for the privilege of doing business. It is competent to consider such statutes for the purpose of construction of the one in question. *Board v. Comrs.,* 137 N. C., 67; *Arendell v. Worth,* 125 N. C., 111; *Abernethy v. Comrs.,* 169 N. C., 631; *Grocery Co. v. Bag Co.,* 142 N. C., 179.

Having determined what kind of tax this is, we proceed to the next question, as to what the term "gross receipts in this State" means.

The plaintiff contends that it does not embrace premiums paid by policy-holders directly to the company at its home office in Pittsburg, Pa., by checks or drafts mailed by them to it, but that it only embraces money actually collected or received in this State. This, though, is a clear misconception of its true meaning. It is not taxation of the receipts, but a tax equal to 2½ per cent on their gross amount, and it is not confined to cash or other collections in this State to the exclusion of the premiums paid directly by check to the home office, as the tax is one on the income or earnings from the business done in this State, however received by or paid to the company. The standard is the volume of the earnings and not the method of payment. Any other interpretation would render the legislation nugatory and disappoint the clear intention of the Legislature. The statute could easily be evaded and nullified; and while this reason should not be considered, if the meaning is perfectly clear, so that there is no room for construction, it is a legitimate circumstance to be considered in ascertaining the meaning where construction is necessary. But the Revenue Law shows, without any doubt, that the "receipts" intended were those derived from its business in this State.

This question, regardless of the light to be obtained from cognate statutes, was considered, and a contention similar to that of plaintiff in this case was fully answered in *Phila. and R. R. R. Co. v. Commonwealth,* 104 Pa. St., 80, 82, where the Court said: "It is argued by the able and ingenious counsel of the defendant that the taxability or otherwise of the gross receipts depends upon the relation of the taxing act

to those into whose hands they come; in other words, that the expression 'gross receipts of said company' means the gross amount received by said company, and that, as the company, as such, received nothing, it had no gross receipts. We do not so understand the act. As we construe it, 'gross receipts' is equivalent to 'gross increase' or 'gross earnings,' and we think that their origin and ownership, rather than the hands into which they come, must be considered in determining the question whether they are taxable or not." But the case of *Com. v. Eq. L. A. Soc. of U. S.*, 249 Pa. St., is, perhaps, a full authority for our view of the case. There it is said: "The annual tax upon premiums of insurance companies of other states or foreign governments shall be at the rate of 2 per centum upon the gross premiums of every character and description received from business done within this Commonwealth. . . . It seems, however, that the premiums for insurance written and maintained upon the lives of residents of Pennsylvania are not all paid to these agencies in Pennsylvania. Some of them are sent to the home office in New York, or are paid to the society through agencies outside the State of Pennsylvania. In making up its returns for taxation for the years 1906 to 1910, inclusive, the society did not include these premiums paid by residents of Pennsylvania for insurance upon their lives which were sent to points outside the State. . . . In order to determine the question in controversy we must ascertain the source of the premiums which were paid to agencies outside the State. If they were received by the society from business done within the Commonwealth, then they were subject to the tax. If they did not come from such business, they were not subject to the tax. . . . When it (the insurance company) comes within our borders to do business, it renders a service; it furnishes protection and indemnity to its beneficiaries, residents of the State of Pennsylvania. That is the business which it does in Pennsylvania, and that is the purpose for which it seeks and is granted permission to enter. Furnishing that service, that insurance against loss, it makes a proper charge to cover the cost of the service which it renders, and that charge is the premium. It is simply payment for the valuable service it renders. Whether that service be paid for on the spot where the service is rendered or whether the amount be remitted to the home office does not change the character of the business done and for which recompense or payment is made. If it happens to be made to an agency in Pennsylvania, the defendant society admits without question that it is received from business done within this Commonwealth, and is subject to the tax. How can the fact, or the character, of the business done for the benefit of residents of Pennsylvania be altered or affected in

any way by the manner in which or the place where the payment for the business done and the service rendered is made? Clearly, it cannot be so affected." That case was taken by writ of error to the Federal Supreme Court, and, the construction of its own statute by the State court being accepted as final, it was held that the Legislature acted well within its power when it laid the tax as one for the privilege of doing business in the State, and that there was no infraction of the Federal Constitution or any of its amendments. *Eq. L. Ass. Soc. of U. S. v. Com. of Pa.,* 238 U. S., 143. *Justice Holmes,* writing for this Court, said: "These policies of life insurance, according to the statement of the plaintiff in error, are kept alive and renewed to residents of Pennsylvania by payments from year to year. The fact that the State could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefit thus annually extended into Pennsylvania in measuring the value of the privileges that it does grant. We may add that the State profits the company equally by protecting the lives insured, wherever the premiums are paid. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax. As to that, a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death. It is not unnatural to take the policy-holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows," citing *Flint v. Stone Tracy Co.,* 220 U. S., 107, 162, 163; *Conn. Mut. L. Ins. Co. v. Spratley,* 172 U. S., 602, 611; *Penn. L. Mut. F. Ins. Co. v. Meyer,* 197 U. S., 407, 415.

As our Revenue Act expressly classifies this as a license tax imposed for the privilege of doing business in the State, it would seem that upon all questions presented by this record the cases just cited are ample to sustain the ruling below.

The reliance of the plaintiff upon the fourteenth amendment to the Federal Constitution is futile in view of those decisions and *So. B. and L. Assn. v. Norman, supra,* where the cases are collated; and equally untenable is the position that the tax is a burden upon interstate commerce. It is restricted to an intrastate transaction and does not extend beyond the boundary of the State, for it is distinctly a tax for the privilege of doing business within and not without the State. It was said in the *Norman case, supra* (at p. 43), where there is an elaborate

discussion of the question, backed by the highest authority: "It is argued that the freedom of commerce between the States is interfered with, and the equal protection of the laws denied the corporation. The statute, whatever may be said of the nature of the tax it imposes, in express terms affects only business done within the State. The business—traffic or commerce, if you please so to term it—of the corporation is purely internal or domestic. Having under consideration the validity of a tax imposed on a Nebraska express company by a Missouri statute (act 16 May, 1889) similar to the one now in question, the Supreme Court, by *Justice Lamar,* after quoting the statute, said: 'It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the business done within the State. This positive and oft-repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. Business done within the State cannot be made to mean business done between the State and other States.'"

It will be observed that our statutes above mentioned are *in pari materia,* and when considered together, as they should be (Black on Inter. of Laws, p. 331, and note 44 *et seq.*), levies the tax upon "the amount of the gross receipts derived from the insurance business under this chapter obtained from residents of this State," a purely domestic or intrastate subject, having no direct or even indirect connection with any interstate business of the company; and the case, therefore, falls naturally and easily within the principles so clearly set forth by *Justice Holmes* in the case above cited and by the State court in the *Norman case, supra.*

The plaintiff further contends that if the law is against it on all other features of the case, the State cannot lay even a privilege tax upon the gross receipts of any business done by the State under the policies of foreign companies, held by residents of the State, which it had reinsured. But this manifestly is a fallacy. The privilege which it enjoys under those policies by its reinsurance is to continue that insurance in the State by receiving the renewal premiums from time to time as they mature or become due, as that is "doing business" in this State. *L. Ins. Co. v. Meyer,* 197 U. S., 407; *M. L. Ins. Co. v. Spratley,* 172 U. S., 602. Its license, therefore, covered those transactions, as well as any other insurance it then had, which had been

originally granted by it in this State to residents thereof, and also all new insurance. It can make no difference how it acquired the right to control the policies, whether by reinsurance or by issuing them in the beginning as its own policies. It is the gross earnings from business carried on, under all of its policies, after it obtained license, which is taken into account by the law as the standard for fixing the tax. It is as much a privilege to do business under the old policies as it is under the new ones, for business does not end with the issuing of policies, but the collection of premiums afterwards is as much within that designation as is the issuing of the policies themselves. If the companies whose policies plaintiff reinsured had continued to carry them without any reinsurance, they would have been liable for the tax; and why, therefore, should plaintiff be exempt therefrom?

The last contention is that if this is a property tax, it violates the fourteenth amendment of the Federal Constitution, being an attempt to take property without due process of law, and a denial of the equal protection of the law, as it taxes property not within this State. This position is equally without any merit and wholly untenable. What we have already said is a full answer to it. There has been no effort to tax property beyond the limits of the State. The tax, by positive words of the statute, is restricted, for its measure, to transactions and property in the State, that is, to insurance and collections of premiums, or gross earnings from the said business "in the State." This objection to the tax is completely answered by the Pennsylvania cases and the *Norman case, supra,* and no further discussion could possibly add any force to what is so well said there. As said in *Flint v. Stone Tracy Co.,* 220 U. S., at p. 162, "This argument confuses the measure of the tax upon the privilege with direct taxation of the estate or thing taxed."

If the position of the appellant were sustained by us it would not only practically nullify the statute, but greatly hamper the State in the proper exercise of her sovereign power of taxation upon subjects wholly within her borders, and seriously curtail her legitimate revenues.

The court rightly sustained the demurrer and dismissed the action.

Affirmed.

THE STANDARD DRY-KILN COMPANY v. W. J. ELLINGTON.

(Filed 15 November, 1916.)

1. Vendor and Purchaser—Title—Registration.

A conditional sale reserving title in the vendor is good between the parties without registration.

2. Same—Mortgages—After-Acquired Property.

A mortgage of after-acquired property, though not good at common law, is now upheld as valid; but the mortgagee's right of lien is subject to the conditions in which the after-acquired property comes into the mortgagor's hands, and if the mortgagor has obtained it subject to the reservation of title in the vendor, the general lien of the prior mortgage is subject to the vendor's right, though the constitutional sale is unrecorded, and the property has been annexed to the land and become a fixture thereon.

3. Limitation of Actions—Vendor and Purchaser—Possession—Mortgages—After-Acquired Property.

The relation between vendor and purchaser, under a conditional sale reserving title, is, in effect, that of mortgagor and mortgagee, and the purchaser's possession is not held adverse to the vendor in the absence of demand; and where the purchaser at a sale of lands under a mortgage claims the property as a fixture, passing with the lands as after-acquired property, and pleads the three-year statute in bar of the vendor's right, the period of the peaceful possession of the mortgagor will not be counted.

4. Limitation of Actions—Vendor and Purchaser—Conditional Sales—Purchase Price—Notes—Waiver—Mortgages.

The vendor of property reserving title under the terms of a conditional sale specifying that the purchaser give his notes for deferred payments may waive the latter part of the agreement and rely upon the retention of his title; and where the purchaser of land at a mortgage sale claims the property as that after acquired under the terms of his mortgage, and pleads the three-year statute as a bar to the vendor's right of action, the failure of the vendor to require the purchaser to give the notes, or to rescind the contract, will not put the statute of limitations in motion against him.

5. Same—Advantage of Wrong.

Where the purchaser of property is, by the terms of a conditional sale, reserving title, required to give notes for deferred payment of the purchase price, he cannot take advantage of his own wrong in failing to give the notes, and thus put the statute of limitations in motion against his vendor in favor of a subsequent purchaser at the sale of his lands under mortgage.

6. Damages—Retention of Goods.

Where the plaintiff has the lawful right of possession of property wrongfully withheld from him by the defendant claiming it as a fixture upon realty he has purchased at a sale, he may recover in his action the property or its value, with damages for its deterioration and detention.

CIVIL ACTION tried before *Connor, J.*, at March Term, 1916, of WAKE.

This is an action to recover certain property alleged to be wrongfully held by the defendant, and for damages for its deterioration and detention. On 11 February, 1911, the plaintiff sold, under a conditional sale contract, to the Ellington Building Supply Company the property in question. The Ellington Building Supply Company was composed of E. E. Ellington, W. E. Ellington, and D. D. Ellington. The defendant was not a member of this firm. The conditional sale contract was never registered. On 23 June, 1910, the Ellington Building Supply Company executed a mortgage to the Mechanics Savings Bank to secure an indebtedness of $3,200, the mortgage covering the land on which the lumber plant of the Ellington Building Supply Company was located. On 2 December, 1910, the Ellington Building Supply Company executed a mortgage to W. J. Ellington embracing the land and buildings on which the plant was located to secure an indebtedness of $5,000.

Prior to that time they had executed a mortgage to W. J. Ellington to secure an indebtedness of $12,228.83, $7,000 of which was secured by supplies and property of all and every kind and description belonging to the defendants or which they might *thereafter* acquire in connection with the business they were running.

Thereafter a suit was brought in the Superior Court of Wake County in which W. J. Ellington and The Mechanics Savings Bank were the mortgagees and plaintiffs and the members of the firm of Ellington Building Supply Company were the defendants. In the case M. A. Moser was appointed commissioner, and, as such commissioner, sold the interest of the defendants in the property under an order of court. The real estate was sold to W. J. Ellington, the defendant, for $7,000, and the personal property was sold to him for $1,498.11.

The defendant denies plaintiff's right to recover, as the conditional sale agreement was not registered, and the defendant purchased the property at the commissioner's sale. Moreover, the defendant claims that he purchased the realty as it was at that time, and this property claimed by the plaintiff had become a part of the realty and could not be removed without injury to the realty. The defendant also pleaded the statute of limitations.

The defendant requested the court to instruct the jury that upon all the evidence the claim of the plaintiff is barred by the statute of limitations. The defendant also requested the court to instruct the jury as follows: "If you find that at the time the contract was made between the plaintiff and the Ellington Building Supply Company,

there was a provision that notes should be given when the dry-kiln was installed and ready for operation, and that when said dry-kiln was so installed and ready for operation, the notes were not given, then there was a breach of the contract, and the plaintiff had a right to bring suit for the possession of the property; and if you should further find that that was more than three years prior to the bringing of this suit, then you are instructed that the action would be barred by the statute of limitations, and you should so find in your verdict."

The court refused to give both instructions, and the defendant excepted.

The contract provided that upon receipt of the material the purchasers were to honor sight draft for one-half the amount of the bill, and when the kiln was completed and in operation they were to accept sight draft for sixty or ninety days for the balance due. There is no evidence that drafts were accepted or paid.

The evidence shows that the kiln was set up and ready for operation about March, 1911.

His Honor also instructed the jury: "If you find the facts to be as testified to by the witnesses in this case with reference to the first issue, I instruct you to answer the first issue 'Yes'; otherwise you will answer 'No.'" The defendant excepted.

The jury returned the following verdict:

1. Is the plaintiff the owner and entitled to the possession of the property described in the complaint? Answer: "Yes."

2. Is the defendant in the wrongful possession of said property? Answer: "Yes."

3. What was the value of the said property at the time defendant took possession of same? Answer: "$350."

4. In what sum, if any, has the value of said property deteriorated while in possession of the defendant? Answer: "$75."

5. What is a fair annual rental value of said property? Answer: "$21."

6. Is plaintiff's cause of action against the defendant barred by the statute of limitations? Answer: "No."

Judgment was entered in favor of the plaintiff, and the defendant appealed.

John W. Hinsdale for plaintiff.

J. C. Little for defendant.

ALLEN, J. The two positions upon which the defendant chiefly relies are:

1. That the personal property sold by the plaintiff to the Supply Company, in which the title was retained by an unregistered condi-

tional sale agreement, passed to the defendant under his mortgage covering after-acquired property, which was executed and registered prior to the conditional sale of the personal property.

2. That if this position is not sustained, the right of action of the plaintiff is barred by the statute of limitations.

If either of these positions can be sustained, the plaintiff cannot recover; but if the property did not pass to the defendant under his mortgage, and if the plaintiff's cause of action is not barred, the plaintiff is the owner of the property under his conditional sale agreement, which is good between the parties without registration. *Kornegay v. Kornegay,* 109 N. C., 188.

At common law no mortgage was valid except upon property in existence and actually and potentially the property of the mortgagor at the time of the execution of the mortgage; but this rule has been greatly modified in different jurisdictions, and since the case of *Holroyd v. Marshall,* 10 H. L. Cases, 191, it has been settled in England, and has been generally recognized in this country, that a mortgage with a clause covering additions or after-acquired property operates to create a lien on the after-acquired property in favor of the mortgagee when the property comes into existence. *Perry v. White,* 111 N. C., 199; *Lumber Co. v. Lumber Co.,* 150 N. C., 286, and cases cited.

The principle, however, is subject to the qualification that the mortgagee who claims after-acquired property takes it in the same condition in which it comes into the hands of the mortgagor, and if at that time it is subject to liens the general mortgage does not displace them, nor does the failure to register the lien, existing at the time of the acquisition of the property by the mortgagor, have this effect, as the registration laws are intended for the protection of subsequent, not prior, purchasers and creditors. *Cox v. Lighting Co.,* 151 N. C., 69.

The question was decided and the authorities reviewed in *Cox v. Lighting Co., supra,* and, in conclusion, the Court quotes from *U. S. v. R. R.,* 12 Wall., 362, as follows: "A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money

makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors," and adds: "This, it seems to us, accords with our own decisions and rests upon the soundest principles of right and equity."

The case also disposes of the contention of the defendant that he can hold the property because of his rights as a mortgagee of the land, upon the ground that the property sold by the plaintiff was annexed to the freehold.

We are therefore of opinion that the property did not pass to the defendant under his mortgages.

We have dealt with the question as if the defendant had bought the property at the sale by the commissioner, Moser; but the record shows that he only bought the interest of the Supply Company in the property, and that he paid nothing for it and has suffered no loss except the crediting of $40 on a debt against his sons.

Is the plaintiff's cause of action barred by the statute of limitations?

The defendant went into possession of the property after 30 October, 1911, the day of the sale by the commissioner, and this action was commenced on 24 June, 1914, within less than three years, and the cause of action is, therefore, not barred unless the defendant can avail himself of the possession of the Supply Company between 11 February, 1911, the day of the conditional sale of the property, and the time when the defendant bought.

The relation between the plaintiff and the Supply Company was in effect that of mortgagor and mortgagee, and as there is no evidence of any demand for the possession by the plaintiff and refusal by the defendant, or any denial of the right of the plaintiff by the Supply Company, its possession was not adverse. *Parker v. Banks,* 79 N. C., 480; *Stancill v. Spain,* 133 N. C., 77.

The defendant says, however, that it was a part of the agreement between the plaintiff and the Supply Company that the Supply Company was to execute notes or accept and pay sight drafts for the purchase price; that this was to be done concurrently with the delivery of the property; that the Supply Company failed to execute the notes or to accept and pay the drafts, and that therefore the company had no rights under the contract, and that the possession of the Supply Company was therefore wrongful from the beginning and adverse to the plaintiff.

There are several satisfactory answers to this position of the defendant.

In the first place, the agreement to execute the notes or to accept and pay the drafts was for the benefit of the plaintiff, and it had the

right to elect to reclaim the property upon the failure of the Supply Company to perform its part of the agreement, or it could waive this part of the agreement and rely upon the retention of title in the conditional sale (35 Cyc., 673); and this is what it has done.

The right to rescind the contract on account of the failure of the Supply Company to perform its part was with the plaintiff and not with the Supply Company, and it is only the innocent party who has the right to rescind (6 R. C. L., 932), and it cannot take advantage of its own wrong to put the statute of limitations in motion. *Robertson v. Dunn,* 87 N. C., 195; 25 Cyc., 1066.

In the *Robertson case* the defendant converted a note and some time afterward received the proceeds. The plaintiff sued in assumpsit to recover the proceeds, and the defendant pleaded the statute of limitations, claiming that it began to run from the time of the conversion. The plea was denied as to all money received within three years, and the Court said: "When there has been a tortious taking of his property, the injured party may bring trespass or trover, or he may waive both and bring assumpsit for the proceeds, when it shall have been converted into money; and if he choose the latter mode of redress, the tort-feasor cannot allege his wrong for the purpose of carrying back the injury to a time which will let in the statute."

This was the controlling principle in *Torrey v. Cannon,* 171 N. C., 521, in which the Court quotes with approval from *Smith v. Gregerty,* 4 Barb., 621, as follows: "Undoubtedly, a party cannot take advantage of the nonperformance of a condition if such nonperformance has been caused by himself."

The question is analogous to that of a debt due by installments, with provision that upon failure to pay one installment the whole debt shall become due, as to which it is said in 25 Cyc., 1104: "It is generally held, however, that such a provision is solely for the benefit of the creditor, who may enforce it or not, as he elects; that upon the default specified the provision does not of itself operate to accelerate the maturity of the debt and that the debtor cannot take advantage of it in computing the period of limitation."

The objection of the defendant to the recovery of $91 provided for in the judgment is without merit.

The plaintiff was entitled to recover the property or its value, with damages for its deterioration and its detention, and the $91 covers the rental value as found by the jury for the length of time which the defendant admitted he held possession of the property.

The judgment is in accordance with law and justice.

No error.

W. N. REYNOLDS v. ADAMS EXPRESS COMPANY.

(Filed 15 November, 1916.)

1. Verdicts—Interpretation—Courts.

A verdict of the jury may be interpreted by proper reference to the pleadings, evidence, and charge of the court.

2. Courts—Judicial Notice—Express Companies—Carriers of Goods.

In proper instances the Court may take judicial notice of the fact that express companies are agencies organized for a higher price than that of ordinary carriage, to provide greater security and dispatch in the delivery of freight.

3. Carriers of Goods—Express Companies—Live Stock—Valuation—Abandonment of Contract—Damages.

Where an express company has contracted to transport a high brood of mare to its destination, wherein the consignor has agreed to a valuation not to exceed $100 for a less rate, and it is alleged and shown that for a part of the trip the car containing the mare had been placed in an ordinary freight train, in consequence of which it was badly damaged, and that a messenger had not been sent with the mare in the car in accordance with its custom in such transportations: *Held*, the restrictions as to valuation contained in the contract can apply only where the express company has itself complied therewith, and it being shown that the mare was injured in consequence of the defendant's violation of the contract, which for the time being is construed as an abandonment by it of its terms, the entire damage is recoverable, though greatly in excess of the value agreed upon.

4. Same—Commerce—Interstate Commerce Commission.

Where an express company, in violation of its contract of carriage, transports a valuable mare in a car, and injury is inflicted upon it by reason of the fact that the car was hauled in a freight train a part of the distance, the fact that it was stipulated in the contract of carriage that the value of the mare should not exceed $100, upon consideration of a less rate, which was approved by the Interstate Commerce Commission, does not preclude a recovery of damages in a greater sum; for the contract of carriage, as approved, contemplates the restriction of recovery as to injuries inflicted by the express company while transporting the mare according to the method required of it under the terms of the contract, and not to those arising from a temporary abandonment thereof.

5. Carriers of Goods—Express Companies—Contracts—Stipulations Unreasonable—Written Demand.

A stipulation in an express company's contract of carriage of live stock, requiring that written demand for damages to the shipment be made in thirty days, is unreasonable as to the time, and unenforcible.

6. Appeal and Error—Objections and Exceptions—Briefs—Oral Agreement—Waiver.

An exception of record merely mentioned in appellant's brief, without discussion, and not urged on the oral agreement, is taken as abandoned.

7. Carriers of Goods—Express Companies—Written Demand—Knowledge—Waiver.

The written demand for damages to a shipment of live stock stipulated in the contract therefor may be waived by the knowledge of the injury by the agents of the carrier and their conduct respecting it.

CIVIL ACTION tried before *Webb, J.*, and a jury, at May Term, 1916, of FORSYTH.

The action was to recover for injuries to a racing mare, shipped by express over a route of defendant company from Winchester, Va., to Hanover, Pa., in September, 1913.

There was denial of liability on the part of defendant, and plea, further, that in reference to this shipment defendant was a common carrier, engaged in interstate commerce; that it had filed its schedule of rates with the Interstate Commerce Commission, and under the contract of shipment the company's liability, in any event, was restricted to $100. The schedule of rates were presented in evidence in support of the plea.

On issues submitted, the jury rendered the following verdict:

1. Did the defendant breach its contract, as alleged in the complaint? Answer: "Yes."

2. If so, was the plaintiff's horse injured by the negligence of the defendant while being transported in violation of the said contract, as alleged in the complaint? Answer: "Yes."

3. What damage, if any, has the plaintiff sustained by reason of said injury? Answer: "$2,500."

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning for error, chiefly, that the jury were allowed to award damages in excess of the amount specified in the contract.

Manly, Hendren & Womble for plaintiff.

Winston & Biggs, J. C. Buxton, Watson, Watson & Robinson and R. G. Parker for defendant.

HOKE, J., after stating the case: The complaint alleged and the proof on the part of plaintiff tended to show that in September, 1913, "the plaintiff through his duly authorized agent, H. N. Reaves, and in the name of said H. N. Reaves, contracted with the defendant to carry by express two race horses from the town of Winchester, Va., to the town of Hanover, Pa., and that said H. N. Reaves paid the defendant the charges required for the transportation of said horses by express and contracted with the plaintiff's agent to ship them by express from Winchester, Va., to Hanover, Pa. When the car in which the horses were being shipped reached York, Pa., it was

cut off from the express train and placed on the freight yards, where it was allowed to remain for several hours, and was then, in violation of the defendant's contract, attached to a freight train, and the said horses were hauled from York, Pa., to Hanover, Pa., by freight train, which was in violation of the defendant's contract, it having contracted to ship said horses by express. That while the car was being shifted by the freight trains on the yards at York, Pa., and on the route to Hanover, it was handled in such a rough and careless manner that one of the horses, a mare named 'Eudora,' was knocked down twice, and was seriously and permanently injured."

The evidence introduced by plaintiff tended to show, further, that the horses were in a car prepared for the purpose and for use only in connection with passenger train service, and that the witnesses had never known of horses in that kind of car, shipped by express, being connected with freight trains. That the injured mare was a racing animal of unusual success and great promise and was worth $4,500 or $5,000, and that by reason of the injuries received while on the freight yards and being conveyed by freight train her value was reduced to $250 or $400.

In regard to conditions caused by change in the character of the shipment, one of plaintiff's witnesses, D. P. Verner, the mare's keeper, testified, among other things, as follows: "When we reached York, the mare was all right, just like she left Winchester. We got into York some time before day. When I waked the next morning I looked out, and we were in the York yards. I do not know exactly what time we left York, but we left on a freight train of about forty cars. This express car was about the middle of the train. We were in the car, sitting on the side-track at York, and they turned loose three box cars and hit this car and knocked this mare down, and it took two of us to get her up. I looked to see what hit the car, and three box cars were coming, turned loose, and hit the car, knocked two of the horses down and knocked the trunks and sulkeys down on each other, and then they put us on this freight train. They were shifting and making up this freight train with this express car in it. When we started to York they would run a while and stop and knock the cars against each other—just keep on doing that way—and knocked her down about halfway between York and Hanover. When they knocked her down, it took two of us to get her up. Her hip was skinned and all the hair was cut loose on her hind feet. They knocked her down again about halfway between York and Hanover, and we got her up again, and she was awful nervous. I had to stand at her head practically all the way, and the train was running so you could not stand still, and the trunks and sulkeys flapping about and making such a noise, and they

would stop and knock up against the mare and knocked her against the bar 2 x 4 across her breast and knocked the window out at her head—just knocked her around all the way. I stood at her head all the way from York, trying to keep her quiet. They were handling her so rough she could not stand still, and she was excited. They had knocked her down twice and she was nervous, and I was trying to keep her quiet as best I could. It looked like they would be running and all at once stop and throw all of us on the horses. The other caretakers were trying to hold their horses to keep them quiet. When traveling with horses by express, the express company sends an express messenger with us in the car. An express messenger started out with us from Winchester, but I did not see anything more of him after we left York. He would not go in the freight. They are supposed to send a messenger with a car-load of horses. I have traveled a great deal in cars with horses shipped by express. In a shipment by express I never knew a car that I was in put in a freight train before. Ordinarily, express cars are hauled in express or passenger trains. Some of them are through express. When we reached Hanover this mare was in bad condition; looked like she was on the verge of a chill, and could not walk; had to sort of push her along. She looked like she was broken down in the back; walked like a hog broken down in the loins, back of her hind legs. Looked like the meat was cut loose on her hind legs from the hock down to the hoof; right hip skin knocked off and left hip bone was injured; wasn't much skin off of it. There was a piece as big as your two hands on the right hip, but on the left hip just a little place, but it was sorer than the right hip."

For defendant there was evidence tending to show that while it was not customary to ship horses under this kind of contract by freight, it was sometimes done for short distances and when no time would be lost by it. Defendant also introduced the schedule of rates filed with the Interstate Commerce Commission showing the alternative rates for shipment by express where liability was limited to $100 and less sums and an increased rate where valuation exceeded that sum, and relied on a clause in the contract of shipment in which these rates were set forth, the evidence tending to show that plaintiff had selected and made his contract in reference to the lower rate and containing provision that the shipper, in order to avail himself of the lower rates, had valued each horse at $100 and "expressly agreed that in no event shall the express company be liable in excess of the above valuation"; and, in this connection, F. Mantz, division agent of the company, testified as follows:

"This is the contract that I made with Mr. Reaves. I was in Winchester when this contract was signed. I asked Mr. Reaves whether

he wanted to put any value on the horses, and he says, 'Oh, I guess not,' and so he signed the contract. They were put down at $100. I told him it would cost more money if he put a value on them, which he knew. He said, 'All right, let it go at that.' He took the lower rate. I told him it would cost him more money if he put the value on them. Each horse was valued at $100 and the cost of a car from Winchester to Hanover would be $100. That was the rate he paid. I rode as far as York in this train. It is 17 miles from York to Hanover. When stock is shipped by express they often carry them in freight trains for short distances to make better time. They frequently send them by freight, but it is not customary. It is not customary, as a rule; but they send them by freight very often to make better time. The rate given by Adams Express Company and filed with the Interstate Commerce Commission, as shown by this certificate of the secretary of the Interstate Commerce Commission, is $1 a hundred from Winchester to Hanover. Taking car-load of horses, 10,000 pounds, makes $100."

It is a recognized principle in our system of procedure that a verdict may be interpreted and allowed significance by proper reference to the pleadings, the evidence, and the charge of the court. *Bank v. Wilson*, 168 N. C., 557; *Donnell v. Greensboro*, 164 N. C., 330.

It is also well understood with us that express companies are "agencies organized for the purpose, at a higher price, of providing greater security and dispatch in the delivery of freight," a fact that the evidence in this instance tends to support and generally of sufficient notoriety to permit and require that the Court should take judicial notice of it. *Furniture Co. v. Express Co.*, 144 N. C., pp. 639-643; *Alsop v. Express Co.*, 104 N. C., 278. And considering the record in reference to these admitted principles, we think that the breach of contract shown in this verdict establishes such a departure from the agreement, in its essential terms and purpose, as to justify the plaintiff in ignoring its provisions and suing for the entire damages.

This position that a willful and substantial deviation from the provisions of the contract of shipment will amount to an abandonment of the same for the time on the part of the carrier and justify a recovery for the entire damages notwithstanding the restrictive features as to valuation contained in the contract, is upheld in many well considered cases on the subject, and, in our opinion, fully sustains the recovery allowed in the present instance. *Frank McKahan*, 209 Mass., 470, reported also in 35 L. R. A. (n. s.), p. 1046; *Parrett v. Lehigh Valley R. R.*, 153 Pa. St., 302; *Pacific Coast v. Yukon Trans. Co.*, 153 Fed., pp. 29-36; *Swift & Co. v. Furness Wilky & Co.*, 87 Fed., 345; *R. R. v. Caldwell*, 89 Ark., 218; *R. R. v. Dunlap*, 71 Kans., 67;

Garnett v. Jones, 5 B. and A., 53; 106 English Reports, reprint, p. 1113; 4 R. C. L., p. 817; 6 Cyc., p. 396.

In *McKahan's case, supra,* it was held: "If a carrier forwards a car of horses by a train other than that provided for by the contract, upon which a care-taker was to accompany them, he abrogates the carriage contract, at the election of the shipper, and deprives himself of the benefit of a provision therein which fixes the value of the horses for purposes of transportation."

In *Pacific Coast v. Yukon, etc., supra,* the principle is stated by *Gilbert, J.,* as follows: "It is contended that the district court erred in holding the appellants liable for damage for the decay of perishable goods when the bills of lading provided that they should not be responsible for the decay of perishable articles or damage to any article 'arising from the effect of heat or cold, sweating, or fermentation.' The answer to this contention is that the limitations of liability expressed in the bills of lading were applicable only to the voyage contemplated in the contract. They do not relieve the carrier from liability for damages resulting from the delay occasioned by the abandonment of the voyage and the return of the vessel to Seattle. 6 Cyc., 383; *Balien & Son v. Jolly, Victoria & Co., Ltd.,* 6 T. L. R., 345; *Luduc v. Ward,* 20 Q. B. D., 475. In the latter case the Court said: 'It follows that when the defendant's ship went off the ordinary track of a voyage from Fiume to Dunkirk to a port not on the course of that voyage, such as Glasgow, there was a deviation, and she was then on a new voyage, different from the one contracted for, to which the accepted perils clause did not apply, and, therefore, the ship owner is responsible for the loss of the goods.' And in 4 Ruling Case Law it is said: 'A carrier unjustifiably deviating from the agreed or customary route or *mode* or *manner* of transportation becomes liable as insurer for loss of or injury to the shipment and cannot avail himself of any exceptions made in his behalf in the contract of agreement.'"

True, the contract of shipment as entered into between these parties was at a stipulated rate and an agreed valuation, and there is stipulation, also, "that in no event shall the express company be liable for the horses in excess of $100 value each." But where the company voluntarily and without just cause or excuse has abandoned the mode and manner of transportation contemplated and provided for by the contract, the shipper, as we have seen, is justified in treating the contract as abrogated for the time being, and for injuries received during such period and incident to such breach he may, as stated, recover for the entire damages suffered, notwithstanding the restrictions as to value; these, being but a part of the contract, are also ineffective while the carrier is acting outside of the contract and its obligations. And the

same answer will suffice, we think, for another objection insisted on by defendant, that to uphold the present recovery would be in violation of the regulations of the Interstate Commerce Commission establishing alternative rates and sanctioning a limitation of liability for the lower rate. These rates were established and approved in reference to contracts of shipment by express, and do not and were not intended to apply where the carrier had wrongfully resorted to an entirely different mode of shipment. It is true, as argued, that the decisions of the Supreme Court of the United States afford the final and controlling rule on this subject, and that they have been very insistent in enforcing the provisions of the Federal statutes designed and intended to prevent undue preferences and discriminations among shippers; but so far as examined, and in reference to the question presented on this appeal, they have only upheld these ratings and incidental valuations where the shipments were of the kind included in the contract and as to injuries inflicted while the contract was in the course of performance and where it clearly contemplated that the valuation agreed upon should form the basis of adjustment.

In *Atchison, etc., Ry. Co. v. Robinson,* 233 U. S., 173, to which we were referred by counsel, the defendant in error was insisting on the validity of an oral and special contract differing from a written bill of lading as to the shipment and in violation of the published rates of Interstate Commerce Commission applicable to that character of shipment, and it was held that the bill of lading and the rate applicable thereto should prevail. And in *Georgia, etc., Ry. v. Bush Milling Co.,* to which we were more especially referred, it was held that when the carrier had made delivery to a wrong person there was a "failure to deliver" in breach of the contract of shipment, and a claim therefor was subject to a provision of the contract requiring such claims to be presented in four months, and that the effect of such a provision could not be avoided by the shipper bringing his action in trover and thus attempting to ignore a provision of the contract applicable to and controlling as to the rights of the parties. But neither of these decisions, as we understand them, is in conflict with the position that when the carrier has, in breach of its agreement, entered upon a character of shipment entirely different from that provided for in the contract, the shipper, as to injuries inflicted during such breach, is relieved from the restrictive and all other features of the contract, and may maintain his suit for the entire injury suffered. If the salutary provisions of the statute enacted to prevent discrimination is in any way threatened by such a ruling, it could be the better preserved by allowing the carrier to deduct the shipping rate for the full value applicable to the character of shipment to which he has seen fit to resort.

The obligation that a written notice of the present claim was not made within thirty days was not urged on the argument, and, being only mentioned in the brief without discussion, under our rules, should be considered as abandoned. Vol. 164, Rule 34. *Guano Co. v. Mercantile Co.*, 168 N. C., 223.

The requirements for presentation within so short a period has been held unreasonable with us. *Phillips v. R. Co., ante,* 86 (89 S. E. Rep., 1057); *Mfg. Co. v. R. R.*, 128 N. C., 280. And, in any event, on the facts of this record, such a requirement would be regarded as having been waived, it appearing that the agents of the defendant company were fully cognizant of the injury to the mare and the attendant circumstances; the company sent a veterinary surgeon to treat her, and the division agent of the company was informed by letter of the injury and went himself to see about it, and "called around pretty nearly every day, and was anxious to see how she was getting on." *Horse Exchange v. R. R.*, 171 N. C., 65; *Mewborn v. R. R.*, 170 N. C., pp. 205-210; *Baldwin v. R. R.*, 170 N. C., 12.

We find no reason to disturb the results of the trial, and the judgment for plaintiff is affirmed.

No error.

NAOMI SCALES v. FRANK LEWELLYN AND THE CITY OF WINSTON-SALEM.

(Filed 15 November, 1916.)

1. Evidence—Impeachment—Witnesses—Contradictory Statements—Bias.

When the necessary grounds for impeaching the testimony of a witness is laid on cross-examination, it is competent to show by another witness contradictory statements he had previously made, and which tended to show his temper, disposition, and conduct in relation to the case.

2. Principal and Agent—Contracts—Independent Contractor—Work Inherently Dangerous.

Where a principal is sought to be held responsible in damages for the negligence of his independent contractor, on the ground that he cannot escape liability if the work contracted to be done is "inherently dangerous," the test is not whether a man of ordinary prudence would have anticipated that injury would have ensued from this work, but whether the work was of itself full of risks, perilous, hazardous, and unsafe to others while being done; and where the raising or elevation of a tenant-house had been let to an independent contractor, and the roof of the porch fell and injured a person through the negligence of the independent contractor, the principal is not responsible.

SCALES *v.* LEWELLYN.

CIVIL ACTION tried in FORSYTH County Court, *Starbuck, J.*, presiding, upon these issues:

1. Was the plaintiff injured by the negligence of the defendant F. P. Lewellyn, as alleged in the complaint? Answer: "Yes."

2. Was the defendant F. P. Lewellyn an independent contractor, as alleged in the answer of the defendant city of Winston-Salem? Answer: "Yes."

3. Was the work contracted for inherently dangerous? Answer: "Yes."

4. Is the defendant the city of Winston-Salem liable to the plaintiff for the negligence of the defendant Lewellyn? Answer: "Yes."

5. If so, what damage, if any, is the plaintiff entitled to recover? Answer: "$250."

From the judgment rendered, both defendants appealed to the Superior Court of said county. The appeal was heard by *Long, J.*, at September Term, 1916, who granted a new trial as to the defendant Lewellyn and affirmed the judgment as to the city of Winston-Salem. From this judgment the plaintiff and the city of Winston-Salem appealed to the Supreme Court.

Louis M. Swink, Gilmer Korner for plaintiff.
Holton & Holton for defendant Lewellyn.
Manly, Hendren & Womble for the city of Winston-Salem.

BROWN, J. The plaintiff sues the defendant Lewellyn and the city of Winston-Salem for damages for injuries sustained by her from the falling of a porch and dwelling-house which the defendant Lewellyn had contracted with the defendant the city of Winston-Salem to raise. The city had raised the grade on Third Street, leaving below the level of the street and without convenient means of access to it a house occupied by the plaintiff as tenant. There were eight other houses similarly situated. The city, with the knowledge and consent of the owner of these houses, at its expense, contracted with the defendant Lewellyn to raise them to the level of the street. It was necessary to raise the house occupied by the plaintiff some 9½ feet. The house was not being moved from its position, but simply raised.

Prior to the night of 1 October, 1915, the contractor had by means of pulleys, blocks, and jack screws raised the house securely from its foundation, but, as alleged, had carelessly and negligently failed to properly secure and support the front porch, causing it to collapse, throwing her to the ground.

There is evidence tending to prove that the defendant Lewellyn, instead of supporting the porch with temporary pillars or blocks, as is

customary in such work, nailed two braces, one end to the edge of the porch and the other to the roof of the house.

THE APPEAL BY THE PLAINTIFF.

On the trial before the judge of the county court the plaintiff introduced one Clara Smith, who testified that she saw the porch break loose and fall; that plaintiff fell under the floor; that Clara Smith helped to get her out; and saw that she was badly bruised in places; that she put turpentine on her and asked her if she, Naomi, was not killed.

On cross-examination the defendant laid the necessary grounds for contradicting and impeaching her by the testimony of one Davis. Defendant offered to prove by Davis a conversation with Clara Smith for the purpose of contradicting and impeaching her. The substance of the proffered testimony is that Clara Smith told the witness Davis that she did not know much about this case; that she was there and helped attend her, saw her a few days afterwards and plaintiff told her that she was not much hurt, but was hurt enough to have a lawsuit against the city; that plaintiff said she was going to lay in a week or two and appear like she was seriously injured; that she, Clara Smith, did not see that plaintiff was hurt very much. This testimony was excluded by the judge of the county court. We concur with the judge of the Superior Court that this was error. The testimony of Davis tended to impeach and contradict that of Clara Smith and the foundation for the introduction of such testimony had been laid upon cross-examination.

It is well settled that contradictory testimony of this character is competent, not only because it is contradictory, but in this case because it tended to show the temper, disposition, and conduct of the witness Clara Smith in relation to this case. *S. v. Patterson,* 24 N. C., 353; *In re Craven,* 169 N. C., 566; *S. v. Lewis,* 133 N. C., 653; *S. v. Crook,* 133 N. C., 672.

The judgment of the Superior Court upon the plaintiff's appeal is Affirmed.

The costs of that appeal will be paid by the plaintiff.

APPEAL BY THE DEFENDANT CITY OF WINSTON-SALEM.

This defendant assigns error because the trial judge refused to instruct the jury upon all the evidence, if it was believed, that the jury should answer the third issue "No" and the fourth issue "No." The judge of the Superior Court sustained the ruling of the trial judge. The said defendant excepted and appealed to this Court.

We are of opinion that upon all the evidence the work upon which the contractor was engaged was not "inherently dangerous." The trial judge seemed to be of opinion that if a man of ordinary prudence would have anticipated that injury would have ensued from this work, then it is inherently dangerous. This is not the test. The word "dangerous" means attended with risk, perilous, full of risk. *West v. Ward,* 77 Iowa, 323. Dangerous as defined by Webster means attended or beset with danger; full of risk; something which in itself is perilous; hazardous and unsafe.

It is a matter of common observation that houses in this day are moved from one part of a town to another with perfect safety, and that they are raised and elevated with more ease and immunity from danger than they can be moved. In this case the contract was to raise the dwelling, and not to move it. The house was raised with perfect safety, but the alleged negligence of the contractor to properly brace the porch caused it to fall when the plaintiff walked out on it.

We have recently said that "The rule in regard to 'intrinsically dangerous' work is based upon the unusual danger which inheres in the performance of the contract, and not from the collateral negligence of the contractor. Mere liability to injury is not the test, as injuries may result in any kind of work where it is carelessly done, although with proper care it is not specially hazardous." *Vogh v. Geer,* 171 N. C., 672.

The work being done in that case was the erection of a concrete building several stories in height. In referring to it we said: "We find no precedent that holds that this work is of that character which the policy of the law requires that the owner shall not be permitted to free himself from liability by contracting with another for its execution."

In *Laffrey v. Gypsum Co.,* 83 Kans., 347, the Court said: "No effort will be made to precisely define the expressions 'intrinsically dangerous' or like phraseology, as used in the authorities. Regard must be had to the reason of the principle and the consequence flowing from its application in the given situation. . . . It is clear from the cases cited and many others in which the subject has been considered that the intrinsic danger of the undertaking upon which the exception is based is the danger which inheres in the performance of the contract, resulting directly from the work to be done, and not from the collateral negligence of the contractor."

The case under consideration is evidently one where the injury was caused by the negligent failure of the contractor to prop up the porch, and not from any inherent danger in the simple and everyday operation of raising a house by means of jack screws.

As said by *Lord Cochran* in *Bower v. Peate,* 1 Q. B. Div., 321: "There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

The case of *Davis v. Summerfield,* 133 N. C., 325, we do not think sustains the contention that the work contracted for by the city of Winston-Salem was of that character which in itself is inherently dangerous, so that the city could not relieve itself from liability for the manner in which the work was done. The real ground of that decision was that the defendant owed the plaintiff a duty, which it could not delegate or get rid of, to notify him of his intention to do work on his (the defendant's) premises which might cause harm to the plaintiff's adjoining property if certain precautions were not taken. *Embler v. Lumber Co.,* 167 N. C., 462.

We think the court erred in not giving the prayer for instructions. The judgment of the Superior Court is reversed. The costs of this appeal will be taxed against the plaintiff.

New trial.

E. D. MILLER AND WIFE V. J. G. LATTA ET AL.

(Filed 15 November, 1916.)

Appeal and Error—Reference—Exceptions Sustained—Evidence.

The order of the trial judge overruling a finding of fact by the referee is conclusive on appeal when there is evidence to support such order, and there is no exception because of the lack of evidence thereon.

CIVIL ACTION tried before *Webb, J.,* at June Term, 1916, of ROCKINGHAM.

This is an action to restrain a sale under a certain trust deed executed by the plaintiffs to the defendants, and for an accounting.

The action was referred by consent, and upon the report of the referee being filed the plaintiffs excepted thereto, and particularly to the disallowance as a credit of an order for $860, issued on 28 July, 1910, in favor of the plaintiff E. D. Miller, by two officers of the Grand Lodge, J. S. Fitts, president, and R. W. Brown, secretary, to cover salary and office expenses.

His Honor overruled all of the exceptions to the report except the one to the refusal to allow the credit of $860, which he sustained, and

in connection therewith he made the following finding: "That the order for $860, dated 28 July, 1910, was duly issued by the Grand Lodge for salary and office expenses of the said plaintiff E. D. Miller; and that the said E. D. Miller is entitled to have the said order for $860 of said date credited on the deed of trust and notes mentioned in the pleadings. And the court finds as a fact that the said order was duly issued and has never been paid to the said E. D. Miller and is a valid claim against the defendants."

Judgment was rendered upon the report of the referee as amended by the above finding of fact, and the defendants excepted and appealed.

W. R. Dalton, P. W. Glidewell, and King & Kimball for plaintiffs.
R. G. Parker and J. C. Buxton for defendant.

ALLEN, J. The judgment appealed from shows that the judge of the Superior Court had the benefit of argument and that he carefully considered the evidence taken by the referee, and when this course is pursued his findings of fact are conclusive upon us, in the absence of an exception that there is no evidence to support the finding, and we find no such exception. *Wynn v. Bullock,* 154 N. C., 382; *Culver v. Jennings,* 157 N. C., 565.

We have, however, examined the record and are of opinion there is evidence to sustain the finding as to the order of $860, and to support the contention of the plaintiffs that the order of 21 July, 1911, for $854.84 was not given in substitution for the first order.

Affirmed.

JOHN S. TILLOTSON v. H. A. FULP AND WIFE, ELLEN.

(Filed 15 November, 1916.)

Instructions, Conflicting—Deeds and Conveyances—Dividing Lines—Burden of Proof—Appeal and Error.

Where the dividing line between adjoining owners of lands is in dispute, the plaintiff claiming one location to be the true one, and the defendant claiming it to be at another place, the burden of proof is on the plaintiff to establish the line as claimed by him, and an instruction which places this burden upon him and at the same time places the burden on defendant to show its location according to his contention, is conflicting, and reversible error to the defendant's prejudice.

TILLOTSON *v.* FULP.

CIVIL ACTION tried before *Shaw, J.*, at Fall Term, 1915, of STOKES, upon these issues:

1. Where is the true dividing line between lots Nos. 3 and 4, referred to in the pleadings? Answer: "From black A to black B."

2. Is the plaintiff the owner and entitled to the possession of the wood and timber described in the complaint? Answer: "Yes."

3. What was the value of the wood and timber removed by the defendant? Answer: "$25."

4. What was the value of the wood and timber seized by the sheriff in this action? Answer: "$15."

5. Is the *feme* defendant the owner and entitled to the possession of the timber and wood described in the pleadings? Answer: "No."

6. What is the value of the wood and timber removed by the plaintiffs from the lands in controversy? Answer: .....

From the judgment rendered, defendants appealed.

J. D. Humphreys, J. W. Hall for plaintiff.

J. H. Clement, E. B. Jones, C. O. McMichael, N. O. Petree for defendants.

BROWN, J. The court instructed the jury: "The plaintiff contends that the black line from black B to black A is the true dividing line. The burden is on the plaintiff to show this by the greater weight of the evidence, before you can find it. If the plaintiff, by the greater weight of the evidence, has shown that the true dividing line between lots 3 and 4 is the black line, as claimed by him, then your answer to the first issue will be the black line running from black B to black A."

The court further instructed the jury that the defendants contend that the true dividing line is the red line, and that the burden of proof is upon the defendants to establish it by the greater weight of evidence.

These instructions are conflicting and erroneous. The burden of proof cannot rest on both plaintiff and defendant in this case. The identical point is decided in *Woody v. Fountain*, 143 N. C., 66, and in *Garris v. Harrington*, 167 N. C., 86. In the last named case the Court in passing upon similar instructions said: "The plaintiff became the actor, and assumed the burden of proof to establish the true line between him and the defendant, when he instituted the proceeding; and this burden of proof did not shift to the defendant because, in addition to denying the line to be as claimed by the plaintiff, he alleged another to be the dividing line."

There can only be one true dividing line between the two tracts of

land, and upon the reason of the thing the burden of proof cannot rest on both plaintiff and defendant at the same time to establish that line.

New trial.

E. M. WHITTINGTON v. SOUTHERN RAILWAY COMPANY.

(Filed 15 November, 1916.)

1. Carriers of Goods—Damaged Shipments—Refusal of Shipment.

Damages to a shipment of goods by a railroad company, caused by the carrier's negligence, does not justify the owner in refusing to accept them on that account, unless the damages are sufficient to render the goods practically worthless; for he is required ordinarily to accept the goods and sue for the damages upon the refusal of the carrier to pay them.

2. Same—Pleadings—Damages.

Where an owner of a shipment of goods has refused to accept them from the carrier on account of their damaged condition, his refusal will not prevent his recovering for the damages sustained, if he has properly pleaded them. His evidence is sufficient to sustain a recovery, and the liability of the defendant is not thereby increased.

3. Carriers of Goods—Damaged Shipment—Measure of Damages.

The measure of damages to a shipment of goods by a railroad company is the difference in value between the value thereof in their damaged condition at destination and what their value would have been had they been properly transported, or handled, by the carrier.

4. Carriers of Goods—Consignor—Owner—Trials—Evidence.

It is competent for the consignor of goods to show by parol that he is the owner thereof, and recover damages from the common carrier caused by its negligence.

CIVIL ACTION tried before *Cline, J.*, at March Term, 1916, of GUILFORD.

This is an action to recover of the defendant damages for injury to certain machinery and supplies shipped by plaintiff from Macon, Georgia, to Kernersville, North Carolina. The shipment consisted of knitting-mill machinery and supplies delivered to the Central of Georgia Railway Company on or about 30 September, 1912, and consigned to J. A. Holloman at Kernersville, North Carolina. When this car reached its destination the machinery and supplies therein were damaged. The defendant received the car containing the shipment from the Central of Georgia Railway Company, and the defendant was the

delivering carrier. The admissions in the pleadings establish the following facts: (1) That the defendant is a common carrier of passengers and freight for hire, and as such maintains and operates a line of railway connecting with the Central of Georgia Railway Company in the State of Georgia to Kernersville, North Carolina; (2) that on or about 30 September, 1912, plaintiff delivered to the Central of Georgia Railway Company a car-load of knitting-mill machinery and supplies, to be transported from Macon, Georgia, to Kernersville, North Carolina; that said machinery was consigned to J. A. Holloman; (3) that the Central of Georgia Railway Company is one of an association of common carriers formed by itself and the Southern Railway Company, and as such issued to the plaintiff for a valuable consideration a through bill of lading for said machinery and supplies from Macon, Georgia, to Kernersville, North Carolina; (4) that the machinery and supplies for which damages are claimed in this action were actually delivered to the said common carrier for transportation; (5) that plaintiff gave notice and made a claim for the loss and damage claimed by him within the time prescribed by the terms of the bill of lading.

The plaintiff offered evidence tending to prove that the shipment was damaged by the negligence of the defendant.

The plaintiff also offered evidence to prove that he was the owner of the property, although consigned to Holloman. This evidence was objected to by the defendant.

The plaintiff also offered evidence that he had a contract for the sale of the property for about $3,000. This evidence was admitted over the objection of the defendant, but was afterwards withdrawn from the jury by the court.

The plaintiff refused to receive any part of the shipment, although it was not a total loss.

The defendant moved for judgment of nonsuit, which was refused, and it excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Brooks, Sapp & Williams for plaintiff.
Wilson & Ferguson for defendant.

ALLEN, J. The motion for judgment of nonsuit is upon two grounds:

1. That as the shipment was not totally destroyed and worthless, it was the duty of the plaintiff to receive the goods, and as he refused to do so, he cannot maintain this action to recover damages.

2. That the cause of action alleged in the complaint is not to recover the damages to the goods, but their value, and as such cannot be maintained, because the goods were not worthless and the plaintiff refused to receive them.

The principle for which the defendant contends is sound, and is thus stated in 3 Hutchison on Carriers, sec. 1365: "As a general rule, the doctrine that where goods are injured the owner may abandon them as for a total loss, and sue for their value, does not apply to contracts of affreightment. The fact, therefore, that the goods were injured upon the journey through causes for which the carrier is responsible, does not of itself justify the consignee in refusing to receive them, but he must accept them and hold the carrier responsible for the injury"; and in *Wilkins v. R. R.*, 160 N. C., 58, which was a case of total loss: "In contracts of affreightment the consignee under an ordinary bill of lading may not, as a general rule, reject the goods because the same have been wrongfully damaged in the course of shipment. Under usual conditions he must receive the goods and hold the company for the injury done; and he is required further to do what good business prudence would dictate in the endeavor to minimize the loss. The principle, however, does not obtain when the 'entire value of the goods has been destroyed and the injury amounts practically to a total loss.' In such case the consignee is justified in refusing the goods, and may sue for the entire amount."

Note, however, that when the loss is partial the doctrine is that the owner cannot reject the goods and recover the *value*, and not that he cannot recover the damages actually sustained; and this distinction is found in all the authorities.

In the case from Texas, cited by the defendant, the Court says: "Where a shipment of goods was only partially destroyed by the carrier's negligence, neither the consignee nor the shipper is justified in abandoning the shipment and charging the carrier with its full value." *R. R. v. Elevator Co.*, Texas (Tex. Civ. App.), 168 S. W., 1028. And in the case from South Carolina: "A carrier having goods in possession for transportation acquires no title to them, as the goods remain the property of the owner. His right of action against the carrier is for the entire value of the goods if lost, or made entirely worthless by the carrier's default; and in case of destruction of value, the recovery is not affected by the owner's acceptance or his refusal to accept the goods. On the other hand, if the value is merely impaired by actual injury in the hands of the carrier, or by delay in the carrier, the consignee is bound to receive the goods, and his right of action is limited to the impairment of value due to the delay in carriage or injury to the goods." *McGrath v. R. R.*, 91 S. C., 552.

In *Parsons v. Express Co.,* 25 L. R. A. (N. S.), 843, the plaintiff refused to receive the shipment, and sued to recover the value, and the Court held that the "Defendant was entitled to have the case submitted upon a proper theory, and the verdict of a jury upon the amount of plaintiff's damage, which was the difference between the value when delivered to the express company for shipment and its value when finally tendered to plaintiff at its destination," and *R. R. v. Cumbie,* 141 S. W., 939; *R. R. v. Everett,* 37 Tex. Civ. App., 167; and *R. R. v. Moore,* 47 Tex. Civ. App., 531, are to the same effect.

This is the rule applied by his Honor, as he instructed the jury that the measure of damage was "The difference between the value, reasonable market value, of the shipment at the time it reached Kernersville, in the condition it then was, and what would have been a reasonably fair value of that same shipment at Kernersville at the same time, but for the damage suffered by it or sustained to it, owing to the negligence of the defendant. You would take and apply the rule this way: You would say, What would have been our finding as to a fair valuation of that shipment if it had come from Macon to Kernersville in as good plight and condition as it was shipped? And then you would ask the second question, What is the depreciation, how much was that machinery lessened in value when it came to Kernersville, on account of the negligent failure of the defendant to transport it safely? And that difference would be the measure of damages."

This rule is not only supported by authority, but seems to be reasonable and just, and it imposes no additional burden on the carrier.

If the plaintiff had received the shipment he would have been entitled to recover as damages the difference between the value of goods in their damaged condition and their value if they had not been damaged, which is all he has recovered, and we see no reason for denying this recovery because of refusal to receive the shipment, when this has in no way increased the liability of the defendant.

We are also of opinion that the complaint alleges a cause of action, which is sustained by the verdict.

It alleges that the defendant received the shipment, that it was damaged during transportation by the negligence of the defendant, and that the plaintiff has suffered damages in the sum of $3,000 by reason of the failure of the defendant to properly and safely haul, transport, and deliver the machinery and supplies aforesaid, and in carelessly and negligently breaking, damaging, and destroying said machinery and supplies while the same was being carried and transported as aforesaid.

The evidence introduced to prove that the plaintiff, who was the consignor in the bill of lading, was the owner of the goods, was com-

petent. *Summers v. R. R.*, 138 N. C., 295; *Rollins v. R. R.*, 146 N. C., 153; *Cardwell v. R. R.*, 146 N. C., 218.

The evidence of a contract for the sale of the goods by the plaintiff was withdrawn from the jury.

No error.

EUGENE W. McNAIRY v. NORFOLK AND WESTERN RAILROAD COMPANY.

(Filed 15 November, 1916.)

1. Carriers of Passengers—Mileage Exchange—Tickets.

It is the duty of a conductor on a passenger train to accept the mileage of a person traveling thereon when the railroad company has not afforded him time to get it exchanged for a ticket at its station.

2. Same—Ejection from Train—Statutes—Usual Stops—Flag Stations.

A place along a railroad company's track is not a usual stopping place within the meaning of Revisal, sec. 2629, forbidding the company to put off passengers except "at usual stopping place or dwelling," when it is merely a flag station, with only a side-track, without shelter, and the nearest dwelling three-quarters of a mile away; and where one traveling on the train has been put off at such place at 9 o'clock in the night for failure to exchange his mileage for a ticket, and was informed by the conductor that it was "a rather poor place to spend the night," it does not preclude his recovery, for the company's violation of the statute, that he again boarded the train and complied with the conductor's demand in paying the additional charge required of those who have no ticket.

3. Same—Excessive Force—Punitive Damages—Trials — Evidence — Mental Anguish.

Where a traveler is ejected from a passenger train in violation of his rights, at night, at a place without shelter, and the evidence tends to show that the conductor, with the assistance of the flagman, used violence in taking him from the seat in the presence of the passengers; that the conductor's actions evinced anger; that the traveler again boarded the train after being ejected, whereupon the conductor told him that he would kick him off if he did not pay the cash fare, in consequence of which the traveler paid the price and remained on the train: *Held*, evidence of unnecessary force on the part of the conductor, and sufficient to sustain a verdict awarding exemplary damages, and damages for humiliation and injury to feelings.

4. Carriers of Passengers—Ejection from Train—Trials—Questions for Jury.

The question whether the conductor of a train used unnecessary force in ejecting a passenger from the train is one for the jury upon conflicting evidence.

5. Carriers of Passengers—Wrongful Ejection—Cash Fare—Damages.

Where a conductor refuses to pull the mileage of a passenger, demands the cash fare, and, upon refusal of the passenger to pay, wrongfully ejects him, it is no defense to the company to avoid the payment of actual or exemplary damages that, upon the payment of the small amount of the cash fare, the passenger could have avoided the entire injury.

6. Appeal and Error—Assignments of Error—Rules of Court.

This cause being tried under one issue, without exception taken, the assignment of error that other issues should have been submitted is not in compliance with the rules of Court regulating appeals.

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendant from *Cline, J.*, at March Term, 1916, of GUILFORD.

William P. Bynum and R. C. Strudwick for plaintiff.
J. C. Buxton and King & Kimball for defendant.

CLARK, C. J. The plaintiff, the holder of a mileage book, obtained in exchange a ticket over the defendant's train from Stoneville, N. C., to Madison, N. C. On arrival at the latter place at 8:30 p. m. he got off the train, but was informed by the agent at the hotel at which he proposed to spend the night that the hotel could not accommodate him. He then determined to take the train and go on to Walnut Cove to spend the night. The train stopped at Madison only about one or two minutes, and the plaintiff testified that the ticket agent was not at the office, but was engaged in transferring baggage. The plaintiff remarked to the conductor, who was standing near him, that he would have to go on with him to Walnut Cove. The conductor replied, "If you are going on with me, get aboard," which the plaintiff did.

There is evidence tending to show that the ticket agent was at his office that night, and that it was the assistant ticket agent who was transferring baggage.

The court charged the jury that if the agent was on duty that night, and if the plaintiff had applied for a ticket he could have gotten one, then the conductor had the right to put him off if at a station or a house and in a proper manner. It does not appear how the jury found the conflict of testimony upon this point. If the agent was not in his office, or the plaintiff did not have time to get a ticket, then it was the duty of the conductor under our statute to take his mileage, for, under the statute, if opportunity is not afforded the passenger to exchange his mileage for a ticket, the mileage shall be accepted by the conductor.

If, however, the plaintiff had time and opportunity at Madison to exchange his mileage for a ticket, the plaintiff relies upon two other circumstances to sustain his verdict. Revisal, 2629, forbids putting off a passenger except "at a usual stopping place or near a dwelling-house," and the place where the plaintiff was put off the train was not a usual stopping place on the defendant's road, but merely a flag station. There was no shelter nor station, nothing but a side-track, and the nearest dwelling was three-quarters of a mile from this siding. The plaintiff testifies that he was put off at 9 p. m. at night, as must have been the case, since he left Madison at 8:30 p. m.; that he was very thinly dressed, wore a Palm Beach suit, with very thin underwear, and the conductor told him at the time that it was "a rather poor place to spend the night." There was no one living there. It did not atone for this violation of law that the plaintiff again got back on the train, paying his fare at the higher rate and with the additional charge required of one who has no ticket.

The plaintiff testified that he had been over the road seven times, and the train had stopped there only once, and that when it was flagged. The court left it to the jury to find whether or not it was a usual stopping place where the train was accustomed to stop for the discharge of passengers, and if it was not and there was no house near by, the jury could answer the first issue in the affirmative. That upon the uncontradicted testimony the defendant was wrongfully ejected is settled by the plain words of the statute as construed in *Mott v. R. R.*, 164 N. C., 367, which held that in such case the plaintiff was entitled to recover. There are numerous cases elsewhere exactly in point, among them *R. R. v. Flagg*, 43 Ill., 364, 82 Am. Dec., 133, in which it was held that "A water tank, although the train ordinarily stopped there, was not a usual stopping place" under a statute like ours. To the same purport, *R. R. v. Parks*, 18 Ill., 460, 68 Am. Dec., 565; *R. R. v. Casey*, 52 Texas, 122.

The plaintiff's further ground of complaint is that he was ejected with unnecessary force and in a manner intensely humiliating to him. The plaintiff's evidence on this point was that he presented his mileage book to the conductor and explained to him why he did not get a ticket to Madison—because the agent was not at his office, and he did not have time to get a ticket. He proposed to the conductor that he could pull the mileage and get the ticket at Madison the next day for the trip from Madison to Walnut Cove. The conductor refused to take the mileage and demanded the cash fare of 50 cents, which was a bonus of 15 cents, besides 2½ cents per mile, whereas the mileage book was at the rate of 2 cents per mile. He testified that when the

conductor refused to take the mileage or his proposition to get the ticket in exchange for the mileage, the conductor called up the flagman and pulled the bell cord for the train to stop; that when the flagman came up and the witness was explaining the matter to him, "the conductor came up and reached down in witness's seat with both hands and grabbed him by the arm and jerked him into the aisle with such violence that both came near falling into the lap of the lady sitting opposite; the witness then said to the conductor: 'I think I know my rights in this case. It is not necessary for you to get rough. All you have got to do is to set me off this train.' The conductor continued pulling the witness down the aisle; that as he went down the aisle, the conductor had hold of one arm and the flagman either with his hand on the shoulder of the witness or his other arm, and led witness out of the car; that they put the witness off in the woods out there some distance from Madison, the conductor remarking that it was rather a poor place to spend the night; that there was nobody living there; the plaintiff was very thinly dressed and there was no house or shelter —nothing but a side-track in the woods, on the bank of a river, after 9 o'clock at night; and as the train pulled out the witness ran ahead and got on the rear steps of the coach ahead, just adjoining the one from which he had been ejected; the conductor immediately ran up the steps and ran around and violently grabbed the witness as he went up the steps; that the conductor, shaking in great wrath, yelled at witness that he would kick him off, or put him off, of the train unless he paid the cash fare; the witness went into the coach and the conductor came in and demanded a cash fare of 50 cents, which the plaintiff paid and took his receipt from the conductor, who was all in a tremble so that it took him some time to write a receipt; that he was intensely humiliated by being yanked out of the train before some twenty-five people, the train being brilliantly lighted." There is evidence from the defendant in contradiction of some of the circumstances concerning the manner of ejectment; but that was a matter for the jury, and the plaintiff's evidence must be taken as true on this motion to nonsuit. Probably there is no one who will contend that such conduct on the part of the conductor was justifiable nor that the plaintiff was not entitled to recover for the humiliation and wrong inflicted upon him if these were the facts. But if there is, that school of thought had no representatives on this jury. Whether the ejection took place in that mode was properly submitted to the jury.

The court charged on this point that if the conductor had the right to eject the plaintiff, he had the "right to use as much force as was necessary to accomplish the ultimate purpose to remove him, if he had not got a ticket, from the train. Now, you cannot weigh that in

golden scales. You cannot say he did use exactly as much force as is necessary, or he did exceed it by the smallest grain. I do not think that would be a reasonable interpretation, because a man, if it is necessary for him to lift a passenger up or drag him along, probably could not measure to an exact nicety just how much force it would require; but this word 'unnecessary force' means here that it should be apparent to you, as triers of this case, that the conductor exceeded the force that was required; that he acted in a manner which showed the exercise in that sense of unnecessary force; that he did more than you could see and will say that it was necessary for him to have done; that he exceeded the rights which the statute gives him to do in such things as are reasonably necessary to accomplish the ultimate object." The question of unnecessary force in the ejection of passengers is one of fact for the jury, and the defendant cannot complain of the charge of the court in this respect. *Knowles v. R. R.*, 102 N. C., 59; 2 Hutchison on Carriers (3 Ed.), sec. 1084.

The charge of the court was not unfavorable to the defendant, for he held as a matter of law (which was a matter of fact to be decided by the jury) that the plaintiff was not excused in not getting a ticket at Madison, though he testified that the agent was not in his office and that he was not afforded time to get a ticket after he told the conductor he intended to go on that night. The court instructed the jury that the conductor was entitled to demand 50 cents cash fare, and left the case upon the two questions as to whether the place of ejection was such as was forbidden by the statute and whether or not excessive force was used. The court instructed the jury that if the plaintiff was wrongfully ejected from the train he "would be entitled by way of actual or compensatory damages to recover such amount as the jury should find would reasonably and justly compensate him for any physical injury or inconvenience, any mental suffering or humiliation which he endured because of the result of what you find, if any, to be the wrongful act done towards him by the defendant company." The court further charged: "In addition to that, gentlemen, to entitle a passenger to punitive damages his wrongful expulsion from the train must be attended by such circumstances as to show rudeness, insult, aggravating circumstances calculated to humiliate the passenger. Exemplary, punitive, or vindictive damages are given to vindicate the right, punish the wrong, and to set an example before others who may be prone to the commission of like offenses. If the defendant has acted wantonly or with criminal or reckless indifference, or has been guilty of intentional or willful violation of the plaintiff's rights, the jury could award such damages in their sound discretion." In these instructions we find nothing of which the defendant can complain.

The defendant contends that the plaintiff could have avoided being put off the train by paying the small sum of 50 cents. The plaintiff contends that it is "the other way around," and that the defendant could have avoided this action by not putting the plaintiff off at a siding in the woods at 9 o'clock at night, three-quarters of a mile from the nearest dwelling, and especially by not putting him off with violence and unnecessary force and in a manner humiliating to him before a car full of passengers.

In *Sawyer v. R. R.*, 171 N. C., 15, this point is discussed, the Court saying: "When a passenger is about to be wrongfully ejected from a train it is not incumbent upon him to prevent the wrong by paying money which the carrier's servant has no right to exact. He is not required to submit to imposition or to buy again his right to remain on the train to his destination, Revisal, 2611. If this were not so, carriers would be above the law, because there could never be punishment exacted for the wrongful violation of the contract of carriage. If it be said that the passenger could pay the money, and recover it back, this would not right the wrong, because he could not afford to pay counsel fees and bear the expenses of litigation for so small a sum. It would be fairer to say that, in cases of doubt, the carrier should carry the passenger to his destination, and sue him to recover the fare which he should have paid. But neither is required to do this. Each party can stand upon his rights, if he so chooses. This has been often held. *Harvey v. R. R.*, 153 N. C., 567, and cases there cited. Revisal, 2611, confers the right of action."

This case was submitted to the jury upon the issue, "Was the plaintiff wrongfully ejected from the train of the defendant?" That issue was submitted to the jury solely upon the evidence whether defendant was put out at a place forbidden by law and by the exercise of excessive force.

There was no prayer to submit this as two issues, nor is there any assignment of error in that regard. The assignments of error were all held insufficient by this Court in accordance with our uniform decisions, some of them at this Court, except only the assignment for the refusal of the motion to nonsuit. It being admitted in the dissenting opinion that there was some evidence to go to the jury upon the issue as framed, there is

No error.

Brown, J., dissenting: The following issues were submitted to the jury:

1. Was the plaintiff wrongfully ejected from the train of the defendant, as alleged in the complaint? Answer: "Yes."

2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: "$1,000."

I am of opinion that his Honor erred in not giving the first of the defendant's prayers for instruction. I am further of opinion that his Honor should have instructed the jury to answer the first issue "No."

The evidence is that the plaintiff had a mileage book on which he had taken a ticket to Madison. When he got to Madison he was told at the car steps that there were no accommodations to be had, and he concluded to go on to Walnut Cove. He made no effort whatever to get another ticket on his mileage book. He did not ask the conductor for time to get a ticket, and he did not go to the ticket office. The train stayed at Madison for a very short time. When the conductor came around for tickets, the plaintiff presented his mileage book and insisted that the conductor should pass him on it.

It is well settled that a mileage book is not good for passage unless the purchaser complies with its conditions. The conductor demanded 35 cents fare to Walnut Cove. The judge instructed the jury that the plaintiff was not rightfully a passenger upon the train at the time in question, and that the conductor was not required to take out of the plaintiff's mileage book the mileage equal to the distance between Madison and Walnut Cove. His Honor should have instructed the jury, in view of that ruling, that upon the plaintiff's own evidence they should answer the first issue "No"; that he was not wrongfully ejected.

I admit that a passenger may be rightfully ejected from a train and at the same time recover damages for the manner in which that ejection was accomplished, but no issue embodying that principle was tendered by the plaintiff or submitted to the jury in this case.

His Honor instructed the jury under the second issue that if plaintiff was wrongfully ejected from the train, the plaintiff would be entitled by way of actual or compensatory damages to recover such amount as the jury said would reasonably compensate him for any physical injury or inconvenience, mental suffering or humiliation which he endured by reason of such ejection. This was error, because his Honor had already instructed the jury that the plaintiff was wrongfully on the train; that he was not rightfully a passenger, and that the conductor had a right to eject him. Consequently, whatever humiliation the plaintiff suffered by reason of such ejection was the result of the plaintiff's own misconduct. It was his duty to pay his fare when the conductor demanded it, and he would have been saved any humiliation and mortification such as he complains of. Therefore, I say that his Honor injected an element of damage for which the plaintiff has no right to recover.

I admit that according to the plaintiff's own testimony there is some evidence of unnecessary force and violence in ejecting him. Inasmuch as the plaintiff was rightfully ejected, this is the only element of damage which should be considered by the jury; that is to say, whatever damage ensued from such excessive force.

I am of opinion that an issue should have been submitted as follows: Notwithstanding that the plaintiff was rightfully ejected from the train, was excessive force and violence used in such ejection? It was the plaintiff's duty to tender such an issue. All the evidence in this case, except that of the plaintiff himself, shows conclusively that no more force was applied by the conductor than was reasonably necessary to eject a man who was resisting such ejection. It is a very easy matter for the plaintiff to say that the conductor jerked him. It is difficult to get a man out of a seat when he is resisting without jerking him. There is not one scintilla of evidence that the plaintiff was in the least degree injured in any way.

The contention that the conductor violated the statute and put the plaintiff off at an unsuitable place should not have been submited to the jury as an element of damage. I do not say this because Sharp's siding was a suitable place for the plaintiff to be compelled to spend the night, but for the reason that the plaintiff himself testifies that he immediately got back on the train and paid his fare to Walnut Cove and spent the night there. The wrong which the statute was intended to remedy was putting a person off at some practically uninhabitable place where no lodgings could be had and compelling him to stay there an indefinite time. It was not intended to cover a case where a passenger is rightfully ejected, but gets back on the train immediately and pays his fare and goes on to the next station.

I admit that this Court has decided that it will not interfere with the damages, but leave it to the judges of the Superior Court to set aside the verdicts when they are excessive. A perusal of the facts in this case will show that the plaintiff was in the wrong from the beginning to the end, and that the verdict rendered by the jury was grossly excessive, assuming that the conductor did exercise a little more force than was necessary. In this case I am convinced that all the force exercised by the conductor was brought about by the plaintiff's resistance. There is no evidence that the conductor used a harsh word or indulged in any abusive epithets. He and the flagman dragged or pulled the plaintiff down the aisle because the plaintiff forced them to do it.

It is suggested in the opinion of the Court that the only assignment of error properly made is the one relating to the nonsuit, and that,

therefore, the Court will not consider the others. I do not agree with the Court in that particular.

The third assignment of error is in these words: "The action of his Honor in declining to give to the jury defendant's special prayer No. 1 is noted in defendant's third exception, page 75." By reference to page 75, it is seen that prayer No. 1 covers a page and a half of the record. I know of no decision of this Court which requires that the prayers for instruction shall be copied in the assignments of error. In these assignments the number of the prayer and the page of the record is given. In my opinion this is all that can be reasonably required of an appellant in respect to the prayers for instruction.

If it is required to reprint them entirely in the assignment of error, it is not only a work of supererogation, but it makes the record extremely bulky and largely increases the expense of printing. All of our decisions, as I understand them, refer to assignments of error relating to the evidence where none of it is set out, no page of the record is given, and the Court would be left to grope through the record and find the exceptions without assistance.

WALKER, J., concurs in this opinion.

FIRST NATIONAL BANK v. JOHN S. PANCAKE.

(Filed 15 November, 1916.)

1. Removal of Causes—Foreign Executors—Voluntary Parties.

Foreign executors may not, of their own motion, make themselves parties to an action brought against their testator, in his lifetime; and where this has been attempted, without order of court to that effect, they may not enter proceedings to remove the cause to the Federal court for diversity of citizenship.

2. Same—Order of Court—Requisites.

Foreign executors may not obtain an order of court to make them parties to an action which had been brought against their testator upon filing a certificate of their appointment, without the seal of any court thereon, unaccompanied by letters testamentary, or copy of will, or without other adequate proof of their appointment as such.

3. Removal of Causes—Foreign Executors—Administration—Statutes—Requisites.

An attachment levied against the property of a nonresident shows that he had property in this State, and when he has died after action brought,

it becomes necessary for his executors or administrators to prove the will here and take out ancillary letters of administration with the will annexed and give the bond as required by our statute, Revisal, sec. 28 (1), before they will be recognized by our courts, or permitted to file a petition and bond for removal of the cause to the Federal court for diversity of citizenship.

APPEAL by plaintiff from *Cline, J.*, at May Term, 1916, of DAVIDSON.

Raper & Raper for plaintiff.
F. C. Robbins, Walser & Walser, and Linn & Linn for defendants.

CLARK, C. J. This action was originally begun against John S. Pancake, a nonresident of the State, and service was had by levying an attachment on a certificate of stock in the plaintiff bank, and service of summons by publication. He entered a special appearance and moved to vacate the attachment, which was denied, at January Special Term, 1916, of Davidson. Before the next term of court John S. Pancake died, and at that term his death was suggested, and on 30 March, 1916, the defendant filed before the clerk what purports to be a certificate of their having qualified as executors in Virginia, and indorsed on back of such certificate is the following: "The within named executors come into court and voluntarily make themselves parties defendant to this action," signed by their attorneys. They moved at May term for removal to the Federal court.

The defendants could not thus make themselves parties without leave of the court, and the motion to remove was erroneous because they have never been made parties to the action by order of the court. And it would have been erroneous to make them parties, for several reasons.

The document filed as the certificate of the appointment of the defendants as executors does not bear the seal of any court, and it is not accompanied by letters testamentary or by copy of the will. There is no adequate proof that they are the executors of the deceased. There is no order of the court here adjudging them to be such. Besides, Revisal, sec. 28 (1), provides: "No foreign executor has any authority to intermeddle with the estate until he shall have entered into bond, which must be done within the space of one year after the death of the testator, and not afterwards." The deceased having left property in Davidson County, in this State, as is shown by the attachment, the defendants must prove the will here and take out ancillary letters of administration with the will annexed and give bond as required by our statute before they are recognized by the courts of this State. *Glascock v. Gray,* 148 N. C., 346; *Scott v. Lumber Co.,* 144 N. C., 45.

Without a certified copy of the will, certainly in the absence of a certificate under seal of court of their adjudication of appointment as

executors by the Virginia court, there is nothing to assure us that they have any right to represent the deceased; and in the absence of a bond, even if so recognized, they are forbidden to represent the estate here.

In 18 Cyc., 1221, it is said: "It is a well settled principle of the common law that letters of administration have no extra-territorial force and confer no authority upon the representative to administer upon property outside of the State or country of his appointment. . . . No State will recognize a foreign representative to the prejudice of its own citizens."

If the defendants are, as they claim, the executors of John S. Pancake, and have so qualified in Virginia, and this had been duly shown, still that would give them no right under our statute, Revisal, 28 (1), except to apply to the clerk of the Superior Court at Davidson, where the attached property was, for ancillary letters of administration and to give bond. The policy of our law is that the property of a nonresident deceased person within this State shall be administered here and applied, first, to the payment of the debts due here, and only the surplus to be removed from the State.

In *Morefield v. Harris,* 126 N. C., 626, it was held: "An administrator cannot sue in this State by virtue of his appointment in another State. There must be an ancillary administrator appointed here." To same effect, *Page v. Ins. Co.,* 131 N. C., 116; *Shields v. Ins. Co.,* 119 N. C., 380. In that case there is full citation of authority to the above effect. The fact that the defendants claim to be foreign executors gives them no more right to defend than to prosecute an action. Bond must be given and ancillary administration taken out here so that the control of the property may remain in our courts for the protection of creditors here, unless and until, after such ancillary administration and bond, there is removal to the Federal court, upon a proper petition filed.

The defendants not having been made parties by any order of the court, and not having presented a case which would have entitled them to be recognized as parties, they were not in condition to ask for removal of this cause to the Federal court. The order of removal was therefore improvidently granted, and must be

Reversed.

WILLIAM MONK v. J. GOLDSTEIN.

(Filed 15 November, 1916.)

1. Usury—Contracts—Intent—Interpretation.

Where in an action to recover for alleged usury charged, the evidence is conflicting as to whether the defendant loaned the plaintiff money at an excessive or usurious rate of interest, to purchase an automobile, taking title to himself to protect himself in the transaction, or whether the defendant purchased the automobile, and sold it to the plaintiff at an advanced price, or for a profit, the intent of the parties and not the form of the transaction should be considered.

2. Usury—Trials—Burden of Proof.

Where the plaintiff sues to recover for usury alleged to have been charged him for a loan of money to purchase an automobile, and the evidence is conflicting as to whether the defendant loaned the money, or purchased the car and sold it to the plaintiff for a profit, the burden of proof is upon the plaintiff to establish, by the preponderance of the evidence, the fact that the money was loaned to him under an agreement requiring him to pay more than the legal rate of interest; and, if paid, that the defendant received it as usury, or with knowledge that it was usury, or with the wrongful intent of violating our statute upon the subject.

3. Instructions—Trials—Usury.

Where the charge, construed as a whole, is free from error, it will not be condemned because an isolated paragraph, standing alone, may be misleading; and in this case the charge of the court upon the question of usury is approved.

CIVIL ACTION tried before *Webb, J.*, and a jury at August Term, 1916, of GUILFORD.

Plaintiff sued, under Revisal, sec. 1951, for $80, double the amount of usurious interest paid by him to defendant. He alleged and testified that he wanted to buy a Ford car for $530, and, not having the money to pay for it, he applied to the defendant for a loan of the amount, and he agreed to lend him the money upon a mortgage of the automobile and a lot. When asked by plaintiff what he would charge for the money, defendant replied that "he could not turn so small a deal for less than 20 per cent, and plaintiff, after stating that it was too much, agreed to take the money," defendant putting up $530 in order to get plaintiff a machine costing $530 and charging him $616, the difference between the $530 that the Ford car cost and the $616 being for the use of the money. Plaintiff further said that the car was sold to him outright by the Ford company, though the bill of sale was made to the defendant, this being done, as plaintiff contended, to cover up the real transaction as being a

usurious one, as defendant was only to advance the money for the car, and told the Ford agent "that plaintiff wanted a car, and to let him have it." Plaintiff drove the car from the garage and kept possession of it.

Defendant alleged and testified that he bought the car from the Ford agency and gave his note of $530 for it, and paid it in a short time afterwards. That he sold the car to plaintiff for $636, and there was no loan, but a straight-out sale, and he never told Monk that he would have to charge 20 per cent on so small a deal, but the true agreement was that he should buy the car from the Ford agency and then sell it to Monk. He testified that as plaintiff gave him a mortgage for only $616, he asked for the balance of $20 and plaintiff paid it to him, making $636 in all, the price of the car, and that the $20 was not a payment on the debt, as plaintiff contends.

Plaintiff further testified that the $20 was for the use of the money, and that defendant so stated at the time it was paid to him, and added that he would not give a receipt for it.

It was admitted that defendant received $50 from the Ford agencies, which was a bonus or premium paid to owners of their cars during that year. Plaintiff testified that Goldstein did not tell him about this, but kept the money.

Defendant also admitted that $570 had been paid on the debt, that is, $40 more than plaintiff contended was due, as principal on the debt.

There was much evidence on both sides as to the usury, plaintiff's tending to show that there was a loan and that he had paid $40 more than the legal interest, and defendant's that there was simply a sale of the car, and no loan.

The jury found that there was a loan and that plaintiff had paid $40 as usurious interest. Judgment was entered upon the verdict for $80 and cost. Defendant appealed. The only exception was to the charge of the court, which will be noticed hereafter.

R. C. Strudwick and L. Herbin for plaintiff.
Stern & Swift, Wilson & Ferguson for defendant.

WALKER, J., after stating the case: The test of usury is that there should be a contract for the forbearance of an existing indebtedness or a loan of money. *Struthers v. Drexel,* 122 U. S., 487; 29 Am. and Eng. Enc., p. 464, sec. 4, and note 5; *Smithwick v. Whitley,* 152 N. C., 366; or, as otherwise expressed, a profit greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, which is a violation of the usury laws, it matters not what form or disguise it may

assume. *Doster v. English,* 152 N. C., 339. The following rule was adopted in that case for our guidance: "In order to constitute a usurious transaction, four requisites must appear: (1) There must be a loan, express or implied; (2) an understanding between the parties that the money lent shall be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned. The text-writers declare that these rules are applicable everywhere and under the usury laws of every State, and that unless these four things concur in every transaction it is safe to say that no case of usury can be declared. Tyler on Usury, p. 110; Webb on Usury, sec. 18, and cases cited; *Bennett v. Best,* 142 N. C., 168; *U. S. v. Wagoner,* 34 U. S., 378." The same rule, somewhat differently expressed, was stated in *MacRackan v. Bank,* 164 N. C., 24, 34, it being there added that the fourth element may be implied if all the others are expressed upon the face of the contract, or are established by sufficient evidence. What was said in *Yarborough v. Hughes,* 139 N. C., 200, is, perhaps, more to the point in this case: "The profit realized by Hughes, even if excessive, would not amount to usury, unless it was a mere device to cover and conceal an usurious transaction. It is less difficult to decide what is usury, when there is a loan of money, than in a case like this one. Interest is the premium allowed by law for the use of money, while usury is the taking of more for its use than the law allows. It is an illegal profit. 4 Blk. Com., 156. How can we say, on the face of this transaction, that as a matter of law it is usurious? If it was a reasonable advance, it surely cannot be illegal, for it was not excessive, and even if exorbitant it must have been resorted to as a mere cloak for usury. It would therefore depend upon the intent with which the increase was exacted. Referring to a state of facts much like those in this record, Tyler on Usury, p. 92, says: 'The inquiry often arises whether the transaction was a real sale in the regular course of business or a colorable sale, with intent to disguise a loan and evade the statute against usury; but if the case is found to be a sale and not a loan, the courts uniformly hold that usury cannot attach, and indeed a sale can in no case be *prima facie* evidence of usury; for it is valid unless it be a loan in disguise, and the burden of proof lies on the party claiming it to be usury, and it is necessary for him to show the circumstances which bring it within the statute.' In cases like this the intent is the essential element of usury, and this is of course a question of fact to be decided by the jury under proper instructions from the court. In this case the unlawful intent is not found."

The jury, of course, must be satisfied by a clear preponderance of proof that the debtor has paid more than the legal rate of interest, and

that the creditor received it as usury, or with the knowledge that it was usury, or, in other words, with the wrongful intent to violate the law by taking an excessive amount for the use of his money. *Bennett v. Best,* 142 N. C., 168. The object of the Legislature was to forbid the reserving, charging, or taking interest for the use of money at a rate in excess of 6 per cent per annum, under any contract where the relation of debtor and creditor is created or survives, and the absolute sale of property bona fide is not condemned by the law. It was held in *Jackson v. State,* 5 Ga. App., p. 181: "There is certainly no intimation in the language of this caption of a legislative intent to make penal the purchase of personal property or choses in action under any circumstances or at any price, no matter how low. The misdemeanor indicated by the title of the act is the reserving, charging, or taking of usury or excessive interest for money loaned or advanced at a greater sum than 5 per cent per month. In a bona fide sale and transfer of property for a cash consideration there is no interest or usury, and the relation of debtor and creditor is not created and does not survive the transaction. Only when the relation of debtor and creditor exists can the question of interest, excessive or otherwise, arise." The law, though, considers the substance and not the mere form or outward appearance of the transaction in order to ascertain what in reality it is. If this were not so, the usury laws might easily be evaded by false and deceitful methods. The inquiry, therefore, is what is the transaction in its substance and effect? These principles of the law upon the subject were carefully and fully explained to the jury, and they have found the essential fact in the case against the defendant, viz., that he loaned the money to the plaintiff with which to buy the car and exacted of him interest in excess of the lawful rate. The defendant excepted to but one instruction, which was taken from the body of the charge, but there was no error in it, especially when considered with its context, and we are required so to view it. The correctness of an instruction should be tested by examining the charge as a whole, and if, as an entirety, it is free from error, an assignment predicated upon an isolated paragraph, which standing alone might be misleading, must fail. *Kornegay v. R. R.,* 154 N. C., 389; *Revis v. City of Raleigh,* 150 N. C., 348; *Aman v. Lumber Co.,* 160 N. C., 369; *Bird v. Lumber Co.,* 163 N. C., 162. This is the settled rule in other jurisdictions. 4 S. E. Dig., p. 2067, sec. 295. The criticism of the selected paragraph is directed more against its verbal accuracy than its substantial correctness. We do not think it is erroneous even if construed alone, and contrary to the rule we have stated, because, when brought to its final analysis, it is equivalent to an instruction that if the transaction was, in good faith and in reality, a sale instead of a loan, then there was no usury, and this was correct. We think that there is no just ground of complaint that the instruction was not clear enough.

An intelligent jury could not have failed to understand it, even standing by itself; but when considered in view of the other parts of the charge, its meaning is perfectly apparent. It was really a repetition of what had before been said by the court in stating the contentions of the parties, and the court was merely affirming, as sound law, the particular contention of defendant, and directing a verdict accordingly, provided the jury found the facts to be as he had stated in his testimony they were.

The charge was scrupulously fair and impartial, and, judged by every test of the law, it complied fully with the requirement of the statute as to instructing juries.

No error.

IN RE WILL OF JOHN A. BROACH.

(Filed 15 November, 1916.)

1. Wills—Probate—Evidence.

Evidence is sufficient for the probate of a paper-writing purporting to be a will which tends to show that the subscribing witnesses went to the house of the deceased with an attorney, the deceased said he wanted them to witness his will, which was lying on a table in the room, then signed it, saying it was his will, requested the witnesses to sign it, the signing by the deceased and the witnesses being in the presence of each other.

2. Wills—Probate—Impeaching Evidence—Burden of Proof—Trials.

Where the formal execution of a paper-writing purporting to be a will has been proven, it is prima facie the will of the deceased, devolving upon the caveators the production of impeaching evidence.

3. Wills—Mental Capacity—Evidence—Witnesses—Opinions—Trials.

In proceedings to caveat a will a witness may be asked of his own knowledge whether in his opinion the deceased possessed sufficient mental capacity to make the will at the time, know his property, his relatives, the claims they had upon him, and to whom he wanted to give his property.

4. Same—Instructions—Intelligence.

Where the court has properly charged upon mental capacity of the deceased to make a will, a further charge that it is not required that he should have had a high degree of intelligence is without error.

5. Wills—Undue Influence—Wife.

Undue influence sufficient to set aside a will must be more than that arising from affection and kindness, but must partake of the nature of fraud; and such will not be inferred from the fact alone that the deceased

devised his property to his wife, who was with him at the time when he executed the paper-writing, and attending him during his sickness, or the fact that hers was a strong and his a weak will.

6. Wills—Caveat—Parties—Evidence—Presumptions.

Where a paper-writing is sought to be set aside for undue influence of the wife of the deceased, a requested instruction that the failure of the wife to testify was a strong circumstance tending to prove its invalidity, is properly refused, there being no parties to a *devisavit vel non.*

7. Wills—Signature—Execution—Evidence—Request.

Where there is evidence that a paper-writing has been signed by the deceased and duly attested by the witnesses, and that the deceased declared it to be his will, a requested instruction that there was no evidence that the will was prepared at his request is properly refused.

8. Wills—Caveat—Burden of Proof—Presumptions—Instructions.

In proceedings to caveat a will, the burden is upon the caveator to show undue influence, if such is relied on to set aside the writing; and his prayer for instruction that if the person benefited procured the same or advised the terms of the instrument, it would raise a presumption of undue influence, and the jury should so find unless explained to their satisfaction, is properly refused.

9. Wills—Mental Capacity—Evidence—Circumstance—Blank Space.

A paper-writing purporting to be a will which appoints the deceased's wife as executor and guardian of minor children, should there be any at the time of his death, and in another section leaves a blank space for the appointment of an executor and guardian in the event the wife predeceased him, cannot be construed as an anomaly of his appointing her as guardian for the children after her death, and a circumstance affecting the question of the deceased's mental capacity.

APPEAL by caveators from *Devin, J.,* at March Term, 1916, of RICHMOND.

Stevenson & Prince, Thomas & Phillips, and H. H. McLendon for caveators.

A. R. McPhail, John P. Cameron, and Kelly & Boggan for propounders.

CLARK, C. J. The following issue was submitted to the jury: "Is the paper-writing propounded, and every part thereof, the last will and testament of John A. Broach, deceased?" to which the jury responded "Yes."

The first assignment of error is that the court allowed the propounder to introduce the paper-writing as the will of John A. Broach. The witnesses Porter and Hinson testified that in company with A. R. McPhail, a lawyer, they went to the home of John A. Broach and his wife,

and Mr. Broach, after some general conversation, said that he wanted Porter and Hinson to witness his will. The paper was lying on the table. Broach got up, took the pen, signed the paper, and handed it to the witness Porter, who also signed it; both of them did this at the request of Broach, who remarked, "This is my will." Both of the witnesses signed in the presence of Mr. Broach and he signed in their presence. On this evidence the will was properly admitted in evidence. The exception to this, which is the first assignment of error, cannot be sustained. *In re Bowling,* 150 N. C., 507; *In re Herring's Will,* 152 N. C., 258. The formal execution having thus been formally proven, it was prima facie the will of the deceased, and the caveators were called on to put on evidence to impeach it.

Exceptions 2, 3, 4, 5, and 6 cannot be sustained. The Court has repeatedly held proper the question propounded, "State whether or not, in your opinion, Mr. Broach possessed sufficient mental capacity in September, 1909 (the date of the execution of the will), to know what property he had, who his relatives were, what claims they had upon him, and if he had wanted to dispose of his property, to whom he intended to give it." *Bond v. Mfg. Co.,* 140 N. C., 383; *In re Thorp's Will,* 150 N. C., 487, and many others.

The seventh assignment of error is that the court charged: "The requirements and test of capacity to make a will is that a man shall have mind and intelligence sufficient to know and understand what property he has, who are the natural objects of his bounty, and his relationship to them, and the manner in which he is disposing of his property. It does not require a high degree of intelligence in order to have capacity to make a will, but he must have intelligence sufficient, as I have just stated. The caveators having alleged in their caveat that the will was procured by undue influence, and that there was want of mental capacity upon the part of the testator, that he was suffering from insanity or dementia, it becomes necessary for us to understand in the beginning what we mean by this term." The court further charged: "In passing upon that the fact that John A. Broach bequeathed his property to his wife would not by itself be evidence of undue influence, because influence obtained by affection and kindness cannot be regarded as undue influence, but the influence must partake of the nature of fraud."

The court also charged: "If upon this testimony you find that this alleged will of John A. Broach was in writing and signed by him, and that he called upon two witnesses to attest it, and that they signed it as witnesses in his presence, being requested to sign it as his will, and you find that at the time when he signed this alleged will he had mental capacity to know and understand what he was doing, the property he owned and wished to dispose of; knew and understood the relations

he bore to his property and the persons to whom he was giving it; understood the nature of the act in which he was engaged and its extent and effect; if he possessed the mental capacity so defined, and you find the facts so to be and from a review of all the evidence that he had a mental capacity sufficient to make a will, then you will answer the issue 'Yes.'" The above instructions are assigned as error, but we find no error therein: *In re Abee's Will,* 146 N. C., 273; *Marshall v. Flinn,* 49 N. C., 199; *Wright v. Howe,* 52 N. C., 412.

The caveators also assigned as error the refusal of the court to charge as requested: "In this case the caveators allege and contend that said paper-writing was executed by John A. Broach on account of undue influence exercised over him by his wife and John Ponds. It is a presumption of law that if a party to an action, or interested in the result of an action, has in his or her possession, or under his or her control, evidence or witnesses, and fails to produce said evidence or witnesses, and that if the evidence was produced it would be against the party under whose control it is, the court charges you that the failure of Mrs. Broach and John Ponds to testify in this case is a strong circumstance tending to prove that said alleged will was executed by John A. Broach on account of undue influence exercised by him, by them, or one of them." This exception cannot be sustained. In an issue *devisavit vel non* there are no parties, and there is no rule of law that the failure of the parties interested in the will to produce witnesses whose evidence would be against them "is a strong circumstance tending to prove that said alleged will was executed by John A. Boach on account of undue influence over him by them or one of them." There is no evidence that undue influence was exercised over the testator in making this will; nor that there were witnesses under the control of Mrs. Broach and John Pond who would have testified against them. Nor could the judge have charged, as requested, that "There is no evidence that the will was prepared at the request of John A. Broach; and unless the jury so found they should answer the issue 'No.'" It is sufficient that the will was prepared and ready for signature and that the testator signed it, declaring it to be his will, and that the witnesses signed in his presence at his request.

Nor was it error for the court to refuse to charge, as requested, that it was the duty of the jury "to consider the fact that said alleged will provides that all of said property shall go to his wife in case she survives him, and later provides that in case of her death prior to his, said property shall go to Lilly May Ponds and Pauline Ponds, and that his wife should act as guardian for said children. This in itself is a circumstance for you to consider against the validity of the alleged will." A reference to the will shows that in section 2 the testator appoints his

wife as executor and guardian of the other beneficiaries, if they should be minors at the time of his death, and in section 5 he provides that if his wife should predecease him he nominated "....." as executor and trustee and guardian of the said beneficiaries. This blank was not filled up, and said article 5 is based upon the contingency that his wife should not survive him.

It is also assigned as error that the court refused to charge, "If the jury find from the evidence that the person to be benefited by said alleged will procured the same to be written, or advised the terms of the instrument, then a presumption of undue influence on her part is raised, and unless explained to the satisfaction of the jury that no such undue influence existed you will answer the issue 'No.'" This changes the burden of proof, which is upon the caveators to show undue influence. There is no evidence of undue influence on the part of any one in procuring the execution of this will. There was evidence tending to show that the wife was a stronger personality than the husband, and that in the ordinary affairs of life he was very much under her influence, and that a year after the will was made he was sent to a sanitarium. But the fact that a wife has influence with her husband, and even if there is evidence that she is the dominant partner, this does not of itself prove that she exerted that influence to dictate the terms of the will; and there is no evidence here that she did so. It would be hard if a husband who may have had very little will of his own during life should on that account be held incompetent to express his will as to the disposition of his property after his death when there is, as in this case, no proof that there was in fact any undue influence exerted upon him in making his testamentary will.

The question whether the husband had sufficient mental capacity to make the will was testified to by many witnesses, and the jury responded in the affirmative. We find

No error.

C. M. FREEMAN v. R. P. CROOM, RAMSAUR BROTHERS COMPANY AND W. A. WEBB.

(Filed 15 November, 1916.)

1. Contracts—Mutual Agreement—Misrepresentations.

The mutual consent of the parties is an essential element of every contract, and where one of the parties misrepresents or conceals a material and important fact from the other upon which the minds of both must necessarily agree, the contract thus made is unenforcible.

2. Same—Mortgages—Registration—Innocent Purchasers.

Under our registration laws an unregistered mortgage is not good as against purchasers for value, etc., and is, in effect, in such instances, to be regarded as no mortgage; and where a vendor of an automobile takes a mortgage thereon which he does not have registered until after the purchaser has sold or exchanged it for another, and then demands the automobile under his mortgage, representing that it is valid, and an agreement is made on this representation that he should be delivered possession of the automobile upon paying for certain repairs made thereon; in his action to enforce this agreement, it is *Held*, that the minds of the contracting parties had not mutually agreed because of the plaintiff's misrepresentation or suppression of the material fact that the mortgage had been registered, concerning which the defendant was ignorant at the time, and under the evidence of this case an issue of fact was raised for the determination of the jury.

CIVIL ACTION tried before *Justice, J.*, at February Term, 1916, of MOORE.

Plaintiff owned a Hudson automobile and on 4 December, 1913, sold it to defendant W. A. Webb, taking a mortgage on it to secure payment of the purchase money, but this mortgage was not registered until after Webb had exchanged the Hudson car with defendant R. P. Croom for an Overland and $150, at Fayetteville, N. C. The two cars were placed in the garage of defendants Ramsaur Brothers Company, and Croom employed them to make certain repairs to the Hudson car, costing $24.50, for which Croom gave his check. Freeman went to Fayetteville, saw the Ramsaurs and Croom, and told them he had a mortgage on the car, and, as he alleged and testified, Croom agreed that if Freeman would pay the $24.50 for repairs that he would release the Hudson car to him. With reference to this transaction Freeman testified: "We met Mr. Croom coming to the garage, and I told him about it, and Croom said he had traded for the car that day and gave $100 to boot. I told Croom I had a mortgage on the car, and Croom said: 'It is your car. I hate to lose my car and pay repair bill.' I told Croom I would pay the repair bill if he would release the car. Croom said, 'That is a trade, then,' and I gave Ramsaur Brothers Company my check for $24.50, the amount of the repair bill, and Ramsaur Brothers Company gave Mr. Croom his check back that Croom had already given Ramsaur Brothers Company in settlement of the repair bill, and Croom then tore up the check that he had given Ramsaur Brothers Company. I told Ramsaur Brothers Company to make certain other repairs upon the car on account of its having been broken that afternoon, and notify me when the car was ready. The car had been broken that evening, so Mr. Croom said, since the first repairs made. Mr. Croom thereupon told Ramsaur Brothers Company to deliver the car to me as soon as it was ready, or to anybody I sent for it with a mortgage calling for that car."

Plaintiff sent J. A. Thompson for the car, when it was ready, and gave him the money for the repairs made by the Ramsaur Company and the mortgage; but Croom and the Ramsaur Company refused to deliver the car to him. This action was then brought to recover damages for the conversion of it. The court instructed the jury to answer the first and second issues "No" and the third "$24.50," if they believed the evidence, and under this instruction the jury returned the following verdict:

1. Did the defendants, or either of them, wrongfully convert and appropriate to their own use the automobile described in the complaint? Answer: "No."

2. If so, was the plaintiff damaged thereby, and if so, in what sum? Answer: "No."

3. Is defendant Croom indebted to plaintiff, and if (so), in what sum? Answer: "$24.50."

Judgment was entered thereon, and plaintiff appealed.

Johnson & Johnson, G. H. Humber, and U. L. Spence for plaintiff.
Davis & Sandrock for defendants.

WALKER, J., after stating the case: We have set forth above only so much of the evidence as is essential to an understanding of the ground upon which our decision must rest.

The clear inference from the refusal of Croom and Ramsaur to deliver the car to Thompson for the plaintiff is that it had been discovered that the mortgage was not registered until after Croom had traded for the car with Kelly, and therefore that the plaintiff did not have a valid mortgage on the car, and was not entitled to its possession. The contention of Croom is that the plaintiff virtually represented to him, at the time of the transaction in Fayetteville, that he had a valid mortgage on the Hudson car at the time of the exchange with Kelly, and that even if he told the plaintiff that it was his car or that he would release it to him, as plaintiff testified, he was induced to do so by this false representation, and, therefore, acted under a mistake of fact, and that he would not have made any such agreement for a return of the car, if it be true that he did so, had he known the facts, which were concealed from him. If the plaintiff, when he told Croom that he had a mortgage on the car, suppressed a material fact of which he knew Croom was ignorant, and thereby induced the latter to believe that the mortgage had been registered before the exchange with Kelly, and was, therefore, a valid lien upon the car, then Croom would not be bound by any agreement to release the car, as, to say the least of it, he would have acted under a clear mistake of the facts caused by the representation of Freeman as to the existence of a valid mortgage. An invalid mortgage is really no mortgage. "Assuming that both parties have done something

which is legally sufficient to indicate their assent to the terms of a contract, the question may arise whether the contract is binding in case the assent of one, or both, is seeming but not real." 6 Ruling Case Law, p. 620, sec. 40. "If an attempted contract assumed the existence of, and is based upon the existence of, an essential fact which does not exist, there is no meeting of the minds of the parties in reality, and no contract that can be enforced by either." *Ibid.*, sec. 41. A contract is based upon the agreement or mutual consent of the parties, which, above all others, perhaps, is an essential element of every contract (9 Cyc., 245), and this must be a real consent. "Since mutual consent is essential to every agreement, and agreement is generally essential to a contract, there can, as a rule, be no binding contract where there is no real consent. Apparent consent may be unreal because of mistake, misrepresentation, fraud, duress, or undue influence, or because of mental incapacity. Mistake is occasioned by ignorance or misconception of some matter, under the influence of which an act is done, and arises where one of the parties does not mean the same thing as the other, or where one or both, while meaning the same thing, form untrue conclusions as to the subject-matter of the agreement. Mistake does not of itself affect the validity of contracts at all. But mistake may be such as to prevent any real agreement from being formed, in which case the agreement is not merely voidable, as in the case of fraud, but is absolutely void, both at law and in equity. Or mistake may occur in the expression of a real agreement, in which case, subject to rules of evidence, the instrument may be reformed in equity." 9 Cyc., 388. These principles, established by the authorities, will suffice to show that in this case there was no actual meeting of minds, if the defendant R. P. Croom was ignorant of the fact that the plaintiff had no valid mortgage, and was induced, by reason of said ignorance, to surrender his rights in the Hudson car which he had acquired from Kelly by exchange for the Overland and $150. The plaintiff knew that he had no such mortgage, as he had it registered, and, of course, knew the date on which it was done. Our statute provides as follows: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage" in the proper county. If, therefore, the defendant Croom was induced to believe that there was a valid mortgage on the car, and acted upon that assumption of fact in making the alleged agreement with the plaintiff, when otherwise he would not have made the agreement at all, there was such a mistake of fact as prevented the assent of both parties to the same, and there was consequently no contract. If he erroneously supposed that plaintiff's mortgage had been registered before the exchange was made with Kelly, so as to be a valid lien upon the car, and this caused him to abandon or give it up, or his right

thereto, he would not be bound by the contract, as this would be a material mistake on his part and fatal to the agreement claimed by the plaintiff to have been made between them at Fayetteville. But we do not think that the evidence was in such a state as to warrant the instruction which was given by the court. The matter should have been left to the jury for them to find whether there was a mistake of fact as to the registration and validity of the mortgage upon which defendant acted. A mistake of fact takes place when some material fact, which really exists, is unknown, or some essential fact is supposed to exist which really does not exist. 27 Cyc., 809.

The parties do not agree in their testimony, exactly, as to what was said at the time of the alleged agreement. Plaintiff testified that he had merely stated that he had a mortgage on the car, and that nothing more, in that regard, was said, while defendant testified that he told the Ramsaurs that if Freeman sent a man with a mortgage they thought to be good they should let him have the car, and he said to Freeman that he could have the car if he would send some one for it with the mortgage. What did all this mean? If it meant that Croom was to see the mortgage so as to determine whether or not it was good or a prior lien, no title passed to the plaintiff until the mortgage was sent for his inspection and examined by him; or if it meant that Croom acted under a mistake of fact as to the validity of the mortgage, assuming from what Freeman had said to him that it was valid and a prior lien, when it was not, the same result would follow. There were other phases of the evidence, but they need not be discussed here. In passing upon the question, the jury may consider what Freeman meant by saying that he had a mortgage, or what impression he intended to make upon Croom, and whether Croom, having paid Kelly $150 in cash, which in all probability would be lost to him if he surrendered the car, and having turned over to him the Overland car, would have made the alleged contract with Freeman without knowing whether the mortgage was good against his claim, or without having the mortgage produced; and they may also consider any other fact or circumstance, on either side, which tends to show what the real understanding of the parties was, and, generally, they should consider the language and conduct of the parties and the nature of the transaction throughout in order to arrive at a just and correct conclusion.

There was error in the instruction given to the jury, which entitles plaintiff to another hearing.

New trial.

JOHN C. DOCKERY v. FAIRBANKS-MORSE COMPANY, INC.

(Filed 15 November, 1916.)

1. Courts—Pleadings—Amendments.

In an action alleging damages by reason of false representations and breach of guarantee in the contract of the sale of an engine, it is within the sound discretion of the trial judge to withdraw a juror and permit an amendment alleging fraud in the transaction, when ample time and opportunity has been given the defendant to answer and procure his evidence, and meet the allegation of fraud.

2. Same—Subsequent Terms—Orders—Variance—Appeal and Error—Objections and Exceptions.

When the plaintiff has been allowed by the court to amend his complaint, a judge holding a subsequent term of the court may strike out the amendment if contrary to the former order; but, if otherwise, he may not pass upon the authority of the former judge to allow it, for this has to be done by exception at the time, and on appeal in the Supreme Court.

WALKER, J., did not sit.

APPEAL by plaintiff from *Adams, J.*, at March Term, 1916, of RICHMOND.

Lowdermilk & Dockery and John P. Cameron for plaintiff.
A. R. McPhail for defendant.

CLARK, C. J. The complaint alleged damages by reason of false representations and breach of guarantees in a contract for the sale of an engine. The case came on for trial at September Term, 1916. The evidence tending to show fraud in the sale of the engine and in procuring the contract, *Carter, J.*, ordered a mistrial and permitted the plaintiff to file an amended complaint. When the cause came on again for trial at March Term, 1916, before *Adams, J.*, counsel for the defendant moved to strike out the amended complaint for the reason that it set up a new cause of action. The motion was allowed and the plaintiff appealed. The only question presented is as to the authority of the trial judge to permit an amendment alleging fraud in an action for damages for false representations and breach of warranties in the original sale.

The defendant was in court and the amendment alleging the fraud was germane to the original complaint, and it was in the discretion of the trial judge to permit the amended complaint to be filed. If this had been done during the trial, and the nature of the amendment was such that the defendant would have been taken by surprise, not being prepared to meet the charge of fraud, then it would have been error not to

withdraw a juror and grant the defendant a continuance; but this was done. The defendant had six months in which to prepare to meet the charge of fraud before the case was again called for trial.

The Code favors liberal allowance of amendments in order that cases may be tried on their merits. There could have been no advantage in dismissing the plaintiff's action and requiring him to bring a new action setting up what is now alleged in the amended complaint. The court in its sound discretion could allow the amendment, which was simply an additional ground to that alleged in the original complaint. *Joyner v. Earley,* 139 N. C., 49; *Worth v. Trust Co.,* 151 N. C., 196; *Pritchard v. R. R.,* 166 N. C., 535; 31 Cyc., 409, 410, 411.

If the amendment was not in the terms authorized by *Judge Carter,* either exceeding the authority then granted or being of a different nature, then it was competent for *Judge Adams* to have stricken it out, because not in compliance with the permission to amend. But if it was stricken out because *Judge Carter* had no authority to permit an amendment of this nature, which seems to be the point presented, then it was simply the case of an alleged error in *Judge Carter's* order which could have been remedied only by an exception and appeal to this Court, for the second judge could not correct an erroneous order, or an order resting in the discretion of the preceding judge who had coördinate and equal power with himself. *Roulhac v. Brown,* 87 N. C., 4; *Wilson v. Lineberger,* 82 N. C., 413; *S. v. Evans,* 74 N. C., 325. "No appeal lies from one Superior Court judge to another." *May v. Lumber Co.,* 119 N. C., 98; *Alexander v. Alexander,* 120 N. C., 474; *Henry v. Hilliard, ib.,* 487; *Cowles v. Cowles,* 121 N. C., 276; *Cobb v. Rhea,* 137 N. C., 298.

Reversed.

WALKER, J., not sitting.

E. A. JOHNSON ET ALS. v. LANDY JOHNSON ET ALS.

(Filed 15 November, 1916.)

Deeds and Conveyances—Correction—Fraud—Burden of Proof—Quantum of Proof—Instructions—Appeal and Error.

A party seeking to correct a written deed by reason of the mutual mistake of the parties or a mistake of one induced by the fraud of the other, must establish his case by clear, strong, and convincing proof; but to set aside a deed for fraud, undue influence, and the like, the proof required is by the greater weight of evidence, as in ordinary civil issues; and where a suit is brought to reform a deed, absolute in terms, on the ground that the parties intended it for a mortgage of lands, and also

as to its correction and procurement by fraud or undue influence, a charge by the court applying to both these issues, that the plaintiff was only required to establish his position by the greater weight of the evidence, is reversible error to the defendant's prejudice.

CIVIL ACTION tried before *Justice, J.*, and a jury, at May Term, 1916, of RICHMOND.

The complaint set forth a cause of action to set aside a deed for land on the ground of fraud and undue influence. By amendment, a clause was added to correct the deed, on allegations that the same, absolute in terms, was intended by the parties as a mortgage and that the clause of redemption had been omitted by mistake. There was general denial in the answer and, on issues submitted, the jury rendered the following verdict:

1. In the execution of the deed referred to in the complaint, was the clause of redemption omitted by ignorance or mutual mistake of the parties? Answer: "Yes."

2. Was the deed intended by all the parties to be a security only for the debt? Answer: "Yes."

3. Was the deed referred to in the complaint obtained from Aaron Johnson by fraud or undue influence on the part of the defendants? Answer: "No."

4. Was the deed referred to in the complaint obtained by fraud or undue influence from Eliza Johnson on the part of the defendants? Answer: "No."

Judgment on the verdict declaring the deed a mortgage and giving plaintiff right to redeem, etc.

Defendant excepted and appealed.

R. Y. Poole, J. P. Cameron, and Brittain & Brittain for plaintiff.
A. R. McPhail, E. A. Harrill, and W. C. Davis for defendant.

HOKE, J. It is the established principle in this State that when the purpose of the suit is to *correct* a written deed by reason of the mutual mistake of the parties or the mistake of one induced by the fraud of the other, plaintiff is required to establish his position by clear, strong, and convincing proof; but when a party seeks to set aside a deed for fraud or undue influence or for mental incapacity and the like, he is only required to make good his allegations by the greater weight of the evidence, as in ordinary civil issues. This distinction, announced and fully discussed in *Harding v. Long,* 103 N. C., 1, has been repeatedly approved in our decisions. *Glenn v. Glenn,* 169 N. C., 729; *Lamb v. Perry,* 169 N. C., 436; *Hodges v. Wilson,* 165 N. C., pp. 323-333; *Lamm v. Lamm,* 163 N. C., 71; *Culbreth v. Hall,* 159 N. C., pp. 588-591; *Odom v. Clark,* 146 N. C., pp. 544-549.

In *Glenn's case* the principle and the practical application of it determining the issues is stated as follows: "It is the established position in this State that where a defendant holds under a deed formally conveying to him the legal title to real property, and a claimant is seeking to correct a mistake in the instrument or annex a condition to it or engraft a trust upon it, he is required to make out his claim by clear, strong, and convincing proof (*Cedar Works v. Lumber Co.,* 168 N. C., 391; *Ely v. Early,* 94 N. C., 1), a position held to prevail in case of formal written instruments conveying personalty (*White v. Carroll,* 147 N. C., 334), and to written official certificates of officers given and made in the course of duty. *Lumber Co. v. Leonard,* 145 N. C., p. 339." And, in further application of the principle, it has been also held that "When the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations, and it is for them to determine whether, in a given case, the testimony meets the requirements of this rule as to the degree of proof. *Gray v. Jenkins,* 151 N. C., pp. 80 and 82, citing *Cuthbertson v. Morgan,* 149 N. C., 72, and *Lehew v. Hewett,* 138 N. C., 6. It is also fully recognized here that this rule as to the quantum of proof does not obtain in suits to set aside deeds or other written instruments conveying property for lack of mental capacity, or for fraud or undue influence, or because made with intent to defraud creditors, etc.; plaintiff, in such cases, being required to establish his allegations by the greater weight of the testimony."

In the present case the court, in either aspect of the case and in reference to both sets of issues, charged the jury that plaintiff was only required to establish his position by the greater weight of the evidence, a charge to which exceptions were duly taken and which was erroneous as to the two issues on the question of correcting the mistake, the issues that were answered against the defendant.

For the error indicated, defendant is entitled to a new trial, and the same is allowed on all of the issues.

New trial.

FRANCIS D. WINSTON AND J. H. MATTHEWS, A COPARTNERSHIP KNOWN AS WINSTON & MATTHEWS, v. M. B. GILLIAM, RECEIVER, AND THE AULANDER REALTY COMPANY.

(Filed 22 November, 1916.)

Appeal and Error—Receivers—Corporations—Parties—Orders—Relevancy.

Where a corporation and its receiver are both sued in the same action, and on motion to strike out the answer filed by the corporation the judge orders the individual answer of a stranger to the action to be stricken out, and holds that the receiver is the only proper party to defend, it is the duty of the appealing corporation to see that its answer is set out in the record, by application for *certiorari* in the Supreme Court, if necessary, so that the court can see its relevancy; and it not appearing from the order appealed from that the appellant corporation was affected thereby, the appeal will be dismissed at its cost.

THIS is a motion in the above cause, heard by *Peebles, J.*, May Term, 1916, of BERTIE, to strike out answer filed by the defendant the Aulander Realty Company to the complaint. The court made the following order: "In this cause it appearing to the court that R. J. Dunning, individually, has filed an answer to the complaint of plaintiffs in this cause without authority and without leave of the court; and this being an action against the defendant corporation for which a receiver has heretofore been appointed, and the receiver, who is a party defendant as such receiver, being the proper party to defend said action, and he having filed answer to said complaint and is in all respects properly defending said action, and the said answer of said R. J. Dunning being superfluous and unwarranted: It is therefore ordered that the said answer of R. J. Dunning be and the same is hereby stricken out from the record in this cause and dismissed therefrom."

From this order the defendant the Aulander Realty Company appeals.

Winston & Biggs for plaintiffs.
Roswell C. Bridger for Aulander Realty Company, defendant.

BROWN, J. This action was instituted by plaintiffs against the receiver of the Aulander Realty Company and against the corporation itself, both being named as defendants in the original summons dated 10 January, 1916. Both defendants are commanded to answer the complaint at a term of Superior Court convening 14 February, 1916. At said term "defendants were allowed thirty days within which to file answer as of this term." The defendant Gilliam filed an answer on 15 March, 1916, and the defendant corporation filed answer on 17 March, 1916.

We fail to find any authority in the order of *Peebles, J.*, for striking out the answer of the Aulander Realty Company, the defendant corporation, and therefore its appeal is unnecessary. The order is confined in its effect exclusively to the individual answer of one R. J. Dunning, who is not a party to the action.

We are unable to determine the relevancy of the answer of the defendant corporation, as no copy of it has been included in the record. It was the duty of that defendant, who is the appellant, to see that the answer was copied in the transcript, and, if necessary, to apply in apt time to this Court for a *certiorari*.

Said corporation, having been made a party defendant in addition to its receiver, and no nonsuit having been taken as to it, had a right to answer, but whether the answer is relevant, raises an issue or is a proper one, can only be determined by an inspection of it.

Let costs of this appeal be taxed against the Aulander Realty Company and its sureties.

Appeal dismissed.

MUTUAL LIFE INSURANCE COMPANY v. LEAKSVILLE WOOLEN MILLS, JAMES S. PATTERSON, BY ANNIE K. PATTERSON, GUARDIAN.

(Filed 22 November, 1916.)

1. Appeal and Error—Issues—Trials.

Issues submitted to the jury for their determination of the matters involved arising from the pleadings and evidence are not reviewable on appeal when they are so framed that the parties have opportunity to present thereunder every material phase of their contention.

2. Insurance—Witnesses—Policyholders—Interest.

Where a policy of life insurance is sought to be set aside for material misrepresentations made by the insured in answering the questions contained in his application therefor, testimony of a physician, a policyholder, affecting the alleged misrepresentations, is not objectionable on account of interest, the interest to disqualify being that in the result of the action; and such as he has, if any, falls under the doctrine of *de minimis non curat lex*.

3. Insurance, Life—Application—False Representations—Material Representations—Contract—Judgment.

Where the application made by the insured for a policy of life insurance declares that the statements the applicant makes below are true and offered to the company as an inducement to issue the proposed policy, and following the questions and his answers, he certifies that he has read them, and that they are fully and correctly recorded, and there

is no evidence that the company or its agents were aware of any facts to the contrary, all of the misrepresentations made as to the prior attendance of physicians, disease, surgical operations, and the like, are deemed material; and where their falsity has been established by the verdict of the jury, a further issue finding they were not material should be set aside and the policy declared invalid as a matter of law, with judgment accordingly, but upon condition that the company return the payments for premiums thereon it has received, with interest.

4. Same—Opinion—Questions for Jury.

Where the applicant for a policy of life insurance declares his answers to the questions asked in his application are material and true, and it is made to appear that he has therein misrepresented facts relating to disease, attendance of physicians, and surgical operations performed on him, the matters so misrepresented are material under the contract of the parties, they must have been known to the applicant at the time, and do not call for the exercise of his opinion, requiring the jury to pass upon an issue as to whether the deceptions were intentional, or made by mistake in good faith, or otherwise.

Two civil actions consolidated and tried as one at February Term, 1916, of Superior Court of ROCKINGHAM, before *Webb, J.*, upon these issues:

1. Did J. Sanford Patterson represent in his application for the insurance policies sued on that he had had no illnesses, diseases, injuries, or surgical operations since childhood, except fracture of the femur in 1885? Answer: "Yes."

2. Was the said representation true? Answer: "No."

3. Did said J. Sanford Patterson represent in his application for the insurance policies sued on that he had not been prescribed for or treated by or had consulted any physician or practitioner in the past five years before the date of said application? Answer: "Yes."

4. Was the said representation true? Answer: "No."

5. Did the said J. Sanford Patterson in said application for the insurance policies sued on represent, in answer to the inquiry in that behalf, that he had stated all illnesses, diseases, injuries, or surgical operations which he had had since childhood? Answer: "Yes."

6. Was said representation true? Answer: "No."

7. Did said J. Sanford Patterson, in answer to an inquiry in that behalf, state that he had named every physician and practitioner consulted by him in five years next previous to the said application, with dates of consultation? Answer: "Yes."

8. Was said representation true? Answer: "No."

9. Did Dr. W. E. Reaves on or about 29 July, 1913, perform surgical operations on said J. Sanford Patterson for ethmoiditis and maxillary sinusitis? Answer: "Yes."

10. Did Dr. W. C. Banner, on or about 15 May, 1909, perform a surgical operation on the said J. Sanford Patterson for polypus? Answer: "Yes."

11. Did the said J. Sanford Patterson consult Dr. W. P. Reaves, a physician, within five years prior to the date of his application for the policy sued on? Answer: "Yes."

12. Did the said J. Sanford Patterson consult Dr. C. W. Banner, a physician, within five years prior to the date of his application for the policy sued on? Answer: "Yes."

13. Were the said representations material to the risks applied for to be assumed? Answer: "No."

Upon motion of plaintiff, the court set aside the finding on the thirteenth issue and held as matter of law that the representations were material, and rendered judgment cancelling the two policies of insurance upon return of the premiums paid thereon, with interest. Defendants appealed.

James H. Pou, H. R. Scott, King & Kimball for plaintiff.
Pharr & Bell, Ivie & Trotter, Lindsay Patterson for defendants.

BROWN, J. The purpose of the action is to cancel two policies of insurance issued by plaintiff upon the life of James S. Patterson, one for the benefit of his estate and the other for the Leaksville Woolen Mills.

The principal question presented upon this appeal relates to the effect of the statements made by the insured in his applications for the insurance. It is contended that these statements constituted a part of the contract, were material to the risk, and, being untrue, void the policies.

The defendants excepted to the issues and tendered others. It is well settled that the discretion of a trial judge in settling issues is not reviewable, provided they are so framed that the parties have opportunity to present every material phase of their contentions. *Cunningham v. R. R.*, 139 N. C., 427; *Redmond v. Mullenax*, 113 N. C., 505.

The issues submitted present every controverted fact necessary to a decision of the case, while those tendered by defendants are very general in their terms and not so well calculated to focus the minds of the jurors upon the exact facts alleged on one side and denied on the other as those submitted by the judge.

The defendants excepted to the testimony of Dr. Sweeney upon the ground that he is a policy-holder in plaintiff company and James S. Patterson is insane. The testimony of witness is material and relates to transactions with Patterson in regard to the applications for the

policies. He is not so "interested in the event of the action" as to disqualify him. The interest which disqualifies is a legal and pecuniary interest, *Jones v. Emory,* 115 N. C., 163, and it must be in the *event* of the action. *Bunn v. Todd,* 107 N. C., 266; *Mull v. Martin,* 85 N. C., 406; *Helsabeck v. Doub,* 167 N. C., 205.

The rights of the witness as a policy-holder were not affected, so far as the evidence discloses, by the result of this action. His policy was subject to forfeiture for nonpayment of premiums and to many other contingencies usually provided in such instruments. He had no interest in the event of this action, or, if so, it is so infinitesimally small as to be impossible of ascertainment, and comes within the maxim, *De minimis non curat lex.*

It is unnecessary to discuss the many other exceptions relating to the evidence, as we think they are without merit and unimportant in the view we take of the case. The facts are practically undisputed and the verdict of the jury upon the issues submitted could not well have been otherwise.

Before either of the policies were issued the insured signed an application which contained the following language: "All the following statements and answers, and all those that I make to the company's medical examiner in continuation of this application, are true and are offered to the company as an inducement to issue the proposed policy. I especially waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired."

The application contained a report to be made by the medical examiner. The questions were to be propounded by him to the applicant and answered by the latter.

At the end of the statement to the medical examiner is the following certificate of the insured:

I certify that each and all of the foregoing statements and answers were read by me, and are fully and correctly recorded by the medical examiner. JAMES SANFORD PATTERSON.

Upon the faith of this application and these answers, and on the report of the medical examiner, plaintiff issued and delivered the policies in August, 1913, and the defendants paid the first premium.

There is no evidence whatever that plaintiff or its agents knew of any facts contrary to those stated by insured in his application.

The jury found that the representations alleged to have been made by the insured were made by him to plaintiff's medical examiner, and that each and every of said statements were untrue. The jury found that on or about 29 July, 1913, Dr. W. P. Reaves performed a surgical operation on insured for ethmoiditis and maxillary sinusitis; and that on or about 15 May, 1909 (within the period of five years), Dr. W. C. Banner performed a surgical operation on the said insured for polypus; and that the insured did consult Drs. Reaves and Banner.

It appears in the evidence of defendants' witness that the insured is now in the State Hospital in a hopeless condition brought about by a chronic disease of long standing.

The court committed no error in setting aside the verdict upon the thirteenth issue and rendering judgment upon the other findings for plaintiff.

The materiality of the representations is not open to dispute. It does not depend upon inferences drawn from facts and circumstances to be proved, in which event the question is one for the jury. A different rule prevails where the representations are in the form of written answers made to written questions. In such case the questions and answers are deemed to be material by the acts of the parties to the contract. *McEwen v. Life Ins. Co.,* 139 Pac., 242. It is not necessary that the misrepresentation should be intentional. "The company is entitled to have the policy canceled on bringing suit within the proper time, especially where, even though the misrepresentation was not intentional, the policy when delivered plainly discloses the untruthfulness of the representation." *Life Ins. Co. v. Houpt,* 113 F. R., 572; *New York Life Ins. Co. v. Fletcher,* 117 U. S., 519.

This case is cited with approval by this Court in *Alexander v. Ins. Co.,* 150 N. C., 538.

The most recent decision on this point is the case of *Mutual Life Ins. Co. of New York v. Hilton-Green and others,* decided by the Supreme Court of the United States, and reported in the Supreme Court Reporter Advance Sheets, vol. 36, No. 16, pages 624 to 728, where the identical questions here were asked and the policy invalidated. *Mr. Justice McReynolds,* speaking for the Court, said: "Considered in the most favorable light possible, the above quoted incorrect statements in the application are material representations, and, nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud."

In that case there was verdict and judgment against the insurance company in the court below, which was reversed.

The same doctrine is laid down in *Jeffries v. Ins. Co.,* 22 Wall., 47. There the Supreme Court of the United States said: "The proposition

at the foundation of this point is this, that the statements and declarations made in the policy shall be true. There is no place for argument either that the false statement was not material to the risk or that it was a positive advantage to the company to be deceived by it. . . . The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. . . . The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agreed that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power thus to make its own opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, namely, that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial."

The same Court in the case of *Ætna Life Ins. Co. v. France,* 92 U. S., 512, said: "We decided in the case of *Jeffries v. Ins. Co.* that the question of materiality of the answer did not arise; that the parties had determined and agreed that it was material; that their agreement was conclusive on that point; and that the only questions for the jury were, first, was the representation made? second, was it false?"

The same doctrine is laid down in *Mouler v. Ins. Co.,* 111 U. S., 335; *Ins. Co. v. Roddin,* 120 U. S., 189; *Ins. Co. v. Moore,* 231 U. S., 543; May on Ins., sec. 181.

The decisions of this Court are in conformity with the decisions above referred to. In *Bryant v. Ins. Co.,* 147 N. C., 184, this Court held that the answers to specific questions like those asked here are material as a matter of law. *Gardner v. Ins. Co.,* 163 N. C., 367; *Alexander v. Ins. Co.,* 150 N. C., 536; *Schas v. Ins. Co.,* 166 N. C., 55; *Powell v. Ins. Co.,* 153 N. C., 124 and 128; *Hardy v. Ins. Co.,* 167 N. C., 22; *Lummus v. Ins. Co.,* 167 N. C., 654.

Nothing herein contravenes the well settled doctrine that where a question is asked which must be necessarily answered by *an opinion,* the mistake of the applicant in answering such question, made honestly and in good faith, will not avoid the policy. This is not so, however, where the questions asked relate to facts within the knowledge of the applicant and not within the knowledge of the company, and where

the questions and answers are material. In such case the applicant must answer truthfully. The purpose of such questions is twofold: first, to elicit information, which the company regards important; second, to give the sources from which the company may obtain further information. The parties themselves have made these questions and answers material. Their materiality depends not only upon their own purport, but upon the fact that the contracting parties have agreed that the written application containing these questions and answers is the basis upon which the contract of insurance shall be made or refused.

No error.

W. B. TROGDON v. BEN K. TERRY.

(Filed 22 November, 1916.)

1. Assaults—Threats of Violence.

A person is guilty of an assault in law when he by a show of violence and force puts another in fear and thereby forces him to commit some act which otherwise he would not have done.

2. Same—Abusive Language—Punitive Damages.

In an action to recover damages for an assault, the defendant wrote an apology or retraxit for the plaintiff to sign in relation to a statement he had written to another, entered the public dining-room where he knew the plaintiff was dining, and, carrying a walking stick on his arm or in his hand, threatened the plaintiff with abusive language, in an attitude to do him personal violence, and caused him to sign the paper against his will. *Held*, sufficient evidence of malice to sustain a verdict awarding, in the discretion of the jury, punitive damages for the assault.

CIVIL ACTION tried at May Term, 1916, of GUILFORD, *Cline, J.*, upon these issues:

1. Did the defendant unlawfully and wrongfully assault the plaintiff, as alleged in the complaint? Answer: "Yes."

2. What actual damages, if any, is the plaintiff entitled to recover of the defendant? Answer: "$1,000."

3. What punitive damages, if any, is the plaintiff entitled to recover of the defendant? Answer: "$1,500."

From the judgment rendered, defendant appealed.

Brooks, Sapp & Williams for plaintiff.
Morehead & Morehead for defendant.

BROWN, J. This action was instituted to recover damages on account of an assault alleged to have been committed by the defendant upon the plaintiff in July, 1915, in the dining-room of the hotel at Draper in Rockingham County. The plaintiff alleges that the assault was the result of ill-will and bad feeling which the defendant had entertained against the plaintiff for two years prior to the assault. It is useless to set out at length much of the evidence in the discussion of this case.

The substantial facts are that on 3 July, 1913, the plaintiff wrote one Pitcher a letter in which he stated that the defendant had been making statements defamatory to plaintiff, and insinuating that Pitcher was his authority to the effect that the plaintiff was responsible for the trouble arising from the incorrect location of the Nantucket Mill. (It is in evidence that the plaintiff is a civil engineer.) The latter denies the charge and states: "This is a false charge, and is as much an injustice to you as it is to me."

In July, 1915, the plaintiff was in the hotel dining-room at Draper eating his dinner. The defendant finding that he was there, wrote out a so-called retraxit and went into the dining-room with his cane and compelled the plaintiff, by threats to do him bodily harm, to sign the paper against his will.

We have carefully considered the six exceptions to the evidence, and find them to be without merit, and do not think they need any discussion. We have likewise carefully considered the several exceptions to the charge of the judge, and in the view that we take of the case it is unnecessary that we should review those assignments of error. Although we were necessarily impressed with the earnestness and force of the argument of the learned counsel for the defendant, yet an examination of the defendant's own evidence leads us to the conclusion that his Honor, instead of leaving the question to the consideration of the jury upon all the evidence, might well have instructed them that upon the defendant's own evidence he was guilty of an assault upon the plaintiff, and to have answered the first issue "yes." This view of the case eliminates the necessity of discussing the several assignments of error to the charge.

The defendant admitted that when he learned that the plaintiff was to take dinner in the hotel he wrote the paper which he called "an apology and retraction," and that then he picked up his walking stick and hung it on his arm, walked down to where the plaintiff was sitting; that he said to the plaintiff, "I want you to read this paper"; that plaintiff read it and asked, "What do you want me to do?" Defendant said: "I want you to sign it." Plaintiff said: "I will think about it."

Defendant says: "No, you won't think about it; you are going to sign it now!" Plaintiff said: "Suppose I do not sign it?" Defendant says: "I will whip hell out of you!" Plaintiff says: "I have not read it, but I will sign it." Defendant says: "No, you are lying when you say you have not read it; but you can sign it that way."

Defendant picked up the paper and read it to plaintiff. Plaintiff signed it. Mr. Lindsay witnessed it. Defendant says: "Trogdon, I do not want to ever hear of your writing or saying anything else about me, you damned, contemptible puppy!"

There is evidence that while this was going on at the table the defendant had his walking stick on his arm or in his hand, ready for action.

The motion for nonsuit was properly overruled. The contention that these facts do not constitute an assault cannot be maintained. It is well settled that where one person, by a show of violence and force, puts another in fear and forces him to leave a place where he has a right to be, or to commit some act which he otherwise would not perform, is guilty of an assault. *S. v. Martin,* 85 N. C., 509; *S. v. Church,* 63 N. C., 15; *S. v. Rawles,* 65 N. C., 334; *S. v. Hampton,* 63 N. C., 13.

In the latter case, as the prosecutor was going in a crowd down the staircase leading out of the courthouse, the defendant turned to him and with right hand clinched and his right arm bent at his side but not drawn back, said: "I have a great mind to hit you"; that before this, and as the crowd was leaving the courthouse, the defendant had said: "If the crowd will go along to see, I will cowhide Lindsey"; that Lindsey had no way to go down that staircase but by pushing past the defendant; and that he turned away from the defendant and went down another staircase The Court held that the defendant was guilty of an assault.

In the case under consideration the defendant approached the plaintiff in a public dining-room and with a walking stick, evidently with the purpose of using it unless the defendant signed the paper-writing. In a most violent and abusive manner, with his stick in view, he forced the plaintiff against his will to sign the paper. In our judgment, according to the defendant's own evidence, he was guilty of an unjustifiable assault upon the plaintiff.

In this connection it is well to repeat the admonition of *Mr. Justice Walker* in *Saunders v. Gilbert,* 156 N. C., 481: "We again remind those who are disposed to take the law into their own hands and punish their enemies or a supposed wrongdoer, that there is a sufficient legal remedy for every alleged grievance, and if they will not resort to the

courts where it can be enforced, but prefer to act in defiance of constituted authority, the fault and the consequences will all be theirs, and they have no reason to complain if that same offended law, whose peaceful methods they have ignored, rebukes their defiance with heavy damages."

As to the question of damages, we find no error, either in the admission of testimony or in his Honor's charge. The plaintiff was plainly entitled to compensatory damages (*Ammons v. R. R.*, 140 N. C., 200) for the humiliation and mental suffering, the result of the assault. There was abundant evidence of malice upon which the jury in their discretion were warranted in inflicting punitive damages.

No error.

D. H. COLLINS v. UNITED STATES CASUALTY COMPANY.

(Filed 22 November, 1916.)

1. Evidence—Nonsuit.

In an action to enforce payment on a policy of health insurance, defended by the company for alleged fraud and misrepresentations made by the insured, the evidence upon defendant's motion to nonsuit must be construed favorably in behalf of the plaintiff, and, so construed, there being sufficient evidence to sustain his contention, the motion was properly disallowed.

2. Insurance, Health—Reservations—Instructions.

Where a policy of health and accident insurance sued on contains a provision that it does not cover loss or sickness or disease existing, or contracted prior to its issuance, etc., a charge to the jury that they should answer an appropriate issue in the defendant's favor should they find from the evidence that the loss resulted from sickness or disease which existed before the policy was issued, or which was contracted before that time, is a proper one, and in this case held preferable to the instruction requested by the defendant.

3. Same—Burden of Proof.

Where a health and accident policy insures, among other things, against loss resulting from sickness or disease, with additional provision that it does not cover such as existed prior to the issue of the policy, the insured, in his action thereon, makes out a prima facie case when he introduces the policy in evidence and proves that he was sick and confined to a hospital with the kind of sickness or disease covered by its terms, and the burden of proof is on the defendant to show that such was contracted prior to its issue, this being, under the language of this policy, in the nature of an exemption to the company's liability from the general terms of its contract.

4. Insurance—Principal and Agent—Application—Misrepresentations—Good Faith.

Where the agent of the insurer fills out the application for a policy, and is given full information by the applicant as to prior sickness and disease which would invalidate the policy, but the agent misrepresents the facts in writing the answers, and the policy is accordingly issued; and the insured, acting in good faith, has been induced by the conduct of the agent to sign the application without reading it or becoming aware of the misrepresentations, and has paid the premiums thereon: *Held*, the acts of the agent in writing the answers are within the scope and purview of his agency for the company, and it is bound by his conduct in misleading the applicant.

5. Insurance—Policies—Interpretation.

The written terms of a policy of insurance which are of doubtful meaning are construed in favor of the insured.

6. Verdicts—Weight of Evidence—Trials—Court's Discretion—Appeal and Error.

A motion to set aside a verdict as being against the weight of the evidence is addressed to the sound discretion of the trial judge, and not reviewable on appeal.

CIVIL ACTION tried before *Cline, J.*, and a jury at May Term, 1916, of GUILFORD.

The action is based upon a policy of insurance issued by the defendant to the plaintiff in May, 1915, and which was in force on and after the 24th of that month. The policy insured the plaintiff to the amount of $5,000 as follows: "Subject to its terms, this policy indemnifies for loss of time, of sight, of limb, and of life from accident, and for loss of time, of sight, and use of limb from sickness, David Harley Collins, of Greensboro, North Carolina, by occupation a justice of the peace and United States Commissioner, herein called the insured, for three months, beginning at noon, standard eastern time on 24 May, 1915, subject to the provisions and conditions and limits herein against loss resulting directly and independently of any and all other causes from bodily injury effected solely through external, violent, and accidental means, herein called such injury, and against loss resulting from sickness or disease, herein called such sickness." Then follows a description of the different kinds of insurance and the indemnities therefor, according to the nature and extent of the injuries and the consequent losses. Under the headline of "Additional Provisions" is this clause: "This policy does not extend to, nor cover, . . . loss caused by any sickness or disease existing or contracted prior to the issue of this policy, nor loss caused by any sickness or disease, unless disability resulting therefrom begins while this policy is in force."

The jury returned the following verdict:

1. Did D. H. Collins, insured, in his application for insurance represent that he had not consulted a physician or taken treatment during the two years immediately preceding the date of the application, except Dr. Jarboe in January, 1914, over one year prior to the date of the application? Answer: "No."

2. Had D. H. Collins, insured, consulted a physician or taken treatment during the two years immediately preceding the date of the application, otherwise than Dr. Jarboe in January, 1914? Answer: "Yes."

3. If so, did the said D. H. Collins fully and fairly disclose all the facts in regard thereto to the defendant at the time the application was made? Answer: "Yes."

4. Did D. H. Collins, insured, in his application for insurance, represent that he had not had any disease or accidental injury during the seven years immediately preceding his application for insurance except muscular rheumatism in January, 1914, and then ten days in the hospital? Answer: "No."

5. Had said D. H. Collins, insured, had any disease or accidental injury during the seven years preceding the date of his application for the insurance herein sued on except muscular rheumatism, and that in January, 1914, and then ten days in the hospital? Answer: "Yes."

6. If so, were the facts in regard thereto fully and fairly disclosed and made known to the defendant at the time the application was made? Answer: "Yes."

7. Did D. H. Collins, insured, in his application for insurance, represent that he had never had any application for accident or health or sickness or benefit or life insurance declined or acceptance postponed, and that no company or association or order had ever canceled or refused to renew a policy or certificate for him? Answer: "Yes."

8. Had D. H. Collins had any application for accident or health or sickness or benefit or life insurance declined or acceptance postponed, or had any company or association or order ever canceled or refused to renew a policy or certificate of insurance for him? Answer: "No."

9. Was the loss complained of by the plaintiff caused by sickness or disease existing or contracted prior to the issuing of the policy sued on? Answer: "No."

10. In what amount, if anything, is the defendant indebted to the plaintiff? Answer: "$350."

Defendant, at the close of the evidence, moved for a nonsuit upon the evidence, which motion was refused, and it then requested an instruction that if the jury believe the evidence, they should answer the

ninth issue "Yes"; this also was refused. Defendant excepted to these refusals and further excepted to the following instruction of the court to the jury on the ninth issue: "The burden of this issue is upon the defendant insurance company. It must establish by the greater weight of the evidence that the loss complained of was caused by sickness or disease existing or contracted prior to the issuing of the policy."

The defendant further excepted to the refusal of the court to set aside the verdict because it was against the weight of the evidence.

Judgment upon the verdict was rendered, and defendant appealed.

R. C. Strudwick, Justice & Broadhurst for plaintiff.
Brooks, Sapp & Williams for defendant.

WALKER, J., after stating the case: The motion for a nonsuit on the evidence was properly denied. There was evidence in the case upon which the jury could return a verdict for the plaintiff, as the evidence, upon such a motion, must be construed most favorably in behalf of the plaintiff, and if in any reasonable view of it he is entitled to recover, it should be submitted to the jury, and they have found that there was no fraud or misrepresentation on the part of the plaintiff. *Brittain v. Westhall,* 135 N. C., 492; *Shaw v. Public Service Corporation,* 168 N. C., 611; *Clark v. Whitehurst,* 171 N. C., 1.

The court told the jury that should they find from the evidence that the loss resulted from sickness or disease which existed before the policy was issued, or which was contracted before that time, their answer to the ninth issue would be "Yes." This was fully responsive to defendant's special prayer for an instruction upon the ninth issue, and was really a more preferable form of instruction than the one which was asked to be given. While we have not rejected the form of instruction which appears in the defendant's prayer, where there is no prejudice from it, we have yet commended the other form as the more desirable one. *Merrell v. Dudley,* 139 N. C., 57; *Sossamon v. Cruse,* 133 N. C., 470; *Alexander v. Statesville,* 165 N. C., 527.

The third assignment of error, as to the burden of proof upon the ninth issue, is untenable. The court properly instructed the jury that the burden was upon the defendant, and for this reason: The policy insured against "loss resulting from sickness or disease," and the plaintiff made out a prima facie case when he exhibited the policy and proved that he was sick and confined to the hospital and his home by such illness after the insurance was taken out. The clause of the policy withdrawing from its operation what would otherwise be embraced by it is in the nature of an exception, or an exemption of the company, under the specified circumstances, from liability thereon, and

if the company would avail itself of the exemption, it must establish the facts which bring the case within the same. "Plaintiff, to establish a prima facie case, must prove: (1) The existence of the contract or policy sued on; (2) the death of the insured or the happening of the event provided for in the policy, and the giving of notice and proof of death (or other event), as required by the policy. On the other hand, the burden is on the company to show a violation of conditions avoiding an otherwise valid policy, or exceptions in the policy which limit the liability of the company." 25 Cyc., 926; *Int. Order of Twelve v. Boswell,* 48 S. W., 1108; 9 Cyc., 762. The burden was on the plaintiff to show a case within the terms of the policy which entitled him to its protection and benefit; but he did this by the proof that he became ill after the policy was issued, and went to the hospital for an operation, and there is evidence that while he was there the second premium due on the policy was paid by him and received by the defendant. The policy is broadly worded, covering all cases of sickness, and if there was any special kind of illness which was excepted from the general words, the defendant should have shown it.

There was proof that the defendant's agent knew that plaintiff had been ill some time prior to the date of the policy, as it appears, by construing the evidence most favorably for plaintiff as against a motion to nonsuit, that the plaintiff stated frankly and fully to the agent, at the time of the application for the insurance, in answer to questions propounded to him, every fact in regard to previous illness, giving all the information in connection therewith. If the agent, by inadvertence or otherwise, failed to insert the answers in the application as they were given to him, it was not the fault of the plaintiff, but of the defendant's agent who represented it in the transaction. If it be said that the plaintiff was negligent in not reading the application before he signed it, the answer is that there is, at least, some evidence to the effect that plaintiff was induced not to do so by what the agent said to him, and upon a motion to nonsuit we must take this evidence to be true; and, in this view, it is not necessary to decide the interesting question whether, if plaintiff had not thus been misled by the agent, which excused him from reading the policy, his omission to read could be imputed to him as negligence which would exonerate the company or whether knowledge of the agent acquired even in this way would still be charged to the company. The authorities are not at one in regard to this proposition. Some cases hold that where the applicant is not, by the conduct of the agent, excused from reading the policy, but is negligent in not doing so, the company is not liable. *Ryan v. W. M. L. Ins. Co.*, 41 Conn., 168 (19 Am. Rep., 490); *N. Y. Life Ins.*

Co. v. Fletcher, 117 U. S., 519. Other authorities hold the contrary. 25 Cyc., 803 (d), 804, 805. It is there said: "Misstatements by way of representation or warranty which are made through the fraud of the company's agent cannot be relied on by it to defeat the policy; and especially is this so where the insured is misled by the agent into making the false statements. But the insured must act in good faith, and if by collusion between him and the agent false statements are made for the purpose of securing the insurance, he cannot recover, notwithstanding the agent's participation in the fraud. An insurance company cannot dispute the truthfulness of false statements written in the application for insurance by its agent without fraud or collusion on the part of the applicant, where the applicant made truthful answers to the agent, even though such statements are expressly made warranties on the basis of which the policy is issued. The theory on which the falsity of answers written in the application by the agent is charged to the company, and not to the insured, is that the agent represents the company in filling out or assisting to fill out the application, and this has been held to be so in some jurisdictions, notwithstanding any stipulation in the application that the agent in taking the application is to be considered the agent of the applicant." Numerous cases are cited in the note to sustain the text. *Otte v. Hartford L. Ins. Co.,* 88 Minn., 423; *McArthur v. H. L. Assn.,* 73 Iowa, 336; *Foster v. Mut. Ins. Assn.,* 37 Wash., 288; *Mass. L. Ins. Co. v. Esleman,* 30 Ohio St., 647; *Keystone Mut. Ben. Assn. v. Jones,* 72 Md., 363; *Marer v. Fed. Mut. L. Assn.,* 78 Fed., 566 (24 C. C. A., 239); *Hook v. M. M. L. Ins. Co.,* 90 N. Y. Suppl., 56; *C. M. I. L. Assn. v. Parham,* 80 Texas, 518; *Ins. Co. v. Wilkinson,* 13 Wall. (80 U. S.), 222; *Ins. Co. v. Malone,* 21 Wall. (88 U. S.), 152. See, also, as bearing upon the same question, *Follette v. Accident Assn.,* 110 N. C., 377; *Sprinkle v. Indemnity Co.,* 124 N. C., 405; *Gwaltney v. Assur. Society,* 132 N. C., 925; *Fishblate v. Fidelity Co.,* 140 N. C., 589.

But we need not decide this question, as we have held that there was proof of circumstances in this case which exempted the plaintiff from the operation of the principle, as stated and applied in *Ryan v. Ins. Co., supra,* and *Ins. Co. v. Fletcher, supra.* The conversation plaintiff had with the agent, as detailed by him, was calculated to throw him off his guard and to justify his placing trust and confidence in the agent's proper discharge of his plain duty, which he owed to him and the company, to write the answers correctly in the application. This prevented the plaintiff from reading the policy, which would have disclosed the errors to him; but the company, in such a case, must be bound by the acts of its agent within the principle stated in *Griffin v.*

Lumber Co., 140 N. C., 514, and *Keystone Mut. Ben. Assn. v. Jones*, 72 Md., 363. As against a nonsuit, as we have already said, we must assume the truth of plaintiff's testimony as to what passed between him and the agent, and that the jury would have found that plaintiff was misled thereby and was not guilty of any negligence when he trusted the agent, and believed that he had written the answers as they had been given to him. This phase of the case does not seem to be discussed in the defendant's brief, but is embraced, perhaps, by the motion to nonsuit, and we have, therefore, referred to it.

We have construed any doubtful meaning of the policy in favor of plaintiff, according to the settled rule. *Bray v. Ins. Co.*, 139 N. C., 390.

The refusal to set aside the verdict because it is against the weight of the testimony is not reviewable here.

We have found no error in any of the particulars to which exception was taken.

No error.

W. T. WYRICK, ADMINISTRATOR OF NELLIE WYRICK, DECEASED, v. SOUTHERN RAILWAY COMPANY.

(Filed 22 November, 1916.)

Railroads—Negligence—Pedestrians on Track—Assumptions in Avoidance—Evidence—Trials—Nonsuit.

The intestate of the plaintiff was a schoolgirl on her way to school with other girls on a dirt road alongside the defendant's right of way, and, seeing the train approach, went upon the track in an intervening cut. The other children climbed the side of the cut and avoided injury; but the intestate, while leaving the track for a place of safety, where there was sufficient room for the train to pass, caught her foot in a switch rod, and was struck by the locomotive and killed. *Held*, a motion as of nonsuit upon the evidence should have been allowed, upon the principle that the employees on defendant's train had the right to assume, up to the last moment, that the intestate, in full possession of her faculties, would leave the track and avoid the injury. In this case there was no evidence that the engineer was negligent or that he could have avoided the injury after seeing the intestate's peril.

CIVIL ACTION tried at August Term, 1916, of GUILFORD, before *Ferguson, J.*, upon these issues:

1. Was the intestate of the plaintiff killed by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff's intestate by her own negligence contribute to her injury and death, as alleged in the answer? Answer: "Yes."

3. Notwithstanding any negligence on the part of the plaintiff's intestate, could the defendant by the exercise of due care and prudence have prevented the injury and death? Answer: "Yes."

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: "$1,250."

From the judgment rendered, defendant appealed.

L. Herbin, R. C. Strudwick for plaintiff.
Wilson & Ferguson for the defendant.

BROWN, J. At the conclusion of the evidence the defendant made a motion to nonsuit, which was refused by the court. This is the only assignment of error we deem necessary to consider. All the evidence in this case tends to prove that on 3 November, 1915, plaintiff's intestate and daughter, Nellie, 12 years of age, in company with her brother and several other school children, was on her way to Brightwood School, which was situated on the same side of the railroad as her residence. The dirt road ran along the eastern side of the railroad track to a point very near the schoolhouse. When these children reached Rudd station, instead of following the dirt road, they walked on the railroad track until they reached a small cut about 150 feet long and sloping away from the track. About the middle of the cut there was a switch which was constructed in the usual and customary manner upon long ties or sills which extended out from beyond the other ties and about 8 or 9 feet from the eastern rail. About 300 yards south of the cut in which the switch stand was located there was another deep cut, and from the mouth of the deep cut to and continuing through the smaller cut the track curved to the right. As the children were approaching the cut they heard and saw northbound passenger train No. 44 coming out of the deep cut and approaching the smaller cut. Instead of stepping off the track on the left before entering the cut, they ran on into the cut and, with the exception of the plaintiff's intestate, the children ran up the sloping bank of the cut on the left of the track. When the train was seen coming, plaintiff's intestate, Nellie, entered the cut with the other children, and, instead of following them up the sloping sides out of the way of the train, undertook to pass between the switch target and the rail. Her foot was caught by the rod of the switch and before she could extricate it she was struck by the pilot beam of the engine and killed.

The evidence tends to prove that the train was running about 45 miles an hour, and that there was sufficient space between the rail and the bank of the cut, some 8 or 10 feet, for a passenger to have stood and let the train pass without injury. There is evidence that

the engineer saw the children as they ran into the cut and ran up the bank.

We are of opinion that the motion should have been sustained. It is settled by numerous decisions of this Court that when the engineer saw the girl upon the track he had a right to suppose that she would get out of the way and follow the other children up the bank to a place of safety. As is said in *Davis v. R. R.*, 170 N. C., 582: "A railroad company is not under any legal obligation to regulate the speed of its train for the convenience of those using its right of way, for its tracks are always places of danger, and the pedestrians who can easily step aside and avoid any danger should do so on the approach of a train. He cannot require the company to slow up any more than to stop. He must look out for trains and take care of himself, and the engineer has the right to suppose that he has done so, or that he will do so in time to save himself."

It is not incumbent upon an engineer to stop his train because he sees on the track ahead of him a pedestrian who is apparently in possession of his faculties and in no difficulty. The engineer has a right to assume that the individual will protect himself and leave the track in time to save injury. The engineer has a right to assume this up to the last moment and until, by reasonable care, he can discover that the person on the track is unable to get off. *Glenn v. R. R.*, 128 N. C., 184; *Talley v. R. R.*, 163 N. C., 567.

There is no evidence in this case of any substantive negligence upon the part of the engineer, which would justify a verdict against the defendant on the first issue. The plaintiff claims that the judgment should be sustained because of the finding on the third issue. We have examined the evidence and are unable to see anything that justifies the conclusion that after the engineer discovered, or by reasonable diligence could have discovered, the terrible predicament in which the plaintiff's intestate was placed, he could have stopped his train.

The motion to nonsuit is allowed.

Reversed.

THOMAS R. PEMBERTON ET AL. v. COUNTY BOARD OF EDUCATION OF GUILFORD COUNTY.

(Filed 22 November, 1916.)

Education—School Districts—Schools Within Three Miles—Old Sites—Commissioners' Discretion—Courts—Statutes.

Revisal, sec. 4129, requiring the county board of education to divide the townships into convenient school districts, as compact in form as practicable, having regard for the convenience and necessities of each race, no new school to be established in any township within less than 3 miles by the nearest route of some other school already established, does not apply to the rebuilding of schoolhouses on old sites erected before the passage of the act, or interfere with the sound discretion of the commissioners in that respect, and in this case the exercise of this discretion in rebuilding a school a half mile from the old site, and within three miles of the primary department of another school more recently established, will not be interfered with.

WALKER and ALLEN, JJ., dissenting without written opinion; CLARK, C. J., concurring.

CIVIL ACTION pending in the Superior Court of GUILFORD County, and heard by *Webb, J.*, upon a motion to dissolve a restraining order, 22 April, 1916. The court dissolved the restraining order and taxed the plaintiffs with the cost, from which order they appealed to the Supreme Court.

William P. Bynum and R. C. Strudwick for plaintiffs.
Brooks, Sapp & Williams, John N. Wilson for defendants.

BROWN, J. The judge below did not find the facts, but they appear in the pleadings and affidavits, and are practically uncontroverted. Over fourteen years ago the board of education of Guilford County established the South Buffalo School District in Gilmer Township, Guilford County, and a school building was erected thereon. Thereafter another school district contiguous to this was established in the same township, called Bessemer. In the year 1911 the county board of education established a branch of the Bessemer School and erected a building for it as a primary school for small children. This primary school was a part of the Bessemer School. This primary school building is within 3 miles by the nearest traveled route of the site of the school building built some years ago in South Buffalo School District, and is also within 3 miles by the nearest traveled route of the location selected by the board for the erection of the new school building on the Gillespie site to take the place of the old one, but neither of these sites

is within 3 miles of the main school building of Bessemer School District. The old schoolhouse of the South Buffalo District building of fourteen years ago was insufficient, and a new building became necessary. To erect this, the voters of the South Buffalo District authorized a bond issue of $10,000. The defendant, the county board of education, received application for the removal of the site and heard witnesses upon that subject. After careful examination the board decided to cause the new school building for the Buffalo District to be erected on the other side of Buffalo Creek on the Gillespie site, which, according to the statement in the plaintiff's brief, is only one-half mile nearer Sunnyside School, which is the primary school referred to, than the old site of the South Buffalo School.

It is admitted that the old schoolhouse stood within 3 miles of the Sunnyside School and that the proposed new school building will be erected on the site about one-half mile from the old site. The plaintiffs base their right of action upon the following statute, Revisal, 4129: "The county board of education shall divide the townships into convenient school districts as compact in form as practicable. It shall consult the convenience and necessities of each race, in setting the boundaries of the school district for each race, *and shall establish no new school in any township within less than 3 miles by the nearest traveled route of some school already established in the said township.*" That statute was enacted in 1905 and the old Buffalo schoolhouse had then been in existence three years.

We are of opinion that his Honor properly dissolved the restraining order. The Buffalo schoolhouse was erected and the school established before the passage of the act, and it is, according to all the evidence, within 3 miles of the Sunnyside Primary Department of the Bessemer School. We find nothing in this statute which, in our opinion, makes it unlawful for the county school authorities in the exercise of sound discretion to remove the school building one-half mile from the old site. The overwhelming weight of evidence, as embodied in the affidavits, is that it is greatly to the interest of the school district that the new building should be located upon the Gillespie site, which is on the north side of the creek.

Forty-five affiants testify that South Buffalo Creek runs through the district and is crossed by a bridge; that on the north side of the creek where the school building is proposed to be erected there are 162 children of school age. These affiants state that in their opinion it is to the best interests of the school children of the district that the new building should be erected on the Gillespie site. This is a matter, we think, under these circumstances, that should be left to the sound discretion of the school authorities. It has been held that in the

absence of misconduct or of violation of some provision of statute the action of the school authorities in dividing townships into school districts and in erection and maintenance of school buildings, cannot be supervised or restrained by the courts. *Pickler v. Board of Education,* 149 N. C., 221.

In this case it was specifically held that "When a school board, acting according to its judgment, without misconduct on its part, or any violation of some provision of statute, rebuilds a schoolhouse on the old site, though in less than 3 miles of some school already established, it is not a violation of Revisal, 4129, providing that no new school shall be established within that distance of another."

We find nothing in the statute which prohibits the erection of the new schoolhouse for South Buffalo District on the Gillespie site.

Affirmed.

WALKER and ALLEN, JJ., dissent.

CLARK, C. J., concurring: Revisal, 4129, provides that the county board of education in dividing the townships into school districts "shall establish no new school in any township within less than 3 miles of the nearest traveled route of some school already established in said township." This statute undertakes to prescribe a limitation upon the county board of education in laying out new school *districts.* This provision was not intended to interfere with their judgment as to the location of a schoolhouse, without misconduct on their part. It was not intended that the opinion of a Superior Court judge should overrule that of the county board of education in that respect. The purpose is to restrict the creation of new districts by providing that in laying out a new district the children therein should not be nearer than 3 miles from some existing school. The provision applies to the creation of new districts and not to the location, or change of location, of a schoolhouse, which is properly a matter resting in the sound judgment of the local authorities, except, as above said, when there is shown to be some misconduct requiring judicial correction. *Pickler v. Board of Education,* 149 N. C., 221.

CHANCEY CHAMBERS, ADMINISTRATOR, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 22 November, 1916.)

Appeal and Error—Nonsuit—Entries—Judgment—Release—Demurrer—Fragmentary—Premature.

Where defendant denied the negligence, and also set up a release as a defense in an action to recover damages for a personal injury, in the defendant's answer, to which the plaintiff demurred, and there is a statement that the court overruled the demurrer, and also it appeared that the court asked the plaintiff if he desired to answer, with reply that he did not so wish until the matter was settled on appeal, the appeal from such action by the trial judge is both premature and fragmentary, for it should be either from an entry of a judgment of nonsuit or reach to the entire merits of the plaintiff's cause of action, which must be determined in the Superior Court before an appeal will lie. And, in this case, as plaintiff could have recovered notwithstanding the ruling of the judge on the demurrer, his appeal was dismissed.

CLARK, C. J., dissenting.

CIVIL ACTION tried before *Cline, J.*, at August Term, 1916, of UNION.

The action was brought to recover damages for personal injuries, resulting in the death of plaintiff's intestate, alleged to have been caused by defendant's negligence in running its engine and cars. Defendant, by its answer, denied the alleged negligence and pleaded contributory negligence of the intestate, and further that the guardian of the intestate, and his ward, who was a minor (19 years old) at the time of his death, had settled and compromised any and all claim for damages on account of the negligence of the defendant, if any, for the consideration of $225 then paid by defendant to said guardian for his ward, and for the same consideration, so paid, they then and there released and discharged defendant "from all claims and causes of action for or by reason of the injuries received by him (Steve Chambers), and especially to his right side, leg, arm, and head, and all injuries, on or about 4 April, 1914, at or near Polkton, N. C., while a switchman in the employ of the Seaboard Air Line Railway." A copy of the release was annexed to the answer. Plaintiff at first replied to the answer, but afterwards withdrew her reply and demurred to the same upon two grounds: (1) Because the guardian of the intestate had no power or authority to compromise and settle his ward's cause of action, and (2) because the release could not operate as a discharge of the cause of action for the wrongful death, as the intestate at the time of the injury was actually engaged in interstate commerce, and his case is governed by the Federal Employers' Liability

Act, the action for the injury and the one for the wrongful death being separate and distinct, though they may both be prosecuted by the administrator in a single action for the double wrong. The court overruled the demurrer as to both grounds stated therein, and inquired if plaintiff wished to make reply to the answer, plaintiff answering that she did not, until the ruling of the court had been reviewed and passed upon by the Supreme Court. Plaintiff excepted and appealed. It does not appear in the record that any formal judgment was entered upon the overruling of the demurrer and no judgment for costs. The court merely stated that the demurrer was overruled.

Stack & Parker for plaintiff.
Frank Armfield, Cansler & Cansler for defendant.

WALKER, J., after stating the case: We are of the opinion that this appeal is both premature and fragmentary. There is no judgment in the record, and it appears that none was filed. There is only the simple statement that the court overruled the demurrer. This is not a judgment, but merely a ruling of the court or an expression of its opinion that the demurrer was bad. There should have been a judgment upon this ruling, at least for the costs, and it has been so held by this Court in a similar case. *Rosenthal v. Roberson,* 114 N. C., 594, 596. In that case plaintiff, in deference to an adverse ruling, "took a nonsuit and appealed." This Court said that "Upon the submission by plaintiff to a nonsuit, judgment should have been entered against him for costs. This was not done. No judgment having been entered below, the appeal must be dismissed. *Taylor v. Bostic,* 93 N. C., 415, and other cases cited; *Clark's Code* (2d Ed.), 559. It is true, if it appeared that the omission of the judgment is a mere inadvertence and the appellant has merits, the court would remand the case to supply the judgment instead of dismissing the appeal. *Baum v. Shooting Club,* 94 N. C., 217." In *Milling Co. v. Finlay,* 110 N. C., 411, "it appeared that defendants submitted to a nonsuit upon their counterclaim, excepted and appealed," and the Court held that "an appeal did not lie, because it only lies from a judgment, and no judgment of any kind appears in the record." In *Milling Co. v. Finlay, supra,* the Court further said: "The record states that, upon the intimation of the court, the defendants submitted to a nonsuit upon their counterclaim and appealed. The appeal was premature, and would not lie till after a final judgment upon the plaintiff's cause of action," upon the ground also that the appeal was fragmentary.

But a case directly in point, upon the proposition that the appeal is fragmentary, is *Shelby v. R. R.,* 147 N. C., 537. That was an action to recover damages for personal injuries alleged to have been caused

by the defendant's negligence in running its cars. The defendant denied the alleged negligence and pleaded a release given for the same injuries. The pleadings were substantially like those in the case at bar. The plaintiff in that case demurred to the plea setting up the release. The court overruled the demurrer, and plaintiff appealed. That is our case exactly. It was there held, and we quote at some length, as the decision completely covers this case: "The defendant pleaded in its answer two separate and distinct defenses. The plaintiff demurred to one of them, as he had a right to do. Revisal, sec. 435. The demurrer was overruled, and the plaintiff appealed. This is obnoxious to the rule forbidding fragmentary appeals. An appeal from a ruling upon one of several issues will be dismissed. *Hines v. Hines,* 84 N. C., 122; *Arrington v. Arrington,* 91 N. C., 301. The plaintiff should have noted his exception, and the judge should have proceeded with the trial upon both issues. If both issues, or only the issue as to this defense, were found with the plaintiff, he would not need to review the order overruling the demurrer as to this; but should he desire to do so, the overruling the demurrer as to this issue can be as well reviewed on appeal from the final judgment. It is true that the plaintiff will have to try this issue, but, aside from the presumption that the judge ruled rightly, it is better practice that the issue raised by the second defense should be tried, even unnecessarily, than that an action should thus be cut in two and hung up in the courts till it is determined, after much delay, on appeal, whether two issues or one should be tried. It is better to try both, and, after final verdict and judgment, pass upon the validity of the defense demurred to, if the result is such as to make the plaintiff still desirous to review it, which he will not be if he gain the case, nor if he lose on the other issue without ground of exception thereto. If this demurrer to one defense had been sustained, a different situation would be presented, and an appeal would lie at once, for to try the case on one defense might cause a verdict and judgment against the defendant, which might be defeated if the other defense were passed on. That would 'affect a substantial right,' and hence an appeal lies. Revisal, sec. 587. Whereas no harm would result from trying both defenses on issues as to each, since the exception to submitting this issue can be reviewed in passing upon the appeal from the final judgment. Judgment on appeal could then be entered without requiring a new trial. It is true that when a demurrer to the whole cause of action or the whole defense is either overruled or sustained, an appeal lies. *Comrs. v. Magnin,* 78 N. C., 181; *Ramsay v. R. R.,* 91 N. C., 418; *Frisby v. Marshall,* 119 N. C., 570; *Clark v. Peebles,* 122 N. C., 163. Such appeal is not fragmentary, but affects the entire action. Indeed, in *Comrs. v. Magnin, supra,* the

court questioned whether an appeal lay even in such case. The refusal of motions to dismiss for want of jurisdiction or that the complaint does not state a cause of action, even though they go to the whole action, are not such demurrers as permit an appeal. *Burrell v. Hughes,* 116 N. C., 430; *Joyner v. Roberts,* 112 N. C., 111; *Sprague v. Bond,* 111 N. C., 425. To allow appeals in such cases would admit of infinite abuse and vexation and delay to plaintiffs." The Court further says, in drawing its conclusion from the above reasoning and former decisions of this Court: "Hence fragmentary appeals like this, and premature appeals and appeals from interlocutory judgments, usually are not tolerated. It can prejudice neither party to have the issue as to the second defense found by the jury (plaintiff's exception being noted) at the same time the issue as to the other defense is found. With all the parties before the court, and the facts fully brought out, a correct conclusion is more likely to be reached by both judge and jury."

There is nothing left for us to do but to abide by what is said and decided in *Shelby v. R. R.* and other cases we have cited. But that decision is strongly supported by a former one in *Knott v. Burwell,* 96 N. C., 272. That was an action for libel. Defendant denied the libel and pleaded a cause of action against the plaintiff for slander as a counterclaim. Plaintiff demurred to the counterclaim. With reference to this state of facts, the adverse action of the court upon the demurrer and the appeal of plaintiff therefrom, the Court said: "This being sustained by the court, and the counterclaim disallowed, the defendant appealed, and at the same time moved the court to suspend further proceedings in the action until the appeal could be heard and decided. This was also refused and the trial ordered to go on. To these rulings the defendant's first exception is taken, and it is, in our opinion, without support in law. The proposed appeal was premature, and the exception being noted upon the record, the ruling would come up for review after the final hearing upon an appeal then taken, and this opportunity is now afforded the defendant." To the same effect is *Bazemore v. Bridgers,* 105 N. C., 191. So it will be seen that the practice and procedure in such cases has been thoroughly settled by decisions above considered. *Justice Reade,* in *Comrs. v. Magnin, supra,* strongly intimated that the result as declared in the above cases was in accordance with the true construction and meaning of The Code, and if there were any cases to the contrary it might be well for this Court to settle the matter finally by the adoption of a rule forbidding such premature and fragmentary appeals and requiring an exception to be noted to the adverse ruling so that the trial of the case can proceed. The point may be reserved for consideration upon appeal at the final hearing. We think that it will, perhaps, be found that the

cases in which appeals have been entertained in this Court from the overruling of demurrers are those where a decision of the question would finally dispose of the case, and not merely be one step forward, and perhaps a useless one. For illustration, in this case, if we should entertain the appeal and sustain the ruling of the court, or even reverse it, the jury may find eventually that there was no negligence, or that plaintiff's contributory negligence was the proximate cause of the injury, or that the release was procured by fraud, or is otherwise invalid, in either of which events our labor here would be utterly lost, and all we did but vain, idle, and fruitless. It is better to follow what the present *Chief Justice* (who wrote the opinions for the Court in all the cases, but one, which we have cited) so well said in the case from which we have quoted, and not decide twice when once will suffice and avoid the expenditure of much time and labor.

The practice we here adopt as the preferable one, besides having been settled by our decisions, is not, in principle, unlike that in cases of nonsuit, where the courts have held that, upon an adverse intimation of the court, the plaintiff may submit to a nonsuit, if he so desires, but he cannot appeal from the judgment of nonsuit, entered upon his submission, and have it reviewed in this Court, if there is any ground left upon which he may recover, for the ruling must go to the whole case and prevent a recovery before an appeal will lie. We have so held during this term in *Chandler v. Mills,* 172 N. C., 366, where it was said: "The nonsuit and appeal were prematurely taken. The law with respect to this matter has been thoroughly well settled by this Court. Before a plaintiff can resort to a nonsuit, and have any proposed ruling of the trial court reviewed here by appeal, the intimation of opinion by the judge must be of such a nature as to defeat a recovery. If there is any ground left upon which the plaintiff may succeed before the jury, after the elimination of all others by an adverse intimation, the remedy is not by nonsuit and appeal, but the case should be tried out upon the remaining ground, for the plaintiff may recover full damages, in which case no appeal by him would be necessary. In other words, the threatened ruling must exhaust every ground upon which a verdict could be had, and, therefore, be fatal to plaintiff's recovery," citing *Hayes v. R. R.*, 140 N. C., 131; *Hoss v. Palmer,* 150 N. C., 12; *Merrick v. Bedford,* 141 N. C., 504; and *Midgett v. Mfg. Co.,* 140 N. C., 361, where the Court held: "An intimation of an opinion by the judge adverse to the plaintiff, upon some proposition of law which does not take the case from the jury and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature, and the appeals will be dis-

missed. . . . If the plaintiff is permitted to take a nonsuit and appeal whenever an adverse ruling is made during the trial, not necessarily fatal to the case, it is possible the same case may be brought to this Court for review repeatedly, and numerous and unnecessary trials had in the court below. It is best that the case be 'tried out,' and then, if an appeal is taken, all the alleged errors excepted to during the trial may be reviewed here," citing *Hayes v. R. R., supra; Tiddy v. Harris,* 101 N. C., 591; *Gregory v. Forbes,* 94 N. C., 221, and *Crawley v. Woodfin,* 78 N. C., 4. We further said in *Chandler v. Mills, supra:* "The rule of practice itself has prevailed in our courts for many years, but it has been strictly confined in its application to cases where the intimation of opinion reaches to the whole case and leaves nothing for the plaintiff to stand upon, so that the review of the ruling in this Court will extend to all essential matters upon which a recovery could be based; otherwise the appeal would be fragmentary, and we would be giving our opinion upon a single question of law not finally determinative of the case, and trials would thus be uselessly multiplied and protracted."

In *Edwards v. Chemical Co.,* 170 N. C., 551, the demurrer of plaintiff was overruled, but it extended to the entire case, and the ruling of the court being sustained by us, we dismissed the action, as the plaintiff could not improve his case by amendment so as to recover. The demurrer in that case was not taken to one of two defenses, the other being sufficient, if true, to defeat the plaintiff, as was done here, but to one defense which, if good, was fatal to plaintiff's recovery, as we finally held by dismissing the action.

The decisions in *Royster v. Wright,* 118 N. C., 155, and *Bethell v. McKinney,* 164 N. C., 74, are entirely consistent with our ruling. In those cases a release was set up as the only plea in bar, and the Court held that it should be passed upon before a reference was ordered, and for this reason alone the appeal was entertained. There was no other defense in bar of recovery to be determined, as there is here. In *Ramsay v. R. R.,* 91 N. C., 419; *Frisby v. Marshall,* 119 N. C., 570; and *Pender v. Mallett,* 122 N. C., 163, the demurrer extended to the entire complaint, and they are therefore wholly different from this case. We have already commented on *Comrs. v. Magnin,* 78 N. C., 181, and especially directed attention to the opinion of *Justice Reade* as to what should be the correct procedure, which agrees with our view.

It is needless to consider the other questions as to the effect of the Federal law upon a release and so forth.

Our conclusion is that the appeal was not only fragmentary, but premature, and cannot be entertained.

Appeal dismissed.

CLARK, C. J., dissenting: No appeal can be taken when a party simply announces that he will enter a nonsuit, for he cannot appeal from his own motion. It requires some judgment of the court for costs or otherwise from which the appeal lies, the intimation of the court against the plaintiff being the ground of exception.

As a general rule, an appeal lies only from a final judgment, but Revisal, 587, was enacted solely to make exceptions to this rule by specifying the instances in which an appeal lies from other than a final judgment, as follows: "An appeal may be taken from every judicial order or determination of a judge of a Superior Court upon, or involving, a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; *or* which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." Under this section a large number of cases have specified numerous instances in which an appeal lies from other than a final judgment. See citations in Pell's Revisal to this section, 587. Among other instances is given: "An appeal lies from an order overruling or sustaining a demurrer." *Pender v. Mallett,* 122 N. C., 163; *Frisby v. Marshall,* 119 N. C., 570; *Ramsay v. R. R.,* 91 N. C., 419; *Comrs. v Magnin,* 78 N. C., 181; and there have been many others. A judgment sustaining a plea in bar (as a release) by overruling the plaintiff's demurrer thereto is appealable. *Royster v. Wright,* 118 N. C., 155; *Bethell v. McKinney,* 164 N. C., 74.

It is not necessary, nor indeed is it legal, to enter other judgment than "demurrer overruled," or "demurrer sustained," for Revisal, 506, provides: "After the decision of a demurrer, the judge shall, if it appear that a demurrer was interposed in good faith, allow the party to plead over, upon such terms as may be just." The only exception which permits of a final judgment in such case is when the demurrer is adjudged to have been frivolous. If after overruling or sustaining a demurrer, the court could enter a final judgment, then, on appeal, if the appeal is sustained as to the demurrer, it would affirm the final judgment, whereas Revisal, 506, provides that the court can merely act on the demurrer, and then, when such order is affirmed, the other party has a right to proceed under Revisal, 506.

It can make no difference whether the demurrer is filed by the defendant to the complaint, or by the plaintiff to the defense, for Revisal, 485, provides: "The plaintiff may demur to one or more of such defenses or counterclaims and reply to the residue of the counterclaim." The plaintiff's rights, therefore, are marked out by Revisal, 485, which gave him the right to demur to the defense in this case; by Revisal,

506, which gave him the right to reply when his demurrer was overruled without being bound by a final judgment, and Revisal, 587, which gave him a right to an immediate appeal on the overruling or sustaining a demurrer.

In *Edwards v. Chemical Co.,* 170 N. C., 551, the facts and the cause of action were identical with this. In that case, as in this, the cause of action was for wrongful death. The defendant in that case, as in this, filed an answer alleging as plea in bar that there had been a release of the cause of action for the injuries sustained, such compromise having been made prior to the death of the party injured. The plaintiff in that case demurred to the answer, as in this, which was overruled, as in this case; but this Court, unlike the present case, passed upon the judgment overruling the demurrer and affirmed it.

This case, however, comes under the Federal "Employer's Liability Act," as to which it has been held, in *R. R. v. Craft,* 237 U. S., 648, that the cause of action for wrongful injuries, and cause of action for wrongful death occurring subsequent to a settlement by the intestate during his life, are two separate causes of action, but that both can be maintained in one action, and hence a settlement by the intestate during his lifetime does not bar the cause of action for the wrongful death accruing subsequent to said settlement. This view was taken by the dissenting opinion in *Edwards v. Chemical Co., supra,* but, as is just said, this being an action under the Federal statute, the decision by the United States Supreme Court must govern, and the action of the judge in overruling the demurrer should be reversed by this Court.

The order overruling the demurrer should be reversed, too, on the further ground that the release pleaded in the answer, which is set out, was signed by the guardian of the infant without any authority of court being shown, and the release, therefore, as pleaded was invalid.

An action for wrongful death did not exist at common law, and is created only by statute, and in this State an action can be brought only by the administrator. *Killian v. R. R.,* 128 N. C., 261, and cases since citing it. In such actions it matters not whether the party was a minor or not, for all damages for the value of the life are recoverable in one action. *Russell v. Steamboat Co.,* 126 N. C., 961, and cases citing it since. In the *Russell case* the decedent was an infant only 5 months old.

When, however, the party injured is not killed outright, but dies subsequently from the injuries, the cause of action for the injuries abates upon the subsequent death. The question here presented is, if the party injured during his lifetime settled for his injuries, whether an action can be brought for his subsequent death. That question is

presented by the demurrer in this case. In *Edwards v. Chemical Co.*, 170 N. C., 551, the majority of this Court held that such settlement was a bar to a subsequent motion for wrongful death. In *R. R. v. Craft,* 237 U. S., 648, the United States Supreme Court, in an action under the Federal statute, held that such settlement would not be a bar, and that governs in this case, and the judge below erroneously overruled the demurrer. Besides, in this case, as already pointed out, the release pleaded as a defense was invalid because made by a guardian, who has no authority to compromise and settle such claim, except by order of court.

The appeal lay, and the order overruling the demurrer should be reversed on both grounds, that the release on its face was invalid, and, if valid, it would not bar the whole action, but only the claim for the injuries for which the deceased could have recovered if he had brought an action.

IN RE WILL OF McD. ARLEDGE.

(Filed 22 November, 1916.)

1. Wills—Caveat—Admissions—Burden of Proof.

Upon trial of *devisavit vel non* the burden of showing the affirmative of the issue is upon caveator.

2. Instructions—Wills—Caveats—Evidence—Trials—Questions for Jury.

The evidence in these proceedings of *devisavit vel non* being conflicting upon the issue, the propounder's requested instruction to find in favor of the validity of the will was properly refused.

APPEAL by propounder from *Carter, J.,* at March Term, 1916, of MECKLENBURG, in proceedings to caveat a will.

T. W. Alexander, F. I. Osborne, and Pharr & Bell for propounder.

J. D. Murphy, F. M. Redd, Stewart & McRae, and Cansler & Cansler for caveators.

CLARK, C. J. This was an issue of *devisavit vel non,* the caveators alleging that the execution of the will had been procured by undue and improper influence, and that the testator did not have testamentary capacity. To the issue, "Is the paper-writing offered, and every part thereof, the last will and testament of McD. Arledge?" the jury responded "No."

When the case was called for trial, counsel for caveators admitted the formal execution of the will, whereupon the court gave them the affirm-

ative in the trial of the case. *In re Peterson,* 136 N. C., 13. When they introduced their evidence and rested, the court ruled that there was not sufficient to submit the case to the jury on the second issue, and that he would submit it only on the first ground of "undue and improper influence."

At the conclusion of all the evidence, the propounder asked the court to instruct the jury that upon all the evidence, if the jury should believe the same, there was not sufficient evidence of undue influence, and to answer the issue in favor of the propounder. The court refused, and this presents the chief exception.

The case is an important one for more reasons than one, and the evidence on both sides was very prolix, a very large number of witnesses being examined. There are forty-four assignments of error, and the case was very fully and elaborately argued by able counsel on both sides. But as we see it, the real issue and the determinative factor was one of fact, and the jury have found that in favor of the caveators. If there was any error in the conduct of the trial by the learned judge, we do not think that it was prejudicial.

No new question of law is presented, and to go over the exceptions one by one would serve no good purpose and could be of benefit to neither party. The questions of law presented have each and all been often before the Court, and our rulings have been carefully and substantially followed by the learned judge, who held the scales even and exact in the trial.

No view that could be presented by either side has failed to appear either in the briefs or in the argument of counsel, and the cause has had the careful attention at the hands of the Court which its importance and the zeal and ability with which it has been argued by counsel entitle it to receive, and our matured judgment is that in the trial there was

No error.

THE STEPHENS COMPANY v. CITY OF CHARLOTTE.

(Filed 22 November, 1916.)

1. Constitutional Law—Municipal Corporations—Public Schools—Necessaries—School Buildings—Approval by Ballot—Bond Issues.

A public schoolhouse is not a necessary municipal expense within the meaning of Article VII, sec. 7, of the Constitution, and where the municipal authorities have agreed to purchase property for this purpose, and the vendor seeks specific performance to recover the deferred payment of the purchase price, a defense that it would require the issuance of bonds, which the electors had refused to approve by their ballots, is a complete

one, and the decisions heretofore rendered, that a tax for public school buildings is not for necessary municipal expenses, are not affected by the subsequent enactment of compulsory school laws.

2. Same—Compulsory Education—Four-months Term.

In the absence of the approval by ballot of the voters, the requirements of our compulsory school law and the constitutional provision requiring a four-months term of public schools must be complied with by the use of such buildings as the funds available will command, either by purchasing and building or renting for the purpose out of the current funds.

APPEAL by plaintiff from *Justice, J.*, at September Term, 1916, of MECKLENBURG.

Tillett & Guthrie, Cameron Morrison, J. H. McLain, and H. C. Dockery for plaintiff.

Marvin Ritch and Cansler & Cansler for defendant.

CLARK, C. J. This action was brought to recover $52,500 alleged to be due for the balance of purchase money of the Presbyterian College property in Charlotte and for specific performance of a contract entered into between the plaintiff and the defendant for the sale of said property at the price of $95,000, of which $42,000 was to be secured by the defendant by a mortgage on the property.

The defendant in its answer insisted that said alleged contract and the promissory note of the city for the balance on the purchase money of the said college property were void because not authorized by a majority of the qualified voters of the city, under Article VII, section 7, of State Constitution, and that the contract was entered into with full knowledge of this fact and in the expectation that the contract was not to be executed unless a bond issue was authorized by the Legislature and ratified by a majority of the qualified voters of the city, and that the failure of the voters to ratify the act authorizing the bond issue made it impossible for the city to execute the contract.

When the case came on for trial the plaintiff proposed that if the defendant would admit title to the land to be in the plaintiff, that the plaintiff would demur to the answer and demand judgment upon the pleadings, which was done, and this presents the point in the case as to whether such contract was within the powers of the city in the absence of a majority vote. As to the other point in regard to the alleged unfitness of the location, and the condition of the property, these were matters resting in the judgment of the town authorities, with which the courts have nothing to do unless there was misconduct on the part of the officials or corruption, which is not alleged. A public school building is not a necessary municipal expense, within the meaning of Article VII, section 7, of the Constitution, and this contract not having been

authorized by a majority vote at the polls, is invalid. This has been repeatedly held, *Lane v. Stanly,* 65 N. C., 153 (in 1871), and later in *Goldsboro v. Broadhurst,* 109 N. C., 228, where this Court denied the right of the plaintiff to recover on certain bonds executed as a part of the purchase price of certain school grounds and buildings on the authority of a legislative enactment. In the last case it is said: "The very purpose of the constitutional inhibition is to prevent the creation of debts for such exceptional purposes, without the sanction of the majority of the qualified voters of the township, city, or town. Important as are public schools and graded schools as well, it is not the purpose of townships, as such, to establish and support them. Under the Constitution, and appropriate legislation in pursuance thereof, schools are otherwise provided for."

In *Rodman v. Washington,* 122 N. C., 39, the Court restrained a tax levy for graded school purposes levied under the authority of an act of the Legislature, saying: "While we are in favor of public education, we cannot hold that a tax over and above that provided for and required to be levied and collected by the Constitution is a necessary corporation expense in the administration of the defendant corporation."

In *Hollowell v. Borden,* 148 N. C., 255, the Court sustained an injunction against the issuance of bonds under a special act of the Legislature for the purpose of buying a site and building for the graded school therein, and said: "It is also contended that the bonds are to be used in building a school building, a necessary municipal expense.

"It has never been held anywhere, so far as we know, that the expense of the public school system of this or any other State is a necessary *municipal* expense.

"Our common school system is created in the Constitution and subject to its provisions; the care and control of which are left to the wisdom of the General Assembly. That body has empowered numerous municipalities to issue bonds and to tax themselves by special taxation so as to enlarge the common school facilities provided for them by the general law of the State. But all such measures are required to be submitted to the qualified voters for approval . . . There is nothing in the recent decision of the Court in *Collie v. Comrs.,* 145 N. C., 170, which sustains the idea that our public school system is a necessary municipal expense. On the contrary, the opinion regards the public school system as a State institution, founded in the Constitution, and governed and controlled by the General Assembly. . . .

"The question presented here was decided adversely to the contentions of the defendant in *Smith v. Trustees,* 141 N. C., 151, where it is held that the establishment of a school district, with power to issue bonds for school purposes, must be sanctioned by a vote of the qualified voters of the prescribed territory."

It did not affect the decision in *Hollowell v. Borden* in any way, because it appeared that the children in the county outside of the prescribed territory were permitted to attend the Goldsboro Graded School. That was merely an incidental matter in no wise affecting the principle upon which the case was decided. Besides, there is the same provision in the Charlotte School act permitting children in the county outside of the city to attend the city schools.

In *Ellis v. Trustees;* 156 N. C., 12, which was an action to restrain the issuance of bonds for the Oxford Graded School under a special act of the General Assembly, the Court held: "The erection of this school building, therefore, not being a necessary expense within the meaning of the constitutional provision, it follows from these and other decisions of similar import that the proposed indebtedness could not be lawfully incurred 'unless approved by a majority of the qualified voters of the school district.'"

It is contended, however, that under the compulsory school law of 1913 a different rule should obtain. It is claimed that a public school building in view of said act has now become a necessary expense, because more buildings are required. This, however, does not change the constitutional provision on which the above cited cases were decided. There is no reason that extra buildings may not be obtained by renting the same without the expenditure of large sums for buildings and grounds, when a majority of the voters of the city will not approve such expenditure.

In *Sprague v. Comrs.,* 165 N. C., 603, decided since the compulsory school act of 1913, the Court held that a bond issue of $50,000 to construct public graded school buildings for Raleigh Township could not be authorized except by the assent of the majority of the qualified voters, saying: "On the question thus presented (Art. VII, sec. 7) it has repeatedly held that the erection of a new school building may not be properly considered a necessary municipal expense. *Gastonia v. Bank,* 165 N. C., 507; *Ellis v. Trustees,* 156 N. C., 10; *Hollowell v. Borden,* 148 N. C., 255; *Rodman v. Washington,* 122 N. C., 39; *Goldsboro Graded Schools v. Broadhurst,* 109 N. C., 228.

"Out of the *current* revenues lawfully available for the purpose, the authorities may build, as their judgment dictates; but when it is proposed to incur a large indebtedness of this kind, and secure same by issuing bonds of the municipality, the Constitution provides, as stated, that it can be done only when a majority of the qualified voters within the district shall give the measure their approval.

"This being the established construction of the Constitution, required by the ordinary significance of the language used, and for other considerations appearing in the authorities cited, it may not be ignored or

departed from because, in an exceptional instance, it may work a hardship to the interests more especially involved or because the Legislature may have given formal indication that the measure is desirable.

"Being a part of our organic law, established as a wholesome restraint on the incurring of burdensome indebtedness, it binds both the Legislature as well as municipal authorities, and must be enforced as controlling in all cases coming within its terms and meaning."

In *Gastonia v. Bank,* 165 N. C., 507 (decided in 1914), the Court held, in construing a special act passed in 1913: "It is well settled by the decisions of this Court that schools and school buildings are not necessary expenses of a municipal corporation. Our school system is founded in the Constitution, and is largely governed and regulated by laws applicable to the entire State. This subject is fully discussed in *Hollowell v. Borden,* 148 N. C., 256, and cases there cited.

"It is plain, therefore, that so much of the act as authorized the issue of bonds for 'erecting new graded school buildings' is invalid."

The last two cases have been decided since the adoption of the compulsory school law.

Whether the maxim is true or not that "Every people has as good a government as they are fit for," it is certainly true that under our Constitution school buildings and grounds cannot be bought by the issuance of bonds and on a credit unless authorized by a majority vote of the people of the city, town, or township interested in that matter. They must be consulted, for their judgment and not that of the officials must control. The constitutional provision requiring at least four months school, and the statute of 1913 requiring compulsory attendance, must be complied with by the use of such buildings as the funds furnished will command, either by purchasing and building or renting for the purpose out of the current funds, until the judgment of the majority at the ballot box shall authorize the issuance of bonds for the purpose of larger and more commodious quarters. This may involve the task of enlightening the adults of the community, which is sometimes more difficult than the education of the children. But as has been so often held, since these buildings, sites, and lots are not necessary expenses, and the issuance of bonds for that purpose may be excessive, however necessary the officials may think such expenditure, and however correct even their judgment may be, the bonds cannot be issued unless a majority at the ballot box, having to pay the principal and interest of these bonds, have first approved such expenditure.

We were earnestly urged by the able counsel who represented the plaintiffs to change the well settled rulings of the Court above quoted. But aside from the respect which should be paid the doctrine of *stare decisis,* we are of the opinion that those decisions were carefully made

and are based upon the provision in the Constitution which requires submission to the majority of the qualified voters of any proposition to incur indebtedness for other than a necessary public expense, which this is not.

The judgment of the court below dismissing the action is
Affirmed.

EULA M. CHANDLER v. J. W. JONES ET. AL.

(Filed 22 November, 1916.)

1. Contracts Voidable—Infants.

A contract made with an infant is voidable, and he may ratify or disaffirm it at his election, upon his attaining his majority.

2. Same—Benefits Retained—Credits—Purchase Price.

When an infant has received money under a contract he has made, and it is consumed or wasted during his minority, he may recover the same; but if it has been used for his benefit and invested in property which he has in hand, he cannot retain the property without allowing a just credit for the money received by him.

3. Same—Majority—Acquiescence—Ratification.

Where money has been paid to an infant under a contract made with him during his minority which he has invested in lands, his continuing to hold and enjoy the property after reaching his majority is evidence of his ratification of the contract, which has been held to be presumed after three years.

4. Same—Feme Covert—Disability Removed—Statutes.

A minor contracted for the sale of her lands and became a *feme covert* before reaching her majority, with agreement that upon payment of a certain sum the lands would go to the purchaser's wife for life, and at her death to him. The purchaser paid the *feme* grantor and her husband the purchase price, with which they paid off a mortgage on her lands. *Held*, whether the mortgaged lands were those of the wife or not, she was advantaged or benefited by the payment, at least to the extent of her dower right, and she is held to have ratified her contract by her acquiescence twenty-three years after receiving the payment, nineteen years after attaining her majority, and more than three years after the statute had removed her disability as a married woman.

5. Same—Acts of Disaffirmance—Actions—Estates Outstanding.

An infant contracted with a husband to convey her lands for a certain consideration, a life estate to the wife with remainder to her husband, the purchaser, and received the agreed price therefor. *Held*, after coming

of age the party could have evinced her disaffirmance of her contract by the return of the purchase money or some other unequivocal act, though she may not be permitted to sue for the land during the continuance of the outstanding life estate; and the failure of the infant to take such action after coming of age may be evidence of the confirmation of the contract.

APPEAL from *Ferguson, J.*, at August Term, 1916, of GUILFORD, in an action to recover the sum of $600 alleged to be due by contract.

The defendant admitted the execution of the contract and alleged that he had paid the sum of $500 thereon.

On 30 April, 1890, the defendant and his wife entered into a contract under the terms of which the defendant was to become the owner of a certain tract of land if he survived his wife, upon the payment of $600 to the plaintiff, who was then Miss Eula Vanstory, and it is upon this contract that the plaintiff is suing to recover the $600.

The defendant was examined as a witness in his own behalf and testified as to the payment of $500 as follows:

Q. State whether or not you ever made any payments to the plaintiff on this contract, and, if so, how much?

To this the plaintiff objected.

By permission of the court, the witness was examined by plaintiff's counsel, and the witness testified that the plaintiff was Eula Vanstory before she was married; that the alleged payment was made seven months after her marriage, and while she was yet only 16 or 17 years of age.

Upon objection and exception by plaintiff to each and all of the following questions and answers, taken and noted in apt time, Mr. Jerome, the defendant's counsel, was allowed to proceed as follows:

Q. State whether or not Mrs. Chandler, the plaintiff in this case, was married at the time you made this payment? A. Yes; she was married seven months before that. She was married on the 2d day of February, and it was in the fall when the payment was made, the November after her marriage. The mortgage will show the date of this payment.

Q. How came you to pay her the sum of $500 on 24 November, 1893?

Q. On 24 November, 1893, state whether or not you paid Mrs. Chandler any money. A. A check for $500.

Q. What was done with this check? A. Turned over to the man of whom they bought the land, J. A. Lambeth, who is so ill he could not come to court, and the mortgage was canceled, and it is in his possession.

Q. State whether or not that check was collected. A. Yes, it was collected.

Q. That was in 1893? A. Yes, sir.

Q. How old was the plaintiff at that time? A. She had been married a few months.

Q. Was she married in the early part of the year? A. Yes, the first of February.

Q. And this payment was made in November afterwards? A. Yes, the money was paid.

Q. Since you made the payment, in November, 1893, has the plaintiff ever claimed or demanded the payment of that $500 of you?

Q. When did you first hear of her claiming you had not paid her the $500? A. Soon after my wife died; it was not due until she died. I had the money on hand and let them have it as an accommodation, and I have been out of the use of the money very nearly twenty-three years."

The wife of the defendant died in November, 1915.

At the conclusion of the evidence, the court, "being of the opinion that the alleged payment having been made to the plaintiff when she was a minor not exceeding 16 years of age in November, 1893; and Mrs. Jones, wife of the defendant, not having died until November, 1915, and it not appearing to the court or claimed by the defendant that the money alleged to have been paid to the plaintiff was invested in land, the title to which was made to the plaintiff, the court is of the opinion that the alleged payment to the infant plaintiff is not a payment under the contract, and excludes the evidence," to which the defendant excepted.

His Honor then directed the jury to answer the issue in favor of the plaintiff, and the defendant excepted.

Judgment was entered upon the verdict, from which the defendant appealed.

King & Kimball for plaintiff.
Cooke & Fentress and Jerome & Jerome for defendant.

ALLEN, J. It was held by his Honor, as matter of law, that the payment of $500 by the defendant to the plaintiff, while she was a minor, did not operate to discharge *pro tanto* his debt to her, and, as the jury was not permitted to consider the evidence introduced by the defendant, we must, for the purposes of this appeal, accept it as true, and give the defendant the benefit of all reasonable inferences that may be deduced from it.

When it is so considered it establishes that a contract was entered into on 30 April, 1890, by the defendant and his wife, by virtue of which the defendant was to become the owner of a certain tract of land if he survived his wife, upon the payment of $600 to the plaintiff, who was then Eula Vanstory; that the said Eula Vanstory intermarried with A. D. Chandler before she was 21 years of age; that she and her

husband bought a tract of land of one Lambeth; that there was a mortgage upon the land; that the plaintiff and her husband requested the defendant to advance the sum of $500 on the amount due by him to the plaintiff under the contract with his wife for the purpose of paying off and discharging the mortgage on the land bought by the plaintiff and her husband; that the defendant advanced the said sum to the plaintiff and her husband, and that it was used in paying off and discharging the said mortgage; that the plaintiff became 21 years of age about nineteen years ago, and that she has done no act disaffirming said payment until the commencement of this action.

Do these facts furnish evidence of a ratification by the plaintiff or can she now disaffirm the same and recover the full amount of $600?

The contract of an infant is voidable and not void, and it may be either ratified or disaffirmed, upon attaining majority, at the election of the infant.

If money is paid to an infant upon a contract, and it is consumed or wasted, the infant may recover the full amount due under the contract; but if the money is used for his benefit and he has in hand property in which it has been invested, he cannot retain the property without allowing a just credit for the money paid to him; and if after becoming of age he continues to hold the property and uses it or disposes of it, this is evidence of a ratification. *Caffey v. McMichael,* 64 N. C., 508; *Skinner v. Maxwell,* 66 N. C., 48; *MacGreal v. Taylor,* 167 U. S., 688.

In the last case cited, and in the note to this case as reported in 42 Law Ed., p. 326, a great many authorities are cited in support of these principles.

Let us then see if the plaintiff has received any benefit from the payment of the $500 by the defendant which she still enjoys, and whether since she became of age she has done any act ratifying the payment made by the defendant.

If there was a mortgage upon the land bought by the plaintiff and her husband, and if at their request the defendant advanced $500 to discharge the mortgage lien and it was so used, then upon a disaffirmance of the payment by the plaintiff, the defendant had the right in equity to be subrogated to the right of the creditor who held the mortgage, and to enforce payment of the mortgage as against the plaintiff and her husband.

This is directly decided in the case of *MacGreal v. Taylor, supra,* and is in accord with the decisions in *Cutchin v. Johnston,* 120 N. C., 55, and *Brown v. Harding,* 171 N. C., 691.

If so, the plaintiff and her husband, if they still retain the title to the land bought from Lambeth, are holding the land freed of an encumbrance which has been paid off by the defendant with money which the

plaintiff is now seeking to recover, and if the Lambeth land is not now owned by the plaintiff and her husband, it must have been conveyed by them after she reached her majority, clear of the mortgage lien; and in either event it would furnish evidence of a ratification.

It does not clearly appear from the record whether the title to the Lambeth land was taken in the name of the plaintiff or her husband; but if the title was to the latter, which is the strongest view for the plaintiff, and it has not been disposed of, the plaintiff derives the benefit from the payment of the money of having her dower right cleared of the encumbrance and of having the defendant to forego his right to be subrogated to the right of the mortgage creditor, which, of course, he could not do if he is allowed the credit of $500.

The *MacGreal case* is also authority for the position that if the plaintiff joined in a conveyance of the Lambeth land free from encumbrances after becoming of age, with knowledge of all the facts, that this would be a ratification, and that if she and her husband now own the land, that they have in hand, in legal effect, the money of the defendant, since they do not recognize the right of the defendant to be subrogated to the rights of the mortgage creditor.

In that case Mrs. MacGreal, while an infant, executed a deed of trust to secure $8,000 borrowed from Mrs. Utermehle, which was used in paying certain mortgage debts on the land conveyed in the deed of trust, and when she came of age she refused to abide by the deed of trust, on account of infancy.

The Court in dealing with the question said: "These debts having been paid by Mrs. Utermehle, the appellees are entitled, in equity, to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. Utermehle for the loan of $8,000 to be used in meeting those debts and in improving the lot in question. 1 Jones Mortg., 874, 877, and authorities cited. And within the meaning of the rule that, upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held—and gross injustice will be done in this case if it be not so held—that the money borrowed from Mrs. Utermehle is, in every just sense, in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong."

In addition to this, the plaintiff has waited nearly twenty-three years after the payment was made, nineteen years after attaining her majority, and more than three years after her disabilities as a married woman were removed, without giving any indication that she disaffirmed the payment or that she would seek to recover the full amount of $600 from the defendant, and it was decided in *Weeks v. Wilkins,* 134 N. C., 524, that an infant will be held to have fully ratified his contract unless he disaffirms it within a reasonable time, which is three years after becoming of age.

It is true, as contended by the plaintiff, that she did not have a right of action to recover the $600 until the death of the wife of the defendant, which was in October, 1915, and that the bringing of an action is a disaffirmance; but this contention was also met in *Weeks v. Wilkins;* and it was held that although the right of action did not exist, that the infant could in some other way give evidence that she did not intend to abide by the contract.

In the *Weeks case* the plaintiff had executed a deed, while an infant, for land in which his mother owned a life estate. He commenced an action to recover the land more than three years after becoming of age and within three years after the death of his mother. The Court quotes from Devlin on Deeds: "The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmation on his part of his conveyance. The law considers his contract a voidable one on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance executed while he was a minor, or will disaffirm it. And it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act, he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it," and adds: "We think this is a just and reasonable rule." The Court then says: "The statute gives him three years after arrival at majority within which to bring his action against a disseizor. It seems to us that the same time, by analogy, should be fixed as the period within which he should determine whether he will disaffirm his deed. But it is said that Mrs. Hester Weeks owned the life estate, and that pending such estate he had no right of action to sue for the possession of the land. We do not think this material. His right to disaffirm his deed was entirely independent of his right to the possession of the land. He could easily have disaffirmed by returning the purchase money or by some other unequivocal act."

This case was affirmed on both points in *Baggett v. Jackson,* 160 N. C., 32; and if applicable to deeds, why should not the same rule prevail as to other contracts?

We are therefore of opinion that there is evidence of ratification which ought to be submitted to a jury.

New trial.

FOY & SHEMWELL, INC. v. W. C. HURLEY.

(Filed 22 November, 1916.)

Conversion—Mortgages, Chattel — Description—Registration—Title—Burden of Proof.

In an action for the wrongful conversion of a bay mare claimed by the plaintiff under a senior and by the defendant under a junior mortgage, the plaintiff must recover upon the strength of his own title, with the burden on him to establish it; and where the evidence is conflicting as to whether the mortgagor had more than one mare which would fit the description in plaintiff's mortgage, and also whether this mortgage had been recorded in the county of the mortgagor's residence, a charge by the court which made the plaintiff's right to recover depend only on the sufficiency of the description is reversible error to the defendant's prejudice. Revisal, sec. 982.

APPEAL from *Ferguson, J.,* at August Term, 1916, of DAVIDSON, in an action to recover damages for the wrongful conversion of one bay mare.

The plaintiffs claim to be the owners of the mare by virtue of a chattel mortgage executed on 12 September, 1914, by L. A. Sheets, and registered in Davidson County, in which the mare is described as "one bay saddle mare 6 years old."

The defendant claims to be the owner of the mare by virtue of a chattel mortgage executed by the said Sheets on 29 September, 1914, in which the mare is described as "one bay saddle mare 6 years old, named Dell, bought of John Kearns."

The plaintiffs offered evidence tending to prove that at the time of the execution of the mortgage to them Sheets was a resident of Davidson County, and that he owned only one bay mare, and that this was the one taken by the defendant and converted to his own use.

The defendant offered evidence tending to prove that at the time of the execution of the mortgage to the plaintiffs Sheets was a resident of Randolph County, and that he owned two bay mares, and that the mare of which he had possession was not the one described in the mortgage to the plaintiffs.

His Honor, among other things, charged the jury that "If there were two bay saddle mares 6 years old, because the description would fit either, and you could not tell which was the mortgaged property, you would answer the issue 'No'; but if there was only one saddle mare 6 years old, then the description was sufficient, and you would answer the issue 'Yes,' and fix the value to the mare." The defendant excepted.

The jury returned the following verdict:

1. Did the defendant wrongfully convert the property of the plaintiff? Answer: "Yes."

2. If so, what damages is the plaintiff entitled to recover? Answer: "$100."

Judgment was entered upon the verdict in favor of the plaintiffs, and the defendant appealed.

Walser & Walser and Phillips & Bower for plaintiffs.

C. A. Armstrong, McCrary & McCrary, and J. A. Spence for defendant.

ALLEN, J. There is error in the instruction given to the jury, because it excludes from consideration the evidence of the defendant as to the residence of the mortgagor at the time of the execution of the mortgage to the plaintiffs.

The plaintiffs must recover upon the strength of their own title, and as against the defendant must not only show that Sheets executed a mortgage, but that the mortgage was properly registered, and if, at the time of its execution, Sheets was a resident of Randolph, there was no authority to register the mortgage in the county of Davidson, because the statute, Revisal, sec. 982, provides that chattel mortgages must be registered where the mortgagor resides.

New trial.

J. S. MOON ET AL. v. SAMUEL W. SIMPSON AND FAUQUIER NATIONAL BANK, INTERVENOR.

(Filed 22 November, 1916.)

1. Bills and Notes—Negotiable Instruments—Indorsement—Presumptive Evidence—Trials—Questions for Jury.

Where the holder of a negotiable draft introduces it in evidence and proves the indorsement to him, he makes out a prima facie case, which entitles him to go to the jury in his action thereon.

2. Same—Banks and Banking—Purchaser for Value.

A bank intervened in attachment proceedings and claimed a draft, the subject thereof, as a holder in due course by indorsement from the defendant, its depositor; and there being no evidence that the intervenor held the draft for collection, or that the proceeds were the property of the defendant, but that he indorsed it to the bank, and received the money thereon, it is *Held*, that there is no evidence of a defect in intervenor's title thereto. Revisal, 2204.

CIVIL ACTION tried at May Term, 1916, of GUILFORD, before *Cline, J.*, upon this issue:

Is the Fauquier National Bank of Warrenton, Va., intervenor, the owner of the money attached in this proceeding? Answer: "Yes."

From the judgment rendered, plaintiffs appeal.

Brooks, Sapp & Williams for plaintiffs.
King & Kimball for intervenor.

BROWN, J. This case was before us at Fall Term, 1915, 170 N. C., 335, and is referred to for a statement of the controversy. The motion to nonsuit the intervenor was properly overruled, as the bank had introduced the draft and proved the indorsement, thereby making out a prima facie case that entitled it to go to the jury. *Moon v. Simpson, supra; Worth Co. v. Feed Co., ante,* 335.

The law applicable to this case is clearly stated by *Mr. Justice Allen* in the opinions in those two cases, and need not be repeated here. The assignments of error relating to the evidence are without merit, and need not be discussed.

In our view his Honor in the charge gave plaintiffs more than they were entitled to when he submitted the controversy to the jury as an open question as to whether intervenor's title was defective. As in the *Worth Co. case,* there is neither allegation nor proof that the title of the intervenor, which negotiated the draft, is defective within the meaning of the statute. Revisal, 2204.

There is no evidence that the intervenor held the draft for collection or that the proceeds were the property of Simpson, the indorser. On the contrary, all the evidence tends to prove that the intervenor purchased the draft and placed the proceeds to Simpson's credit, who at once drew them out.

The court might well have instructed the jury that if they believed the evidence the indorsement was properly proved, and there being no allegation or evidence of any defect in intervenor's title, it was entitled to recover.

No error.

SAMUEL L. ALLEN AND WIFE, LAURA V. ALLEN, v. A. SHIFFMAN.

(Filed 22 November, 1916.)

Attorney and Client—Evidence—Confidential Communications.

Communications which an attorney may not testify to against the interest of his client are those of a confidential nature in relation to his employment, and not such as the attorney knows independently from transacting his client's affairs, as in effecting a compromise of a former action in which attorneys for both sides and the parties were present; and in order to give such testimony the attorney may withdraw from a pending trial, upon considering that his client's testimony as to such compromise reflected upon his integrity.

CIVIL ACTION tried before *Cline, J.*, and a jury, at February Term, 1916, of GUILFORD.

The action was to recover the penalty for taking and receiving usurious interest in transactions had between male plaintiff and defendant. On denial of liability and issues submitted, the jury rendered the following verdict:

1. Did the defendant knowingly take from the plaintiff, and did the plaintiffs pay to the defendant, any amount in excess of the interest allowed by law, as alleged in the complaint, and if so, what amount? Answer: "No."

2. Did the defendant pay to the plaintiffs, and did they accept the sum of $100 and release the defendant from liability on account of the usurious transaction, as alleged in the answer? Answer: (Not answered by the jury.)

Judgment on the verdict, and plaintiff excepted and appealed.

W. J. Sherrod and R. C. Strudwick for plaintiff.
Stern & Swift and Wilson & Ferguson for defendant.

HOKE, J. The only objection insisted on to the validity of the trial was the reception of the testimony of C. C. Frazier, Esq., appearing in the present case as attorney for the defendant.

The usury alleged as the basis of the present suit was to some extent involved in a former case between these same parties which had been settled by compromise at August Term, 1912, of said court, in which transaction the witness had appeared as attorney for the plaintiff. In the present trial the attorney, considering that his position was to some extent reflected on in the testimony of the plaintiff, was allowed to withdraw from the case as attorney and become a witness for defendant. Plaintiff objected to certain portions of the witness's testimony, on the ground that it was in violation of the accepted principle which forbids disclosure of "confidential communications between the attorney and

client." The position is fully recognized, but it only extends to communications in the course of the attorney's employment and which may properly be regarded as confidential in their nature, and, so far as we can see, on careful perusal of the record, the only facts spoken to, having any significance on the issue, were concerning a compromise in adjustment of a former suit between these parties which was effected between the witness, who was then appearing as attorney for the present plaintiff, and David Stern, Esq., now deceased, who then represented the defendant, at which both of the parties litigant were apparently present and of which all of them were fully cognizant. The facts of such an occurrence could, in no sense, be considered confidential communications within the meaning of the principle, and the exception, therefore, must be overruled. An objection very similar was disallowed in *R. R. v. R. R.*, 147 N. C., pp. 368-388, and, speaking to the position, the Court said: "The objection to the testimony of one who had been of counsel for Howland, the original lessee, as to the fact that the Ives contract was mentioned and referred to at the time of taking the lease is without merit. This was a fact necessarily known to both parties, brought out during their negotiations concerning the lease, and could in no sense be considered a confidential communication. Weeks on Attorneys, 289; Wigmore Evidence, 2311, 2312; 23 A. and E., 67; *Elliott v. Elliott,* 92 N. W., 1008, citing with approval *Hills v. State,* 61 Neb., 598, reported in 57 L. R. A., 155." And, in *Dearsier v. Walkup,* 43 Mo. App., 625, it was held: "Professional communications between attorney and client are protected from motives of public policy, but the rule will not apply where the transaction shows the matter was not private, and could not in any sense be termed the subject of a confidential disclosure, as when, like this case, the disclosure was made in the presence of the opposite party."

There is no error, and the judgment for the defendant is affirmed.

No error.

F. H. REVIS AND WIFE v. J. D. MURPHY.

(Filed 22 November, 1916.)

Deeds and Conveyances—Heirs of the Body—Statutes—Fee Simple—Intent.

A conveyance of land to A. and "her heirs by the body of R. (her husband) and assigns forever" was a fee at common law, but under our statute, Revisal, sec. 1578, it is converted into a fee-simple absolute, unaffected by the fact that there were children of the marriage living at the time of the execution of the conveyance; and in this case, construing the instrument as a whole, it evidences the intent of the grantor that it should be so interpreted.

REVIS *v.* MURPHY.

CIVIL ACTION tried before *Adams, J.*, at October Term, 1916, of BUNCOMBE.

This is a controversy submitted without action upon an agreed statement of facts.

"It is agreed between F. H. Revis and wife, Avvie Revis, the plaintiffs above named, and J. D. Murphy, the defendant above named, as follows:

"1. That on 19 September, 1916, a contract was duly made and entered into between the plaintiffs and the defendant, by the terms of which the plaintiffs were to execute and deliver to the defendant a deed conveying to him in fee simple the tract of land described in the deed hereinafter set forth.

"2. That F. H. Revis and wife, Avvie Revis, prepared and duly tendered to J. D. Murphy a deed sufficient in form to convey the said land to defendant in fee simple, but the defendant J. D. Murphy refused to accept the same for the reason that the plaintiffs were not able to convey the lands in fee simple in accordance with their contract.

"3. That the land described in the complaint was conveyed to the *feme* plaintiff, Avvie Revis, by J. S. T. Baird by deed dated 22 January, 1909, and duly recorded, the material parts of said deed from Baird and wife to Avvie Revis being as follows:

"This indenture, made this 22 January, 1909, by and between J. S. T. Baird and Clara Baird, his wife, parties of the first part, and Mrs. Avvie Revis, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of eight hundred dollars ($800) to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have given, granted, bargained, sold, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, convey, and confirm unto the party of the second part, her heirs by the body of F. H. Revis, and assigns forever, a certain piece, parcel, or lot of land situate, lying, and being in the county of Buncombe and State of North Carolina, on Beaverdam Creek, and bounded and more particularly described as follows: [Here follows the description of the land.]

"To have and to hold the above described land and premises, with all the appurtenances thereunto belonging or in any wise appertaining unto the said party of the second part, her heirs and assigns, to the only use and behoof of her and her said heirs and assigns forever.

"And the said parties of the first part do hereby covenant to and with the said party of the second part, her heirs and assigns, that the said parties of the first part are lawfully seized in fee simple of said land and premises, and have the full right and power to convey the same to the said party of the second part in fee simple, and that said

land and premises are free from any and all encumbrances, and that they will, and their heirs, executors, and administrators shall, forever warrant and defend the title to the said land and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, against the lawful claims of all persons whosoever.

"4. At the time of the execution of said deed, the plaintiffs, F. H. Revis and Avvie Revis, were husband and wife; they are now husband and wife, and at the time of the execution and delivery of the deed from Baird and wife to Avvie Revis there were two children born of the marriage of F. H. Revis and Avvie Revis, namely, Marjorie Revis and Willowjine Revis, and one has since been born, and all are now living."

The parties further agreed that if the court should be of opinion with the plaintiffs, a decree should be entered accordingly, and if with the defendant, that the action be dismissed.

The court being of opinion with the plaintiffs, adjudged accordingly, and defendant appealed.

Guy Weaver for plaintiffs.
Garland A. Thomasson for defendant.

WALKER, J., after stating the case: The single question in this case is whether Avvie Revis took a fee-simple estate under the deed of J. S. T. Baird and wife to her. The limitation is to Avvie Revis, "her heirs by the body of F. H. Revis." This was at one time a fee tail special (2 Blk. Com., 113, 114), but by our statute of 1784 (Revisal, sec. 1578) it was converted into a fee-simple absolute. The form of the limitation here and the one in *Jones v. Ragsdale,* 141 N. C., 201, are the same. It was held in the latter case that the wife, Zilphia S. Jones, acquired a fee simple under and by virtue of the provisions of the statute, and our ruling in this case must be the same, viz., that Avvie Revis by the deed of the Bairds to her got a fee-simple estate. This affirms the judgment below.

Counsel for defendant relied on *Kea v. Robeson,* 40 N. C., 373; *Rowland v. Rowland,* 93 N. C., 214; *Gudger v. White,* 141 N. C., 507; *Triplett v. Williams,* 149 N. C., 394; *Beacom v. Amos,* 161 N. C., 357; and other cases to the same effect, which decided that the intention of the grantor must be sought for in the language of the entire deed and the latter construed in accordance therewith; but that is what we do when we hold this estate to be a fee simple, as the grantor has used language which conveys that kind of estate and no other. If we are to ascertain his intention by his words, that is the clear result, and if the law did not require us to give that construction to the deed, by reason of the particular words of limitation used, "her heirs by the body of F. H.

Revis," and the statute defining what the same shall mean, we would, by a survey of the whole deed, construing one part with another, reach the same conclusion.

Affirmed.

J. H. WADDILL, CITIZEN AND TAXPAYER, FOR THE BENEFIT OF FORSYTH COUNTY, v. H. W. MASTEN, FORMER REGISTER OF DEEDS, AND THE TITLE GUARANTY COMPANY.

(Filed 29 November, 1916.)

1. Statutes, Interpretation—Prospective Effect.

Generally a statute will be construed so as to give it prospective effect, unless the law in question clearly forbids such construction.

2. Statutes, Interpretation—Retractive Effect—Remedial Statutes.

A statute which is retrospective is one in some way affecting the rights of the parties incident to and growing out of a past transaction. In case of a remedial statute the rule is not so insistent, and it may be given retrospective effect where the language permits and such construction will best promote the meaning and purpose of the legislation.

3. Same—Procedure—Parties.

The rule that statutes may not be construed to have retrospective effect does not prevail when they concern mere matters of court procedure before action instituted, or the substitution or designation of new parties deemed necessary to a proper determination of a controversy or authorized to maintain and enforce a recognized or existent right.

4. Same—Statutes—Register of Deeds—Fees.

The statute, Laws 1905, ch. 436, changing the basis of compensating the register of deeds, among other county officers, from a fee to a salary basis, giving the taxpayer, having first made demand on the county commissioners, a right of action against the sheriff and his sureties, to recover taxes which the sheriff actually had collected, or should have collected, operates only on the procedure and the parties thereto, having no substantial effect on the rights and liabilities of the persons interested in the transaction, and is not a retrospective law.

5. Actions—Register of Deeds—Fees—Taxpayer—Equity—Suits—Statutes.

Apart from the provisions of the statute, a taxpayer has the right to prosecute a suit against the register of deeds of the county to enforce payment of taxes collected and wrongfully withheld by him when the county commissioners have refused to institute action to recover them; and when such right of action exists, usually appertaining to the exercise of the equitable jurisdiction of the courts, this jurisdiction is not necessarily withdrawn because the Legislature has provided a legal remedy, unless the statute itself shall so direct.

6. Register of Deeds—Fees—Counties—Vested Rights—Legislature.

The county has a vested right in fees collected by its register of deeds and wrongfully withheld, and these being in relation to the governmental agency of the county, the Legislature has the control of the remedy and procedure to enforce their collection.

7. Register of Deeds—Fees—Parties—Actions—Suits—Amendments.

While a taxpayer, in his suit independent of the statute, should make the proper county officials parties to his action against a register of deeds for unlawfully withholding fees collected by him, so they may be heard on the questions presented, and that the funds, if recovered, should be in proper custody or control, this matter affects the remedy, and may be cured by amendment.

CIVIL ACTION heard on exceptions to report of referee, before *Long, J.*, September Term, 1916, of FORSYTH.

The action was instituted by plaintiff on 10 December, 1913, against H. W. Masten, a former register of deeds of the county, for two terms, from 1 December, 1908, to December, 1912, and his codefendant, surety on his bond, to recover for fees due the county of Forsyth to the amount of $6,000 or $7,000, which plaintiff alleged said Masten had collected or should have collected by virtue and color of his office, and wrongfully withheld from the county. Plaintiff alleged, further, a demand and refusal on the part of the county commissioners to institute and maintain suit, etc.

On denial of liability, plea of settlement, release, etc., cause was referred by the court, and the referee, after a full hearing, reported that there were fees due the county of Forsyth to the amount of $6,867.17 from H. W. Masten, which he had received while in office, but ruled, among other things, as a conclusion of law, that the present action could not be maintained because chapter 80, Public Laws 1913, authorizing such suit to be instituted and maintained by a citizen and taxpayer of the county, was prospective in its operations and did not apply to the facts of the present case.

To this report the plaintiff excepted, in terms as follows: (2) "That the referee erred in finding that this action cannot be maintained by the plaintiff as instituted, because chapter 80 of the Public Laws of 1913 is not retrospective in its effect and cannot apply to settlements made between the defendant and the board of county commissioners during the year of his incumbency or amount paid to the defendant H. W. Masten by the board of commissioners of Forsyth County for making out the tax receipts."

(3) "That the referee erred in failing to find as a conclusion of law that, independent of chapter 80 of the Public Laws of 1913, the plaintiff, as a citizen and taxpayer of Forsyth County, had a common-law right to institute and prosecute this action in his own name for the benefit of Forsyth County."

The court entered judgment "overruling these exceptions" and in effect dismissing the action, and plaintiff excepted and appealed.

A. H. Eller and Gilbert T. Stephenson for plaintiff.

Benbow, Hall & Benbow, Watson, Buxton & Watson, A. E. Holton for Masten.

Hastings & Whicker for Guaranty Company.

HOKE, J. Under chapter 436, Laws 1905, the principal county officers of Forsyth County are to be compensated by salary, and the fees collected over and above the salary allowed become the property of the county. The defendant Masten was the duly qualified and acting register of deeds of Forsyth County from 1 December, 1908, to 1 December, 1912. The other defendant, being his surety and plaintiff, a citizen and taxpayer of the county, having first made demand on the county commissioners to act, etc., instituted the present suit, alleging that said defendant Masten wrongfully withheld from the county $6,000 or $7,000 of fees which he collected or should have collected during his term of office.

On denial of liability, the cause was referred by the court, and the referee, having heard the evidence, reports that said Masten is indebted to the county of Forsyth in the sum of $6,867.17 by reason of fees collected by him or which he should have collected during his term of office, but ruled, as a conclusion of law, that the present action could not be maintained because the statute, chapter 80, Laws 1913, authorizing any citizen or taxpayer to bring such suit, having first made demand thereto on the county commissioners, is prospective in its operation, and does not apply to the present case.

The general rule is fully recognized with us that a statute will be given prospective effect only unless the law in question clearly forbids such a construction. *Mann v. Allen,* 171 N. C., 219; *Elizabeth City v. Comrs.,* 146 N. C., 539. A retrospective law, however, within the meaning of the principle, is one that in some way affects the rights and liabilities of parties incident to and growing out of a transaction that has passed. In case of remedial legislation, the general rule is not so insistent, and such statutes are not infrequently given retrospective effect where the language permits and such a construction will best promote the meaning and purpose of the Legislature. *Connecticut and E. Ins. Co. v. Talbot,* 113 Ind., 373; *Ex Parte Brickley,* 53 Ala., 42; *People ex re Collins v. Spicer,* 99 N. Y., 225. And well considered authority is to the effect that the rule does not prevail as to statutes concerning mere matters of court procedure and before action instituted, nor to the substitution or designation of new parties deemed necessary to a proper determination of a controversy, or, as in this case, duly authorized to

maintain and enforce a recognized or existent right. These positions, both as to remedies and parties, are approved in *Tillery v. Candler,* 118 N. C., 889; *Worth v. Cox,* 89 N. C., pp. 42-48; *Oates v. Darden,* 5 N. C., 500; *Aultman, etc., Machinery Co. v. Arthur, Fish & Co.,* 120 Ill., Appellate Court, 314; *Tompkins v. Frestal,* 54 Minn., 119; Black on Inter. Laws, pp. 380-403, 408-411; 36 Cyc., p. 1213. In the cases of *Mann v. Allen* and *Elizabeth City v. Comrs., supra,* a construction giving retrospective effect to the statute would have affected the right of the parties growing out of the transaction, and *S. v. Pridgen,* 151 N. C., 651; *S. v. Littlefield,* 93 N. C., 614; *Merwin v. Ballard,* 66 N. C., 398, to which we were referred, were cases of indictment found or causes already instituted, which usually come within the general rule, and on the principle further recognized, "that a legislative enactment will not be construed to oust a jurisdiction once regularly and fully vested unless such an intention is clearly expressed." Black on Interpretation of Laws, p. 413, citing *Crane v. Reeder,* 28 Mich., 527.

In the present case, if the allegations of the complaint are established, there was a vested right of action for these fees in the county of Forsyth. Being a right appertaining to the county as a governmental agency of the State, so far as the county was concerned, it was very largely in the control of the General Assembly, *Jones v. Comrs.,* 137 N. C., 579; and they could, by statute, designate any person to institute and maintain the suit that the public interest might require. *Tillery v. Candler, supra.* Operating only on the procedure and the parties thereto, having no substantial effect on the rights and liabilities of the persons interested in the transaction or towards each other in reference to it, it was, in no sense, a retrospective law within the meaning of the principles stated, and defendant's exceptions on that ground cannot, therefore, be sustained.

There is allegation, further, in the complaint that a good portion of these fees had been collected and are now wrongfully withheld by defendant, and, as to that, if properly established, a recovery would be upheld, though a prospective effect only should, in its strictness, be allowed the statute as affecting both the right and the remedy. Apart from this, the plaintiff, as a citizen and taxpayer for Forsyth County, on sufficient and proper averment of default in this respect on part of the county officials, had and has a right to maintain an action of this character without resort to the provisions of the statute.

Suits in protection of the rights and interests of the county, on the part of citizens and taxpayers, have been frequently entertained by the courts in this State, and, while they have usually been of an inhibitive character, as in restraint of incurring an unlawful indebtedness of levying unlawful taxes, etc., the same principles, in proper cases, will uphold

recoveries for money wrongfully disposed of or withheld from the counties, on averment that the proper officials have corruptly or negligently refused to perform their duties in the matter. True, without the statute, it would be necessary in such a suit to make the proper county officials parties defendant, that they might be heard on the questions presented, and that the funds, if recovered, should be in proper custody and control; but this is a matter affecting the remedy which may, even now, if necessary, be cured by amendment, and does not affect the right of the taxpayer to proceed, on averment, as stated, that moneys are clearly due the county and the proper county officials wrongfully and corruptly or willfully refuse to institute suit to recover it. *Zuelly v. Caspar,* 160 Ind., 455; *Land Co. v. McIntire,* 100 Wis., 258; *Willard v. Comstock,* 58 Wis., 565. Speaking to the question in *Zuelly's case, supra, Dowling, J.,* delivering the opinion, said: "The reasons given by the court in support of the right of the taxpayer to maintain an action to enjoin an unlawful disposition of public funds apply with equal force where the wrong has been accomplished, the fund dissipated, and the public officers, whose duty it is to sue for and recover the money, obstinately or corruptly refuse to act. In the case of private corporations it has often been decided that a suit may be brought by a stockholder on behalf of the corporation against the directors and others for frauds, wrongs, and breaches of trust, and for the recovery from them of money of which the corporation has been defrauded, the latter being joined as defendant" (citing *Porter v. Sabin,* 149 U. S., 473, and many other cases), and further: "The legal principle which, under special circumstances and subject to somewhat narrow restrictions, permits a stockholder to sue for and redress wrongs or frauds upon the corporation may without violence be extended to the taxpayers of public corporations where the wrong is apparent, the equity clear, and the officers, charged with the duty of protecting the interests of the taxpayers, refuse to act." And when such right of action exists, usually appertaining to the exercise of the equitable jurisdiction of the courts, such jurisdiction is not necessarily withdrawn because the Legislature have seen proper to provide, by statute, a legal remedy, unless the statute itself shall so direct. *Oliveira v. University,* 62 N. C., 69; *Humphrey v. Wade,* 70 N. C., 280; *McKay v. Woodle,* 28 N. C., 352. It may be well to note that we are not passing or attempting to pass on the rights of these parties, as affected by the auditing of defendant's accounts or settlements which may have been had between him and the court authorities. Neither the report of the referee nor the evidence accompanies the case on appeal, the parties, as therein stated, intending to present the question merely of plaintiff's right to maintain the suit, and, for the reasons stated in the record, as it now appears, we are of opinion that the action is sustainable.

There is error in the judgment, and this will be certified, that the cause as now constituted be proceeded with in accordance with the opinion.

Reversed.

MRS. MINNIE DICK HINTON v. SOUTHERN RAILWAY COMPANY.

(Filed 29 November, 1916.)

1. Railroads — Negligence—Automobiles—Statutes—Speed Limit—Proximate Cause.

Where a railroad company has provided a gate at a public street crossing of a town to be let down for the protection of vehicles, etc., from passing trains, and it has been shown that the employee in charge has negligently let down this gate in front of an automobile too suddenly for the driver and owner to stop, and has caused him to deflect his course to the damage of the machine and his own injury, without negligence on his part, the fact that the driver was at the time exceeding the statutory speed limit, and was therefore guilty of a misdemeanor, does not alone bar his recovery, such being dependent upon the question as to whether his act was the proximate cause of the injury. *Lloyd v. R. R.*, 151 N. C., 536, where the statute itself is made the basis of the injury, cited and distinguished.

2. Railroads—Negligence—Automobiles—Speed Limit—Statutes.

Chapter 107, Laws 1913, among other things providing that a person operating a motor vehicle shall have it under control and not exceed 7 miles an hour in certain surroundings, having regard to the traffic on the highway, making a violation thereof a misdemeanor, includes railroads within its provisions, and it is therefore a misdemeanor to run an automobile at a greater speed than 7 miles an hour while approaching a railroad crossing in a town.

3. Negligence—Evidence—Sudden Peril—Railroads—Crossings—Automobiles.

The doctrine that a person in the presence of imminent peril is not held to the same deliberation or circumspection of care as he would be under ordinary conditions applies to the facts of this case, where an automobile, driven by the owner, was approaching a railroad crossing, with his view of a coming train obstructed, and the employee of the company suddenly dropped the gate to allow a train to rapidly pass, thereby causing him to deflect the course of his car to its damage and causing him personal injury.

See *Walters v. R. R.*, next following.

CIVIL ACTION to recover for alleged negligent injuries to plaintiff and to her automobile, which plaintiff was driving at the time, tried before *Cline, J.*, and a jury, at March Term, 1916, of GUILFORD.

There was denial of liability by defendant, and, on the trial, the jury rendered the following verdict:

1. Was the plaintiff and her automobile injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff, by her own negligence, contribute to her own injury, as alleged in the answer? Answer: "No."

3. What damages, if any, is the plaintiff entitled to recover on account of any personal injuries? Answer: "$200."

4. What damages, if any, is the plaintiff entitled to recover on account of any injury to her automobile? Answer: "$300."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

John A. Barringer for plaintiff.
Wilson & Ferguson for defendant.

HOKE, J. The facts in evidence on the part of plaintiff tended to show that on 11 May, 1915, she was driving her automobile along Summit Avenue, in the city of Greensboro, and towards the crossing of that street over the defendant railroad. That it is a much frequented crossing, with buildings extending up near the railroad, shutting off the view of the railroad tracks for persons traveling on the highway, and, for these reasons, there are gates provided to be let down and bar the approach and also a tower and watchman, the latter having full view of both railroad and highway, who operates these gates and also a gong for the purpose of giving warning of trains to persons who may be on the highway, approaching the crossing. That on the occasion in question plaintiff was running her car at the rate of 10 to 15 miles per hour, having the same under good control, and, hearing no gong nor signal, she approached the crossing with a purpose of going over, and when she was in 25 or 30 feet of the gates they were suddenly lowered and a freight train "rushed instantly by," without any warning having been given; that in order to avoid running on the gates and a probable collision with the passing train, plaintiff turned her machine square to the right, and in doing so ran the same into a building, 19 or 20 feet off, and in doing so received the injuries and damage complained of; that the car, under ordinary conditions and at the speed it was moving, might have been stopped in 25 or 30 feet, but it struck before plaintiff was able to stop it, and the injuries occurred as stated.

There was evidence on the part of the defendant to the effect that proper signal warnings were given, and, further, that the car left the street about 81 feet from the gate, and that the same could have been stopped and the injuries avoided by the exercise of ordinary care and firmness on the part of the plaintiff.

Under a charge free from error, in the ordinary aspects of such a case, the jury, accepting plaintiff's version of the occurrence, have established that plaintiff was injured by reason of defendant's negligence; that plaintiff herself was free from blame at the time, and has suffered the damage as alleged in the complaint. Judgment having been entered on the verdict, defendant appeals and assigns for error that the cause should have been nonsuited on his motion, for the reason, solely, that plaintiff at the time, by her own testimony, was approaching the crossing at a rate of speed forbidden by the statute. The law in question, chapter 107, Laws 1913, makes extensive regulations as to the use of motor vehicles, and in the latter portion of section 15 provides: "That upon approaching an intersecting highway, a bridge, dam, sharp curve or steep descent, and also in traversing such intersecting highway, bridge, dam, curve or steep descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed 7 miles an hour, having regard to the traffic then on such highway and the safety of the public," etc.; and section 20 enacts that "Any person who violates any provision of the act shall be guilty of a misdemeanor."

Both from the language and the evidence and controlling purpose of the statute it is clear, we think, that the Legislature intended to include in the provisions of the statute a railroad as well as other *highways*, and the plaintiff, therefore, who testifies that she approached the crossing at a speed of 10 to 15 miles an hour was acting in violation of the law at the time of the occurrence. It does not necessarily follow, however, that plaintiff is for that reason barred of recovery. Where the violation of a statute is, in itself, made the basis of an action, an instance presented in *Lloyd v. R. R.*, 151 N. C., 536, such a suit cannot be maintained, but where it only affects or presents the conditions existent at the time of the occurrence, the injured person, though himself violating the law at the time, is not prevented from recovering for a willful or negligent wrong and injury inflicted upon him, unless his own misconduct is the proximate cause of the injury. The principle has been approved in several recent decisions of the Court, as in *Zageir v. Express Co.*, 171 N. C., 692; *Paul v. R. R.*, 170 N. C., 230; *Ledbetter v. English*, 166 N. C., 125; and its proper application to the facts of this record is against defendant's position. It is well understood that a person in the presence of an emergency is not usually held to the same deliberation or circumspect care as in ordinary conditions. *McKay v. R. R.*, 160 N. C., 260. And the jury having accepted the version that plaintiff, going down Summit Avenue at a moderate speed with her car under control and with every reason to believe she would receive timely warning, was put in a position of real peril by the sudden lowering of defendant's gates, she would have a right to do what was reasonably

necessary to save herself and the other occupants of the car, and she should not be prevented from recovering solely because she was moving in excess of the statutory speed unless, as stated, such violation was clearly the proximate cause of the injury.

On the facts in evidence it has not at all been made to appear that these injuries would have followed if she had been going 7 miles an hour, as the statute requires, and certainly it should not be so ruled against her as a conclusion of law.

The precise question has been so resolved with us in *Shepard v. R. R.*, 169 N. C., 239, in which it was held: "The mere fact that the speed of an automobile exceeded that allowed by chapter 107, Laws 1913, at the time of collision with a railroad train at a public crossing, does not of itself prevent a recovery by the owner, where there is evidence of negligence on the part of the railroad, because it would, among other things, withdraw the question of proximate cause from the jury." And *Clark v. Wright,* 167 N. C., 646, is to same effect.

There was no error in denying the motion for nonsuit, and the judgment below is affirmed.

No error.

MRS. M. D. WALTERS v. SOUTHERN RAILWAY COMPANY.

(Filed 29 November, 1916.)

CIVIL ACTION tried before *Cline, J.,* at March Term, 1916, of GUILFORD.

John A. Barringer for plaintiff.
Wilson & Ferguson for defendant.

HOKE, J. In this cause the facts in evidence and the questions as considered and decided by the Court are the same as those presented in the appeal of *Hinton v. R. R.* (next preceding case), and, for the reasons given in that opinion, the judgment recovered by plaintiff in the court below is affirmed.

No error.

P. W. GARLAND, TRUSTEE IN BANKRUPTCY OF LUTHER C. ARROWOOD, v. LUTHER C. ARROWOOD AND WIFE, LAURA.

(Filed 29 November, 1916.)

1. Bankruptcy—Trustee—Limitation of Actions.

The trustee in bankruptcy is subrogated to the rights of the creditors as to the plea of the statute of limitations; and where the bankrupt may sustain his plea against the creditors, he may also sustain it as to the trustee.

2. Limitation of Actions—Plea—Trials—Questions for Jury.

The plea of the statute of limitations generally involves a mixed question of law and fact, and where the facts are not admitted they must be found by a jury unless by consent they are found by the court.

3. Limitation of Actions—Pleas—Reference—Appeal and Error.

Where the plea of the statute of limitations is a good plea in bar of the action, it is reversible error to order a reference until the plea is disposed of.

4. Limitation of Actions—Pleas—Trials—Burden of Proof.

When the statute of limitations is pleaded in bar of an action, the burden of proof is on the plaintiff to show that his cause of action accrued within the time limited by the statute.

5. Limitation of Actions—Pleas—Bankruptcy—Fraud—Trials—Questions for Jury—Reference—Appeal and Error.

Where the bankrupt pleads the three-year statute of limitations against the trustee in bankruptcy, in the latter's action to recover money alleged to have been expended on the lands of another, with the consent of such other person, in fraud of the bankrupt's creditors, under an arrangement that the lands should be devised to the bankrupt, and that it was in fact devised to the bankrupt's wife under a further agreement, and that she had accordingly become the owner of the lands; and it is set out in the plea in bar that the creditors were aware of this arrangement more than three years prior to the adjudication in bankruptcy, and also alleging circumstances that would have put them upon reasonable inquiry, it is reversible error for the trial judge to hold, as a matter of law, that the plaintiff's action was not barred, and order a reference upon the other phases of the case.

CIVIL ACTION, tried at April Term, 1916, of GASTON, before *Carter, J.*

The court made an order of reference to try all issues of law and fact involved in the case, adjudging "that the issue raised on the plea of the statute of limitations pleaded by defendants is determined by the court against the defendants; that the statute of limitations pleaded as aforesaid is not a bar to the action, does not apply, and the same is overruled." Defendant excepted and appealed.

S. J. Durham, Mangum & Woltz for plaintiff.
J. W. Keerans and A. C. Jones for defendants.

BROWN, J. This action is brought by plaintiff as trustee in bankruptcy of Luther C. Arrowood to subject certain lands to the charge of certain money alleged to have been wrongfully invested by the bankrupt in building a barn and dwelling-house and in making other improvements thereon with the consent of the owner, William C. Arrowood, and in fraud of the creditors of the bankrupt. The allegations are that this money was invested in the erection of buildings on the land under an agreement that William C. Arrowood should devise the land, known as the home place, to the defendant, his son Luther; that after the contract had been carried out on the part of said defendant, the will which had been executed in pursuance of the agreement was destroyed and another will was executed devising the property to defendant Laura, the wife of said Luther, which said will was duly probated upon death of William C. Arrowood. Plaintiff further alleges that at the time said Luther was largely indebted and that the money was unlawfully invested for the purpose of defrauding creditors, with the knowledge and consent of William C. Arrowood.

Among other defenses, the defendants plead the statute of limitations as follows: "That said barn and dwelling-house thereon were erected on the land of William Arrowood in 1900, 1905, and 1906, as set forth in the preceding paragraphs; the barn about ten and the dwelling-house about five years before Luther C. Arrowood was adjudicated a bankrupt and nearly eleven (11) and six (6) years respectively before the death of William Arrowood, on 22 April, 1911; that for more than three years prior to the institution of this action and for more than three years prior to the adjudication of Luther C. Arrowood as a bankrupt and the death of William Arrowood, the creditors of said Luther C. Arrowood well knew, or could have known by exercise of ordinary care, when said buildings were erected and in what manner they were paid for, and, further, that said Luther C. Arrowood was the agent of and manager of the farm or land of William Arrowood and attended to matters thereon for him, yet brought no action whatever to attempt to recover any portion of said land or premises or to subject same to any trust in order to apply to their debts as against Luther C. Arrowood; that said cause of action, as set forth in the complaint (which are expressly denied), accrued more than three years prior to the institution of this action and more than three years prior thereto since the creditors of Luther C. Arrowood and this plaintiff knew of the relations of Luther C. Arrowood to the farm of his said father and the manner in which said buildings were erected and paid for; and this defendant hereby expressly pleads the three years statute of limitations, in force in North Carolina, during

all the periods set forth in the complaint, and now, and then, existing by statute, as well as the bankrupt act, especially 67-E and 70-E thereof, in bar of any recovery in this action, or to enforce any of said alleged claims or causes of action against the land and premises of William Arrowood or to enforce any alleged claim thereon in order to apply to the debts of Luther C. Arrowood."

We are of opinion that *the court erred in holding, as a matter of law, upon the pleadings, that defendant's plea of the statute of limitations was not a bar to the action, and referring same without first having the plea determined by a jury upon the facts.*

In passing upon the sufficiency of the plea as a matter of law, the court must take the facts pleaded to be established. That being so, it appears that the money was invested in the buildings erected upon the land of William C. Arrowood some ten years and five years before defendant Luther was adjudicated bankrupt, that the creditors were fixed with knowledge of the fraud for more than three years before the adjudication in bankruptcy. It is manifest that, under these facts, the bar of the statute could have been successfully interposed by the defendant Luther against his creditors prior to the adjudication in bankruptcy.

In *Sinclair v. Teal,* 156 N. C., 460, it is held: "The statute runs from the discovery of the fraud, or when it should have been discovered in the exercise of ordinary care." *Pelletier v. Cooperage Co.,* 158 N. C., ...; *Peacock v. Barnes,* 142 N. C., 219; *Jefferson v. Lumber Co.,* 165 N. C., 49.

When the plea of the statute is good against creditors, it is good against a trustee in bankruptcy, for the trustee is only subrogated to the rights of creditors and may sue to avoid any conveyance which a creditor could have avoided. Collier on Bankruptcy (10 Ed.), p. 1042 E.

In Woodman on the Law of Trustee in Bankruptcy, p. 585, it is said: "It is clear that under section 70-E the trustee may avoid transfers made before the commencement of the four months preceding the filing of the bankruptcy petition, as well as during that period, and it is immaterial how long before the four months period a transfer was made, provided the right to avoid it has not been barred by a State statute of limitations prior to the date of the filing of the bankruptcy petition."

In *Sheldon v. Parker,* 92 N. W., 923-9-30 (Neb.), the Court said: "A trustee in bankruptcy may maintain an action to set aside a conveyance by the bankrupt at any time within two years after the estate has been closed, provided the action was not barred by the State law at the time when the petition in bankruptcy was filed."

In re Dunavant, 96 Fed. Reporter, 543 (N. C.), the Court said: "Where in proceedings in bankruptcy creditors impeach a deed of land made to a son of the bankrupt, alleging that it was procured by the

bankrupt as a means of defrauding his creditors, but an action to set aside such deed would have been barred by the statute of limitations in the courts of the State before the adjudication in bankruptcy, the bankrupt may plead the statute in bar of the petition of such creditors"; and on page 549 the Court said: "It is insisted by creditors that the statute only began to run from the date of the discovery of such fraud or mistake; Code N. C., sec. 155, subsec. 9, above quoted. Conceding that to be true, it appears from the evidence that all of the material facts in this matter were known to the judgment creditors and their attorney of record more than three years before the filing of the petition in bankruptcy by Dunavant"; and on page 550 the Court further says: "The plea of the statute of limitations in this case interposed by the bankrupt is sustained."

To same effect is *Pace's Trustee v. Pace,* 172 S. W., 926; 1 Wood on Lim. (4 Ed.), 336.

The court could not properly decide that the action is not barred upon the facts stated in the answer, for it is settled that if those are the true facts it is barred according to the authorities. When the statute is pleaded by defendant, the burden is upon the plaintiff to prove that his cause of action accrued within the time limited for bringing it. *Hussey v. Kirkman,* 95 N. C., 66; *Sprinkle v. Sprinkle,* 159 N. C., 82.

The plea of the statute of limitations generally involves a mixed question of law and fact, and when the facts are not admitted they must be found by a jury, unless by consent they are found by the court. *Oldham v. Rieger,* 145 N. C., 259.

Such plea constitutes a good plea in bar, and it is error to order a reference until the plea is disposed of. *Jones v. Wooten,* 137 N. C., 421; *Royster v. Wright,* 118 N. C., 152.

Reversed.

M. C. PROPST, ADMINISTRATOR, ET ALS. v. LIZZIE CALDWELL ET ALS.

(Filed 29 November, 1916.)

1. Partition—Title—Judgments—Estoppel.

While ordinarily the title to lands is not adjudicated in proceedings to partition them, it may be put at issue by a party thereto properly pleading it; and where the lands are ordered to be partitioned, reserving the question of title, and a final judgment entered, adjudicating it, the judgment so entered will operate as an estoppel in another and independent action between the parties and privies calling it into question.

2. Judgments—Estoppel—Parties—Privies.

Judgments and decrees of court regularly entered will conclude parties and privies as to all issuable matter contained in the pleadings, or other matter within the scope thereof, though not issuable in a technical sense, if they are material and relevant or are in fact investigated and determined.

3. Partition—Judgments—Estoppels—Wills.

Where in proceedings to partition lands the question as to whether certain devises under the terms of a will were entitled to their part of the lands or its proceeds, or whether they were to be held in trust for them, has properly been put in issue and determined by final judgment therein, it is *Held*, that the parties and privies thereto are estopped in an independent action to question the correct interpretation of this clause of the will.

CIVIL ACTION tried before *Carter, J.*, at April Term, 1916, of MECKLENBURG.

This is a proceeding to sell land for partition.

The land described in the petition and other lands formerly belonged to J. D. Caldwell, who died intestate prior to 1881, leaving several children as his heirs at law, and among them R. C. Caldwell and John M. Caldwell.

In 1881 R. C. Caldwell died leaving a will, the material parts of which are as follows:

"Item 1st. It is my will that all my just debts and funeral expenses be paid by my executor as soon after my decease as practicable.

"Item 2d. I will to each of my brothers and sisters the sum of $1.

"Item 3d. I will to my namesake, Walter Calvin Caldwell (my brother John's son), a good collegiate education, all the expenses of said education to be paid for out of any property of which I may die possessed of.

"Item 4th. I will that all my property, real and personal, be used by my executor in educating my brother John's children; that is, all that is not needed to educate my namesake above mentioned, he to have the preference.

"Item 5th. I will that my executor furnish to my mother the same amount of living I have been in the habit of doing yearly, and that left to his judgment.

"Item 6th. I will that my executor have the power to use all of my estate, real and personal, for the best interest in educating his children.

"Item 7th. I will to my nephew D. G. Caldwell $100 to be used in buying books for his profession.

"Item 8th. I do hereby constitute and appoint my brother John M. Caldwell my lawful executor to execute this my last will and testament

according to the true intent and meaning of the same. Given under my hand and seal this the 9th day of July, 1881."

In 1883 a proceeding was commenced for the partition of all the lands of J. D. Caldwell among his heirs, in which the parties under whom the plaintiffs in this proceeding claim were plaintiffs, and the children of J. M. Caldwell, the defendants in this proceeding, and J. M. Caldwell, were defendants.

It is alleged, among other things in the petition of 1883, "That in October, 1881, R. C. Caldwell died in the county of Cabarrus, State aforesaid, first having made and published a last will and testament, by which said will he gave his undivided interest in the aforesaid tract of land to the infant defendants, Walter C., S. L., D. C., M. L., L. A., F. V., J. L., and J. M. Caldwell, to be applied first to the education of the said Walter C. Caldwell, and any balance or remainder of said undivided interest in said real estate to be equally divided between the other infant defendants above named," and further, "and Walter C. Caldwell and the seven other infant defendants are entitled to five twenty-eighths of the whole of said estate." These last were the children of J. M. Caldwell.

The guardian *ad litem* for the children of J. M. Caldwell filed an answer to this paragraph of the petition as follows:

"Second. That the allegation in the fourth section, that after the education of the defendant Walter C. Caldwell the balance of the said interest is to be divided among the other infant defendants, is not true; but, on the contrary, this defendant avers that he is advised that by a proper construction of the said will of R. C. Caldwell, deceased, J. M. Caldwell, the father of said infant defendants, is constituted a trustee of the said property with instructions to apply the same to the education of his said children, the said Walter C. Caldwell having always the preference."

The said J. M. Caldwell, who was a defendant, and who is now dead, filed answer to the petition as follows:

"J. M. Caldwell, Sr., defendant in the above action, answering the complaint, says:

"First. That the facts set forth in the said complaint are true with the exception of the allegations of the fourth section as to the disposition made by the will of R. C. Caldwell, deceased, and as to these allegations he submits the same to the judgment of the court upon inspection of the said will."

In October, 1883, an order was made in said proceeding appointing commissioners to divide the lands, but providing therein: "That the question as to the rights of the infant defendants under the will of R. C. Caldwell, deceased, be and the same is reserved by the court for further consideration."

The commissioners made report in which the land described in this action was allotted to the defendants in this action and to those under whom they claim, and a final decree was entered confirming the report.

The defendants in this action pleaded the partition proceeding of 1883 as an estoppel.

His Honor sustained the plea, and the plaintiffs excepted and appealed from the judgment rendered in favor of the defendants.

Maness & Sherrin, M. H. Caldwell, and W. G. Means for plaintiffs.
H. S. Williams and Stewart & McRae for defendants.

ALLEN, J. The effect upon the title of a decree in partition proceedings was considered in the concurring opinion in *Weston v. Lumber Co.*, 162 N. C., 180, which was afterwards adopted as the opinion of the Court, *Weston v. Lumber Co.*, 169 N. C., 403, and the following conclusions were reached:

"1. That at common law, as the only unity between tenants in common was one of possession, the judgment in partition had no effect except to sever the possession, and did not operate upon the title.

"2. That at common law and now, partition may be had of estates less than a fee simple.

"3. That statutes have been passed in the different States which authorize an adjudication of title in partition proceedings.

"4. That under the statutes of this State, as they exist now, persons 'claiming real estate as tenants in common' may have partition; that upon a petition being filed, the court may appoint commissioners 'to divide and apportion such real estate among the several tenants in common'; that the commissioners shall partition the land 'among the tenants in common according to their respective rights and interests therein, by dividing the land into equal shares in point of value as near as possible,' and shall make report, which, when confirmed, 'shall be binding among and between the claimants, their heirs and assigns.'

"5. That when title is put in issue under the statute, the judgment is an estoppel as to that title."

We also quoted from Mr. Freeman, the author of the Work on Cotenancy and Partition, as follows:

"We have hereinbefore shown that, in many of the States, title may be put in issue and determined in suits for partition. We may assume that, even in those States, the title is not put in issue merely by the allegations necessary for a declaration in partition at common law, and that where nothing is known about the pleadings in such a suit, it will be presumed that title was not put in issue by them, nor determined in any judgment based on them. We apprehend, however, that whenever plaintiff alleges himself to be the owner in fee, or of any specified estate, or avers any other ultimate fact under which he is entitled to relief, it

becomes the duty of defendant either to concede or take issue with the allegation or averment, and that the judgment in the action will be as conclusive as it would be upon a like issue in any other action."

It is also held with reference to judgments and decrees in other actions and proceedings, that they conclude parties and privies as to all issuable matter contained in the pleadings, and as to other matters within the scope of the pleadings, although not issuable in the technical sense, if they are material and relevant and are in fact investigated and determined. *Tyler v. Capehart,* 125 N. C., 64; *Coltrane v. Laughlin,* 157 N. C., 282; *Ferebee v. Sawyer,* 167 N. C., 203; *Cropsey v. Markham,* 171 N. C., 45.

Applying these principles, we are of opinion the decree in the partition proceeding of 1883 operates as an estoppel and is a bar to the further prosecution of this proceeding.

The plaintiffs and the defendants in this proceeding are either parties or privies to the proceeding of 1883; they occupy the same relative position as plaintiffs and defendants, and the same tract of land is involved in each.

In the petition of 1883 it is alleged that R. C. Caldwell, one of the heirs of J. D. Caldwell, had died leaving a will by which he gave his undivided interest in the lands of his father to the children of J. M. Caldwell, who were parties and who represented the defendants in this proceeding.

This allegation was denied in the answer of the guardian *ad litem,* and in the answer of J. M. Caldwell the question is submitted to the court for decision "upon inspection of said will."

The construction of the will of R. C. Caldwell, and the title of the children of J. M. Caldwell thereunder, were therefore directly in issue in the proceeding of 1883, and while the question was reserved at the time the order appointing commissioners to divide the lands was made, it was reserved "for further consideration," and when the final decree was entered it adjudged the title to the land in controversy to be in the defendants, which could not have been done without adopting the construction of the will of R. C. Caldwell for which the plaintiffs then contended, and which they now seek to repudiate.

The question of the correctness of this construction is not before us, because, as was said of a decree construing a will in a partition proceeding in *Weeks v. McPhail,* 128 N. C., 131: "The decree was not appealed from and is an estoppel upon the parties thereto and those claiming under them, though it may be erroneous in law (*Silliman v. Whitaker,* 119 N. C., 89) in the construction thus placed upon the terms of the devise."

We are therefore of opinion that the ruling of his Honor ought to be approved and the judgment affirmed.

Affirmed.

FLORENCE T. MOORE, ADMINISTRATRIX OF J. W. MOORE, DECEASED, v. JOHN C. RANKIN ET ALS.

(Filed 29 November, 1916.)

1. Judgments—Nonresidents—Motions to Set Aside—Statutes.

Where a judgment has been rendered upon newspaper publication of summons against a defendant who was at the time and has continued to be a nonresident defendant, and he shows that he has moved to set it aside within one year after notice or knowledge thereof, and within five years after its rendition, the motion, excepting in actions for divorce, should be granted as a matter of right upon such terms as the court may consider just. Revisal, sec. 449.

2. Same—As a Whole—Descent and Distribution.

Upon motion to set aside a judgment involving the distribution of personal estate, the court erroneously holding that it should be divided among uncles and aunts to the exclusion of the children of such as were dead, Revisal, sec. 132, Rule 3: *Held*, the judgment must be set aside in its entirety when the movant has brought himself within the provisions of Revisal, sec. 449, regarding setting aside a judgment against nonresidents.

3. Descent and Distribution—Personalty—Collateral Representation—Statutes.

Our present statute of distributions, Revisal, sec. 132, Rule 3, changes the former rule under the Revised Code of 1854 so as to allow representation among collateral relations as to personalty to the same extent as in the descent of real property, and where the aunts and uncles of the deceased must take, the children of those who have died may take the part of the personalty their parents would have taken if living.

4. Executors and Administrators—Settlement—Actions at Law—Statutes—Equity.

Revisal, sec. 150, provides a remedy at law for an administrator who has filed a final account for settlement, by his thereafter filing a petition against the parties interested in the due administration of the estate, in the Superior Court at term, for an accounting and settlement; and wherein such matters have neither been shown nor funds for distribution, there is nothing for the decree to operate upon, and the petition should be dismissed, reserving to the petitioner his remedy at law under the terms of the statute.

MOTION to set aside a judgment in the above entitled cause, heard before *Carter, J.*, at May Term, 1916, of GASTON. The judgment was rendered by *Lane, J.*, at January Term, 1915. The motion was made by Walter Ballew, one of the defendants. The court finds that said defendant was only served by a newspaper publication, and had no notice of the said judgment or of this action until 9 May, 1916; and that he

was not a resident of the State of North Carolina when the action was begun and has at no time since been a resident thereof. The court set aside the judgment, and the defendants C. D. Taliaferro, administrator of Martha Lowe, John C. Rankin, Mrs. E. C. Wilson, Mrs. Rosa M. Cloyd, Mrs. J. C. Latham, excepted and appealed to the Supreme Court.

F. W. Thomas for Florence T. Moore, administratrix.

John W. Hutchinson and Arthur C. Junes for Walter Ballew, appellee.

Mangum & Woltz, Clarkson & Taliaferro for appellants.

BROWN, J. The motion to set aside the judgment is made under section 449 of the Revisal, which provides that a defendant against whom publication is ordered and made, on showing sufficient cause at any time before judgment is rendered, must be allowed to defend the action, and, except in an action for divorce, such defendant may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof and within five years after its rendition, on such terms as may be just.

Under the statute the defendant Walter Ballew had a legal right to have the judgment vacated. Such right is absolute and not within the discretion of the presiding judge. *Rhodes v. Rhodes,* 125 N. C., 191; *Page v. McDonald,* 159 N. C., 38. His affidavit fully justifies the findings of fact made by the court below and brings him within the terms of the statute.

The court very properly set aside the judgment in its entirety, for from its nature it could not well be set aside in part. The proceeding in which the judgment was rendered was brought to determine the proper distribution of an intestate's personal estate. The court held that it should be divided among a certain class of distributees, to wit, uncles and aunts. If the contentions of the defendant Ballew are upheld, this distribution was wrong and there must be a redistribution to the end that the other collateral relations, the children of uncles and aunts who were dead, shall participate. The court cannot declare a judgment to be valid as to some parties and erroneous as to others when, as in this case, the subject-matter of the judgment is an entirety as to all and their rights are inseparable. *Rhodes v. Rhodes, supra; Bilzer v. O'Brien,* 54 S. W., 951; 23 Cyc., 900.

We are of opinion that the defense of the defendant Walter Ballew is meritorious. The judgment of *Lane, J.,* which has been set aside, decreed that one-half of the surplus belonged to the plaintiff as the widow of J. W. Moore, deceased, and that the other one-half belonged to his next of kin, to wit, John C. Rankin, Mrs. E. C. Wilson, Mrs. J. C. Latham, and Rose N. Cloyd, share and share alike, subject to the right, if any, of Martha Lowe and those claiming under her.

It seemed uncertain as to whether Martha Lowe died before or after the intestate. The court adjudged that none of the other defendants have any interest in the personal estate of said J. W. Moore. The other defendants, including the defendant Walter Ballew, are the children of uncles and aunts who predeceased the said intestate. It is plain that under the Revised Code of 1854, in the distribution of the personal estate there was admitted among collateral kindred no representation after brothers' and sisters' children. The case of *Johnston v. Chesson,* 59 N. C., 146, was based upon this statute. Our present statute of distributions allows representation among collaterals to the same extent as in the descent of real property. Revisal 1905, sec. 132, being Rule 3 of the statute, and reading as follows: "If there be no child, nor legal representatives of a deceased child, then one-half of the estate shall be allotted to the widow and the residue be distributed equally to every of the next of kin of the intestate who are in equal degree, *and to those who legally represent them.*"

Construing this statute according to its literal interpretation, the first cousins here must be allowed to take the share of their ancestor which the ancestor would have taken if living, because, if living, they would be in equal degree with the surviving uncles and aunts. Inasmuch as they are dead, the statute declares that their shares must go to those who legally represent them.

We think, however, the whole proceeding must be dismissed for the reason that the Superior Court, upon the facts of the complaint, has no jurisdiction. This complaint does not come under any one of the defined heads of equity jurisdiction. It is not a bill in equity to construe a will in order to fix legacies and have them paid under the direction of the court. It is not an action by a trustee who comes into court and brings funds with him and asks the court, with all claimants before it, to decree a proper distribution. It is a petition by an administrator who does not allege that she has filed any final accounting or that she has the funds in hand ready for distribution. There is nothing, therefore, for the decree of the court to operate upon. It is simply an application for advice to be given the plaintiff in regard to her future conduct. As said by *Judge Pearson* in *Tayloe v. Bond,* 45 N. C., 17: "She must get such advice from a lawyer, and can only get the advice (more properly the direction) of the court when its present action is invoked in regard to something to be done under its decree."

It is common learning that a court of equity will not lend its aid in any case where the party seeking it has a full and adequate remedy at law. These principles relative to the effect of the existence or absence of a legal remedy apply as well to the jurisdiction of equity over administrations as to its jurisdiction over other matters of general equitable cognizance.

It is said in 16 Cyc., p. 100: "While in administration matters a resort to equity may be justified on the ground of a lack of a remedy at law, the mere fact that the subject of the suit involves the estate of a deceased person will not justify the interference of equity when a legal remedy exists." A large number of cases are cited in the notes supporting the text. Among others, *Wilkins v. Finch,* 62 N. C., 355; *Lyon v. Lyon,* 43 N. C., 201; *Jones v. Jones,* 6 N. C., 150.

The remedy of the plaintiff administratrix is now regulated by statute, and in order to get the benefit of it she must comply with its terms. Section 150 of the Revisal provides, in substance, that the administrator, who has filed his final account for settlement, may at any time thereafter file his petition against the parties interested in the due administration of the estate in the Superior Court in term-time, setting forth the facts and praying for an account and settlement of the estate. This remedy is still open to the plaintiff.

The action is dismissed.

CITIZENS NATIONAL BANK v. GASTON FARMERS' UNION WAREHOUSE COMPANY.

(Filed 29 November, 1916.)

1. Reference—Pleas—Limitation of Actions.

A plea of the statute of limitations is a plea in bar, and when pending the court cannot order a reference except by consent.

2. Limitation of Actions—Pleas—Interpretation.

The plea of the statute of limitations must sufficiently state the facts upon which it rests; and the courts in determining the sufficiency of the allegations will construe it liberally without requiring technical accuracy or precision.

3. Same—Conversion.

A plea of the statute of limitations to an action for conversion of personal property, that the defendant "expressly pleads the statute of limitations," and then alleges "more particularly" that the plaintiff for more than three years next prior to the commencement of the action had knowledge that the property had been sold, and received the proceeds of sale, though a plea in payment, is also a sufficient plea of the statute.

CIVIL ACTION tried before *Carter, J.,* at April Term, 1916, of GASTON.

This is an action to recover damages for a conversion of cotton, the plaintiff claiming under warehouse receipts issued by the defendants.

The defendants, after answering the different allegations of the complaint, filed the following plea as a part of its answer:

"For further answer and defense the defendant warehouse company expressly pleads the statute of limitation, laches and estoppel, alleging, more particularly, that for more than three years next before the beginning of this action and for more than a reasonable length of time the plaintiff bank had actual knowledge and repeated notice that the warehouse receipts sued upon in this action were valueless and should be surrendered to the defendant warehouse company for cancellation, the plaintiff having received proceeds from the sale of cotton evidenced thereby; that the plaintiff bank failed to make any proper demand within reasonable time after notice upon the said defendant warehouse company."

His Honor held that the statute of limitations was not sufficiently pleaded and ordered a reference over the objection of the defendant, who excepted and appealed.

Mangum & Woltz for plaintiff.

S. J. Durham, Margaret Berry, E. R. Preston for defendant.

ALLEN, J. The plea of the statute of limitations is a plea in bar, and the court cannot order a reference when such a plea is pending except by consent. *Duckworth v. Duckworth,* 144 N. C., 620; *Oldham v. Rieger,* 145 N. C., 260.

It is also true, as the plaintiff contends, that the plea is not good if it merely states that the party pleads the statute of limitations, and that he must go further and state the facts constituting the defense. *Pope v. Andrews,* 90 N. C., 401; *Turner v. Shuffler,* 108 N. C., 642; *Lassiter v. Roper,* 114 N. C., 17.

We must then examine the pleadings and see if the acts are sufficiently alleged, and when doing so we must keep in mind that a pleading is liberally construed, and "If it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it." *Blackmore v. Winders,* 144 N. C., 215; *Brewer v. Wynne,* 154 N. C., 471.

The action is to recover damages for the conversion of personal property, and the statute applicable is that of three years.

The defendant in its plea says it "expressly pleads the statute of limitation," and then alleges "more particularly" that for more than three years prior to the commencement of the action the plaintiff had actual knowledge that the cotton had been sold, and that it had received the proceeds of sale.

This may amount to a plea of payment, but it also contains all the facts constituting the defense of the statute of limitations, because if there was a conversion it took place prior to or at the time of the sale, and by fair intendment it is alleged that the sale was more than three years before the commencement of the action.

We are therefore of opinion that it was erroneous to order a reference with the plea of the defendant undisposed of.

Reversed.

BERTIE F. BROWN, ADMINISTRATRIX OF W. L. BROWN, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 29 November, 1916.)

1. Railroads—Negligence—Trials—Evidence—Last Clear Chance—Nonsuit.

Where in an action against a railroad company for the negligent killing of plaintiff's intestate there was evidence tending to show that he was intoxicated and was killed by the train rapidly rolling down grade 40 miles an hour upon him in a populous town where the track was straight for a mile or more and frequently used by pedestrians for years, and at a point between two public crossings 250 yards apart; that the train approached without signals or warnings, and the intestate was not seen by the engineer until after he was struck; that the intestate had been drinking and his wounds indicated he was helpless upon the track; and also evidence to the contrary, that the intestate had suddenly stepped from a place of safety in front of the defendant's fast moving train: *Held*, upon a motion to nonsuit it was sufficient upon the question of proximate cause and to sustain a verdict against the defendant upon the third issue as to the last clear chance.

2. Evidence—Nonsuit—Defendant's Evidence.

Upon a motion to nonsuit, the defendant's evidence will not be considered.

3. Railroads—Negligence—Pedestrians—Engineers—Presumptions.

The doctrine that an engineer on the locomotive of a railway train is not required to stop or slacken the speed of the train upon seeing a pedestrian on the track in apparent possession of his faculties is approved. *Hill v. R. R.*, 169 N. C., 740, cited and approved.

APPEAL by defendant from *Long, J.*, at January Term, 1916, of CABARRUS.

J. Lee Crowell and H. S. Williams for plaintiff.

Caldwell & Caldwell for defendant.

CLARK, C. J. This is an action for wrongful death. About 8 o'clock on the night of 4 October, 1910, the plaintiff's intestate was killed by the defendant's passenger train between Salisbury and Concord, just north of Cook's Crossing on a track which was straight for over a mile at that point. It is alleged in the complaint that the engineer in charge of the train by proper care and diligence could have seen the intestate of the plaintiff in time to stop before the engine struck him, by using proper appliances; but that the train approached the crossing at a rapid rate of speed and the engineer failed to keep a proper lookout for persons on the track or to give any warning of the approach of the train to said crossing, killing the intestate while he was in a helpless condition; that it was in a thickly settled community and that the track had been used by the public for a walkway for a long time. The defendant denied any negligence on its part and averred that the death was caused by the negligence of the intestate, who, it being a double track, stepped from the track on which he was walking suddenly onto the track ahead of the engine when there was not time to stop it.

On the issues submitted to the jury upon the conflicting testimony the jury found that the plaintiff's intestate was killed by the negligence of the defendant; that the said intestate was guilty of contributory negligence, but, notwithstanding, the defendant could have avoided the injury by the exercise of ordinary care and prudence.

The first four exceptions are for failure to nonsutt or to instruct the jury to direct a verdict in favor of the defendant.

The fifth exception is because the court instructed the jury, "If the engineer discovers, or by reasonable watchfulness may discover, a person lying on the track asleep or drunk, or sees a human being who is known to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life and immediately use every available means shorter than imperiling the lives of passengers on its train, to stop it." The sixth exception presents substantially the same point.

The seventh exception is for the instruction to the jury that if they answered the third issue "No," the plaintiff could not recover. The defendant contends that this was an intimation to the jury how that issue should be answered in order for the plaintiff to recover. We do not think that this exception needs any discussion, for there is no indication that the learned judge had any bias in favor of the plaintiff in conducting this trial.

The appeal practically presents the single question of the proximate cause of the death of the plaintiff's intestate. There was evidence pro and con as to the alleged negligence of the defendant. The jury

found that the defendant was negligent and that the intestate was guilty of contributory negligence. The result depended upon the third issue, "Whether, notwithstanding the contributory negligence of the plaintiff's intestate, W. L. Brown, the defendant or its agents could have avoided the injury by the exercise of ordinary care and prudence on its part." There was evidence to sustain a finding in the affirmative, and evidence to the contrary, and the jury have responded "yes." There was evidence that the deceased was killed in a thickly settled community where the railroad had been constantly used as a walkway since 1885; that he was killed at or near two public crossings about 250 yards apart, one of which was the National Highway crossing and the other the Cook crossing; that the track at that place was straight for 2 miles; that the train was a fast passenger train rolling down grade about 40 miles an hour, using little steam and making little noise; that no whistle was blown or other warning given until the man was killed; that the engineer could have seen a man on the track about a mile before reaching him; that he was cut diagonally across his body, a part of his body being on each side of the track, indicating, as the plaintiff claimed, that he was lying on the track when he was killed; that when last seen, about two hours before he was killed, the deceased was drinking and staggering, going in the direction of Cook's crossing, where his body was found a few minutes after he was killed.

In *Norris v. R. R.*, 152 N. C., 505, where the accident happened between two much used crossings about 500 yards apart and the track was much used as a walkway, in a thickly settled community, *Hoke, J.*, for a unanimous Court, held that under such circumstances one walking on the track which has been habitually used as a walkway "has a right to rely to some extent, and under some conditions, upon the signals and warnings to be given by trains at public crossings and other points where such signals are usually and ordinarily required; and that a failure to give proper signals at such points is ordinarily evidence of negligence; and where such failure is the proximate cause of the injury, it is, under some circumstances, evidence from which actual negligence may be inferred."

In *Troy v. R. R.*, 99 N. C., 305, *Davis, J.*, held that where the public had been "in the habit for a series of years of using the track, with the acquiescence of the defendant, this amounts to a license or permission and imposes upon the railroad company the duty to exercise care on that account."

In *Cogdell v. R. R.*, 132 N. C., 853, *Walker, J.*, says: "The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself."

The engineer states that he did not see the intestate before striking him, and did not know it until informed by the fireman.

The deceased was last seen in an intoxicated condition near the track, which had been long used by the plaintiff for a walkway; was killed near a crossing, was not seen by the engineer when struck, and there was evidence that no whistle was sounded. The court properly refused a motion to nonsuit. *Powell v. R. R.*, 125 N. C., 370; *Cox v. R. R.*, 123 N. C., 604. The jury had the right to consider the evidence that no whistle or other signal was given. *Howard v. R. R.*, 122 N. C., 952. The jury had also a right to consider the condition in which the body was cut as evidence tending to show that he was drunk and down on the track in an apparently helpless condition. *Barnes v. R. R.*, 168 N. C., 512; *Sawyer v. R. R.*, 145 N. C., 24; *Carter v. R. R.*, 135 N. C., 498; *Deans v. R. R.*, 107 N. C., 686.

The evidence of the defendant cannot be considered on a motion to nonsuit. *Powell v. R. R.*, 125 N. C., 370.

The charge excepted to in the fifth exception is copied from *Deans v. R. R.*, 107 N. C., 692, which has often been approved since. There was evidence for the defendant by the colored fireman that the deceased was walking on the other track, but when the train got within 20 or 30 feet of him he made a lunge over to the right and fell across the rail right in front of the engine. If the jury had believed this testimony, under the charge of the court it would have returned a verdict in favor of the defendant.

The court charged the jury, quoting from *Hoke, J.*, in *Hill v. R. R.*, 169 N. C., 740: "The engineer of a moving train who sees on the track ahead a pedestrian who is alive and in apparent possession of his strength and faculties, the engineer not having information to the contrary, is not required to stop his train or even slacken its speed because of such person's presence on the track. Under the conditions suggested, the engineer may act on the assumption that the pedestrian will use his faculties for his own protection and will leave the track in time to save himself from injury."

The contest was almost purely one of fact upon the third issue, whether, notwithstanding the negligence of plaintiff's intestate, the defendant with the exercise of reasonable and proper care could have avoided killing him; and that depended upon whether he was down on the track or in an evidently intoxicated condition upon the track; and, if so, whether the engineer with proper care should have seen him in time to have avoided killing him.

The court could not have directed a nonsuit upon the evidence, but properly left the case upon the issue of proximate cause to the jury under instructions in accordance with our well settled precedents.

No error.

S. J. DULIN v. C. G. BAILEY ET AL.

(Filed 29 November, 1916.)

Wills—Spoliation—Personal Action—Probate—Caveat.

A personal action for damages will lie against wrong-doers in destroying a part of a will wherein certain legacies had been left to the plaintiffs, and which they are unable to establish as a will, the measure of damages being the value of such legacies; and the action being for spoliation and suppression, it is not necessary that the will should be proven in common form and attacked by a caveat to set it aside. The court, after stating precedents, also applied the maxim, there is "no wrong without a remedy."

APPEAL by plaintiff from *Ferguson, J.,* at May Term, 1916; of ROWAN.

George W. Garland for plaintiff.
E. L. Gaither for defendants.

CLARK, C. J. The complaint alleges that after the death of W. A. Bailey the defendants conspired to deprive the plaintiff and others of the benefits of his last will by removing from the paper-writing the sheet of paper to which the alleged signature of the deceased was attached and that part providing for the legacy to the plaintiff and others and substituting other provisions therefor. The plaintiff contends that thereby a previous will has been admitted to probate. In the course of the proceeding the plaintiff asked for the appointment of a commissioner to take the examination of the defendants in the nature of a bill of discovery. The defendants demurred that the complaint did not state a cause of action. The court sustained the demurrer and held that unless the will that had been proven in common form was attacked and set aside by caveat, the plaintiff could not maintain the cause of action set out in the complaint. This put an end to the plaintiff's further progress in the cause, and he took a nonsuit and appealed.

The plaintiff is not seeking to attack the will on record nor to probate what she alleges was a subsequent will. She is not seeking to recover anything out of the estate, but is bringing an action of tort against the parties who, as she alleges, conspired and injured her by removing the clause of, and the signature to, what was a subsequent will by which she would have received a legacy. It is an action of *spoliation* in which she alleges the defendants have prevented her receiving the sum of money which was due her if they had not fraudulently altered and defaced the subsequent will.

She alleges that she does not attempt to set up the second will because the evidence accessible to her would not prove its entire contents. She prefers, therefore, to bring this action against the defendants for their wrongdoing in fraudulently destroying the part of the will which was beneficial to herself.

Though this action seems to be of the first impression in this State, and is doubtless a very unusual one, there is foundation and reason for the action upon well settled principles of law, and we are not entirely without precedent. In *Tucker v. Phipps,* 3 Atkins, 359; *s. c.,* 1 Ves., 264, it was held that the spoliation being clearly proven, the plaintiff could maintain his action without setting up the will by a probate. It was held that "where a will is destroyed or concealed, while the general rule is to probate the alleged will by proof in the ecclesiastical court (which was there the court for probate of wills), yet the legatee might bring his action for the damage sustained by spoliation and suppression." In that case the spoliation was alleged to have been a destruction or concealment of the will by the executor. Such action against a stranger is even more appropriate than an independent action against the executor. *Tucker v. Phipps* is to be found in 26 English Reports (reprinted), 1008. Another case very much in point is *Barnesley v. Powell,* 1 Ves., 119, 27 English Reports (reprinted), 1034, in which *Tucker v. Phipps* is cited as authority, and the Court also refers with approval to "a late case where the defendant burned a will, in which was a legacy to the plaintiff, so that it could not be proven in the ecclesiastical court (which cannot prove a will on loose parts of the contents of it), yet on the evidence of such a will, and the defendants destroying it, the court decreed the legacy to the plaintiff, as the defendant by his own iniquity had prevented the plaintiff from coming at it."

There may be other precedents, but the instances must have been rare. Even if there had been no precedent, it would seem that upon the principle of justice that there is "no wrong without a remedy" the plaintiff is entitled to maintain this action if, as she alleges, the defendants conspired and destroyed the subsequent will in which the legacy was left her. If she cannot prove the destroyed will because unable to prove the entire contents thereof, *In re Hedgepeth,* 150 N. C., 245, surely she is entitled to recover of the defendants for the wrong they have done her by the conspiracy and destruction of the will, and the measure of her damages will be the legacy of which she has been deprived.

It may be very difficult for her to prove her allegations by legal evidence and satisfactory to a jury; but with that we have nothing to do.

The only question presented to us is the ruling of the court below that the complaint does not state a cause of action, and in this we think the court below was mistaken.

As the action is not to set up the will, nor against the estate, but against the defendants individually for their tort, the action could be brought in the county where the plaintiff resides.

Reversed.

J. R. HARRINGTON v. G. M. FURR.

(Filed 29 November, 1916.)

1. Mortgages—Registration—Notice—Right of Possession.

A purchaser of a chattel upon which there is a prior registered mortgage is a purchaser with notice thereof, and the assignee of the mortgage has the right of possession as against him.

2. Equity—Marshaling—Mortgages — Contracts — Consideration—Claim and Delivery.

D. held an unrecorded chattel mortgage, subject to a prior registered one which included the same property and, in addition, a horse. Defendant subsequently purchased the horse and swapped it with the plaintiff for a mare. D. acquired the first mortgage, and sold the property, inclusive of the horse, under the mortgages. Recognizing the doctrine of marshaling of assets, had the horse remained in the mortgagor's possession it is held that defendant should have invoked it prior to the sale, when he was present and made no objection, and may not do so for the first time in plaintiff's action of claim and delivery to recover his mare for a failure of consideration in the transaction, and the plaintiff is entitled to the possession thereof.

3. Equity—Marshaling—Right of Party.

The equity of marshaling is not a lien but a right to be administered, and is not determined solely by the time the successive securities were taken, but at the time it is invoked.

APPEAL by defendant from *Carter, J.*, at August Term, 1916, of CABARRUS.

L. T. Hartsell for plaintiff.
H. S. Williams for defendant.

CLARK, C. J. This is a claim and delivery to recover possession of a certain black mare for entire failure of consideration, the defendant having traded the plaintiff a claybank horse which was mortgaged and which the plaintiff had to surrender, in exchange for the black mare.

On 31 October, 1914, J. W. Dees gave M. F. Teeter and R. A. Dees a chattel mortgage for $100 on certain personal property which was recorded 12 October, 1915. On 18 March, 1915, J. W. Dees gave M. J. Corl a chattel mortgage of $55, which was recorded 19 March, 1915, on certain of the personal property embraced in the first named mortgage, and, in addition, a claybank horse. The mortgagor in July, 1915, after the mortgage to Corl containing the claybank horse was recorded, traded said horse to the defendant Furr and said Furr then traded the horse without actual knowledge of the recorded mortgage to the plaintiff for the black mare in dispute, and before the mortgage to Teeter was recorded. J. W. Dees, the mortgagor, then left the State. M. F. Teeter and F. A. Dees, discovering that the Corl mortgage was recorded prior to theirs, bought in the Corl mortgage and demanded of the plaintiff the claybank horse, who turned it over to them without suit. Teeter and R. A. Dees advertised all the property in both mortgages and sold the same, which did not realize enough to pay the total indebtedness therein. The defendant Furr was present at the sale and made no objection to the sale of the claybank horse.

The plaintiff having turned over the claybank horse to Teeter and Dees under the mortgage they had purchased from Corl, at once began this action, 19 October, 1915, to recover from the defendant the black mare which the plaintiff had swapped to him for the claybank horse, on the ground of total failure of consideration.

The sole question presented is whether Teeter and Dees had a right to marshal the securities in the two mortgages so as to apply the claybank horse first to the payment of the Corl mortgage and to retain the other property in said mortgage, which is also embraced in the Teeter mortgage, to apply to the latter. If so, there was a total failure of consideration, and the plaintiff can maintain this action to recover his black mare.

It is well settled that if one party has a lien on two pieces of property, and the other has a lien on one piece only, the latter has the right in equity to compel the former to resort to the other piece of property in the first instance if this is necessary to satisfy the claims of both parties. There is no difficulty in applying this principle when the property is in the possession of the mortgagor. The question here is, Did the plaintiff get a title to the claybank horse superior to the mortgagee when the mortgage was on record at the time the mortgagor traded the claybank horse to the defendant Furr, and Furr traded it to the plaintiff? If Harrington had bought without notice he would have had a superior title to the horse over the mortgagee. But he bought when the mortgage was on record at the time he exchanged

horses with Furr; consequently the assignees of the mortgage had a right to take the horse whenever they found him.

Teeter and Dees got possession of the claybank horse as assignee of the Corl mortgage. Their right to sell the horse was not restricted because they were the owners of both mortgages. Equity is not a lien, but a right to be administered. The defendant contends that the Teeter and Dees mortgage was not on record when the mortgagor traded the claybank horse; but the claybank horse was not in that mortgage. The doctrine of marshaling is not determined by the situation when the successive securities are taken, but is to be determined at the time the marshaling is invoked. If the defendant had any right to have the securities marshaled they should have begun proceedings before the sale.

The plaintiff surrendered the claybank horse at the demand of the mortgagee, and the defendant Furr standing by without speaking when the assignees of the mortgage, Teeter and Dees, sold the claybank horse, he cannot now be heard to assert that the plaintiff should have compelled the marshaling of securities so as to have exempted the claybank horse from sale till the other property in the mortgage which was doubly charged had been sold under the first mortgage.

There was an entire failure of consideration and the plaintiff had the right to recover back his black mare, and the court was correct when he instructed the jury upon all the evidence to answer the issue in favor of the plaintiff.

No error.

MRS. K. O. SANDERS v. W. H. RAGAN, ADMINISTRATOR OF W. W. HINSHAW.

(Filed 6 December, 1916.)

1. Contracts—Quantum Meruit—Marriage—Fraud—Husband and Wife.

Where one having a living lawful wife induces another woman to go through the marriage ceremony with him in the innocent belief that she is becoming his wife, and by keeping her in ignorance of the fact of his marriage she lives with him, lends him money, and performs valuable services for him without expecting remuneration or compensation, she is entitled to recover from his estate, by reason of the fraud practiced upon her by him, upon a *quantum meruit*, the value thereof over and above the benefits she may have received in clothes, maintenance, etc.

2. Contracts—Implied—Wrongdoer—Indebitatus Assumpsit.

An action of *indebitatus assumpsit* is dependent largely upon equitable principles, and in the absence of special contract, and unless in contravention of public policy, it will usually lie wherever one has been enriched

or his estate enhanced at the expense of another under circumstances that in equity and good conscience call for an accounting by the wrongdoer.

3. Contracts—Implied—Tort—Waiver—Indebitatus Assumpsit.

When one's property has been wrongfully converted by fraud or deceit, the owner is allowed to waive the tort and sue on an implied contract under the equity of *indebitatus assumpsit.*

CIVIL ACTION to recover for work and labor done and money advanced by plaintiff to defendant's intestate while they lived together as man and wife, tried before *Cline, J.,* and a jury, at March Term, 1916, of GUILFORD.

The allegations and proof on the part of plaintiff tended to show that on or about 20 September, 1913, she was induced to go through the forms of marriage with defendant's intestate, and lived with him as his wife, fully believing she was such, till the date of his death in February, 1915, when she ascertained that, during all the time intestate had a lawful wife still living, resident elsewhere; that during said period and association plaintiff advanced him $200 in money, to be used in building a home, and, in addition, had rendered him various services of value, in waiting on him in his last sickness, etc., and that said money, etc., was reasonably worth $680.

There was denial of liability on the part of defendant, and, on general issue of indebtedness, the court submitted to the jury the question of money advanced and the amount of the same, and, in reference to the claim for work and labor, charged the jury, among other things, in substance, that plaintiff could not recover if she had knowingly and voluntarily lived in illicit relationship with defendant during said time, and further, "That if 'plaintiff went through the form of marriage with W. W. Hinshaw, deceased, honestly believing she was marrying him, he knowing that he had a living wife, and, therefore, could not marry—if she went into his house under those circumstances and resided with him in the apparent relationship of husband and wife, and she served him, labored for him, and those services and those labors had a value to him; that it turned out afterwards that she was not his wife, could make no claim upon his representative or his estate after his death—in such case the law would raise for her benefit an implied promise to pay her for what the jury might find her services to be reasonably worth over and above, that is, in excess of, what benefits by way of food and clothing and keep and maintenance she received from him, if any you should find."

There was verdict for plaintiff for $422. Judgment on verdict, and defendant excepted and appealed.

Clifford Frazier for plaintiff.
Roberson, Barnhart & Smith, King & Kimball for defendant.

HOKE, J. There is conflict of authority on the question presented in this appeal, but we are of opinion that the decisions in support of plaintiff's claim have the better reason and that the judgment in her favor should be affirmed. True, the position is fully recognized in this jurisdiction that no recovery can be had for services rendered when they are given and received without expectation of pay. *Guano Co. v. Bennett,* 170 N. C., 345, citing *Winkler v. Killian,* 141 N. C., 578; and *Prince v. McRae,* 84 N. C., 675. But the principle should have no application to this record, where, on the facts as accepted by the jury, the plaintiff being without default, has rendered services of value in ignorance of the essential relevant facts and was induced thereto by the fraud and wrong of the intestate. In such case we think that the general equitable principles of *indebitatus assumpsit* should apply and the cases which so hold should be approved as controlling. *Fox v. Dawson's Curator,* 8 Martin (La.), 94, 4th Reprint, 47; *Higgins v. Breece,* 9 Mo., 497; *Heckham v. Heckham,* 46 Mo. App., 496; *Boardman v. Ward,* 40 Minn., 399; Keener on Quasi Contract, p. 318.

Two of the cases opposing this position, *Franklin v. Waters,* 33 Md., 322, and *Cooper v. Cooper,* 147 Mass., 370, and cited in several text-writers of recognized merit as upholding the better view, have been subjected to intelligent criticism in Mr. Keener's work, and the decisions rendered in these cases are expressly disapproved. Keener on Quasi Contract, pp. 321-22-23-24-25.

Speaking to the decision in *Franklin v. Waters,* a case where a slave, who had been freed by the will of his former owner, was kept in ignorance of the fact and thereby made to serve for some length of time as a slave, by the heir and successor of the testator, and recovery on a *quantum meruit* was denied, the author says: "The reason why a man who does not intend to charge for services rendered is not allowed to recover compensation therefor is because the gift of a thing is inconsistent with a sale or barter thereof, and, therefore, one to whom a thing has been given is not doing anything inequitable in refusing to pay therefor. The principle, therefore, clearly has no application to a case where the plaintiff has been induced by fraud to give services to the defendant which the defendant knew he had no right to claim, and which he also knew would not have been rendered but for the belief of the plaintiff in the defendant's right thereto." And, in reference to *Cooper v. Cooper, supra,* a case as to a claim for services exactly similar to the one before us, in which a recovery was also denied, on a *quantum meruit,* the Court holding that plaintiff's

remedy should have been in tort for the deceit, it is said, among other things: "It is submitted with all deference that a different result should have been reached in this case. It is true that the intestate's accepting the plaintiff's services was an incident of a previous wrong, and not an independent tort. But it is also true that the intestate, by accepting the services, wrongfully enriched himself at the plaintiff's expense; and while if he had received nothing of value from the plaintiff, the plaintiff could only have sued for breach of promise to marry, or in tort for deceit, yet it is submitted that when he, because of his tort, enriched himself, the plaintiff, if she saw fit to sue, not for damages, but simply for compensation to the extent that the defendant had profited by his wrong, should have been allowed to do so." And speaking further to this decision: "If instead of receiving the services of plaintiff, the defendant had, in the exercise of his supposed common-law marital rights, reduced to possession choses in action belonging to the plaintiff, it hardly seems possible that a court would hold that as the right to sue in tort had been lost by the death of the intestate, the plaintiff could recover against his estate the money received in extinguishment of choses in action, which in fact belonged to the plaintiff, and which the defendant unlawfully appropriated to his own use. Had the plaintiff in this case surrendered to the defendant money or other chattels to which the defendant asserted a right because of his marital rights as husband, it does not seem possible that a court would hold that because of the loss of the right to sue in tort by the death of the intestate, no claim could be asserted against his estate for the value so received by him. And yet in point of principle it is submitted that it is impossible to distinguish between the receipt of money or other property by the defendant and the receipt of services. The plaintiff, whether she conferred a benefit on the intestate by rendering services or by delivering him money or other personal property, in either case parted with a right *in rem* under a mistaken supposition, induced by the fraud of the defendant, that the defendant was entitled thereto." A line of reasoning which gives full support to plaintiff's right to recover for money advanced, in the principal case, and to our minds equally sustains her recovery for services rendered and received by intestate to his pecuniary advantage. The action of *indebitatus assumpsit*, as stated, is dependent largely on equitable principles, *Mitchell v. Walker*, 30 N. C., 243, and, in the absence of a special contract controlling the matter and unless in contravention of some public policy it will usually lie wherever one man has been enriched or his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrongdoer.

Our decisions uphold recoveries when money not justly due has been paid under a mistake of fact. *Simms v. Vick,* 151 N. C., 78.

When a man's property has been wrongfully converted or obtained by fraud or deceit, the owner is allowed to waive the tort and sue on contract, *Stroud v. Ins. Co.,* 148 N. C., 54; *White v. Boyd,* 124 N. C., 177; and we see no reason for withholding the application of the principle from the present case, where it is established that valuable services were rendered and received and plaintiff was induced thereto by the wrong and fraud of defendant.

There is no error, and the judgment is affirmed.

No error.

M. F. TEETER v. SOUTHERN EXPRESS COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 6 December, 1916.)

1. Negligence—Partnership—Pleadings—Carriers of Goods.

Where the plaintiff sues a carrier, an express company, for damages to a shipment of goods, and in the complaint alleges ownership thereof, which is not denied in the answer, the defendant cannot escape liability upon the ground that the shipment was owned by a partnership between plaintiff and others.

2. Carriers of Goods—Live Stock—Viciousness—Negligence—Burden of Proof.

While a carrier is not answerable in damages to a shipment of live stock caused by the natural viciousness of the animals, it must establish to the satisfaction of the jury that the damages were thus caused, and not as a result of its own negligence, when the shipment was under its care.

3. Carriers of Goods—Express Companies—Railroads—Live Stock—Contracts—Tort-Feasors, Joint.

Where an express company violates its contract of carriage of a live-stock carload shipment in not allowing an attendant to ride free in the same car, owing to crowded conditions therein, and the attendant attempts to ride in a passenger coach of the same train under this contract, but is ejected by the conductor thereon: in his action against the railroad and express company, it is *Held,* that the two defendants were not joint tort-feasors, and that whatever rights the plaintiff may have had arose *ex contractu* with the express company, which was not responsible for the act of the railroad company in ejecting him.

4. Carriers of Goods—Express Companies—Live Stock—Attendants—Contracts—Breach—Damages Minimized.

Where an express company contracts for free transportation of an attendant on a carload of live-stock shipment, which it does not perform,

and the attendant is ejected by the conductor on the passenger train drawing the car, while attempting to ride under his contract in the passenger coach, it becomes the attendant's duty to purchase a passenger ticket and make claim against the express company for the amount, in diminution of his damages, and not permit himself to be ejected from the train to his humiliation, and hold the express company responsible therefor.

CIVIL ACTION tried at April Term, 1916, of CABARRUS, before *Long, J.*, upon these issues:

1. Did the defendant, the Southern Express Company, enter into a contract with the plaintiff on 24 January, 1915, to transport a car of horses and mules from East St. Louis, Illinois, to Albemarle, N. C., with the privilege of free transportation to the plaintiff as attendant and care-taker to look after said stock while in transit, as alleged in the complaint? Answer: "Yes."

2. Was the Southern Railway Company, the codefendant, one of the carriers employed by the Southern Express Company to transport said car of horses and mules from East St. Louis, Illinois, to Albemarle, N. C.? Answer: "Yes."

3. Were the horses and mules of plaintiff injured by the negligence of the defendant, the Southern Express Company, while in transit, as alleged in the complaint? Answer: "Yes."

4. If so, what damages, if any, is the plaintiff entitled to recover of the Southern Express Company for the injuries to said horses and mules? Answer: "$27.50."

5. Was the plaintiff wrongfully ejected from the train at Biltmore, and was such wrongful ejection due to the acts and conduct of the Southern Express Company, as alleged in the complaint? Answer: "Yes."

6. If so, what damages, if any, is the plaintiff entitled to recover of the Southern Express Company by reason of said ejection from the train, as alleged in the complaint? Answer: "$500."

7. Were the horses and mules injured by the negligence of the Southern Railway Company in transit, as alleged in the complaint? Answer: "No."

8. If so, what damages, if any, is the plaintiff entitled to recover from the Southern Railway Company by reason of said injuries? Answer: "None."

From the judgment rendered, the Southern Express Company appealed.

J. W. Keerans, M. H. Caldwell for plaintiff.

J. Lee Crowell for defendant.

BROWN, J. On 24 January, 1915, the plaintiff entered into a written contract with the defendant express company for the transportation of a car-load of horses and mules from East St. Louis, Ill., to Albemarle, N. C.

The plaintiff in his complaint states two distinct causes of action. Whether two such causes of action can be properly joined is doubtful, but as no such point is made, we will not decide it. We only note it so that this may not be regarded as a precedent.

FIRST CAUSE OF ACTION.

Plaintiff sues the defendant express company to recover damages for injuries to the live stock, alleged to have been caused by the negligence of the express comany. The defendant contends that plaintiff cannot recover for damages to the stock because the plaintiff is a member of a copartnership to which the stock belongs. This position is untenable.

In section 3 of the complaint it is alleged that plaintiff is the owner of the stock, and that the contract for transportation was made with him. The defendant answers said section specifically and does not deny the allegation of ownership. As to the negligence alleged, the stock was injured while in the custody of the express company, and the burden of proof is upon such defendant to exculpate itself. It is true that a carrier is not liable for damages caused by an animal's natural viciousness or by the viciousness of other animals (6 Cyc., p. 382), but as the injuries occurred while the stock was in the care of the carrier, it must establish to the satisfaction of the jury that the injury is not the result of its own negligence. In a shipment of live stock the carrier is to some extent an insurer, and the burden is upon it to show that injuries in transportation were not caused by its negligence. *Schloss-Davis Co. v. R. R.*, 171 N. C., 350; *Ry. Co. v. Slatterly*, 107 N. W., 1045 (Neb.).

The motion to nonsuit upon this cause of action for injuries to the stock was properly denied.

SECOND CAUSE OF ACTION.

Plaintiff alleges that under the written contract for the transportation of the stock, the express company undertook to give him transportation without further cost to plaintiff from East St. Louis to Albemarle. The clause of the contract relied on by the plaintiff is as follows: "In consideration of the carriage of plaintiff without charge upon the *same car wherein the animals referred to are forwarded*, he assumes all injury to person or property." The agent wrote in pencil on the contract. "One attendant free."

The plaintiff alleges that the stock car was full of animals and sealed up, and that there was no room in it for him as the attendant of the stock, so he rode in the passenger cars. He avers that he exhibited the contract to the several conductors and it was duly honored on connecting railroads until he reached Knoxville, Tenn., on the Southern Railway, when the conductor from that place to Asheville refused to honor it, and in consequence he paid his fare to Asheville. The plaintiff refused to pay his fare from Asheville to Salisbury, and the conductor on that train refused to honor the contract so far as the right to ride in passenger car and ejected the plaintiff at Biltmore. Plaintiff purchased a ticket and took the next train to Salisbury. Plaintiff avers "that such ejection was illegal, in violation of his rights under the written contract with the express company, and caused him much humiliation, indignity, and mental distress." Plaintiff seeks to recover compensatory damages of the express company for this alleged tort.

The court charged the jury that "The two companies (the express and railway companies) are joint tort-feasors, and their liability may be a recovery against both."

It is contended that under the express terms of the written contract, exhibited by plaintiff to conductor, the plaintiff had no right to travel in the passenger cars without paying his fare, and that the conductor was right in ejecting him therefrom. As the plaintiff and the railway company did not appeal, we will not consider that contention, but will rest our decision upon other grounds.

The court erred in holding that the express company is a joint tort-feasor with the railway company and liable for the tort alleged to have been committed by the conductor. An express company is not a carrier of passengers, but is a carrier of goods. The business of an express company, as usually conducted, involves continuous custody of goods received as a bailee from the time of their receipt until their final delivery, although the transportation thereof is to be effected by means of vehicles belonging to and controlled by others. 6 Cyc., 369.

Under their charters the duties and powers of express companies are defined, and do not extend to the carriage of passengers in interstate commerce. There is nothing in this record indicating that the express company was authorized to give or sell transportation over the Southern Railway. Were it otherwise, the written contract, introduced by plaintiff, contains nothing that would on its face authorize the conductor of the railway to accept it in payment for transportation in its passenger coaches.

Whatever rights the plaintiff may have arise out of that paper-writing, and are *ex contractu* and not *ex delicto*. When the conductor

refused to accept it for transportation, it was plaintiff's duty to pay for his passage, as he had previously done, and thereby minimize the damage. He should have then presented his bill of expenses to the express company, and if payment was refused, plaintiff should have sued on the contract if he thought there had been a breach of it. He has no cause of action against the express company as a joint tort-feasor. The motion to nonsuit as to this, the second cause of action, is allowed.

The cause is remanded to the Superior Court of Cabarrus County with instruction to enter judgment in accordance with this opinion. The costs of this appeal will be equally divided between plaintiff and defendant express company.

Error.

M. F. TEETER v. SOUTHERN EXPRESS COMPANY.

(Filed 19 December, 1916.)

Appeal and Error—Rehearings—Rules of Court.

In order to obtain a rehearing of a case in the Supreme Court it is necessary for the applicant to observe Rule 52 (amended 170 N. C., 1) and Rule 53 (164 N. C., 557) of the Court, and where he has failed to file the certificates of two disinterested members of the bar, indorsed by two members of the Court, the application will not be considered, except in certain instances where the Court may reconsider the case *ex meru motu.*

J. W. Keerans for plaintiff.

PER CURIAM. This is a petition to reëxamine our opinion in this case before it is certified down, and to order a reargument.

The rules for rehearing, which, as we have said, is in effect an appeal from this Court to itself, are set out in Rule 52 (since amended, 170 N. C., 1) and Rule 53 (164 N. C., 556). Among these requirements is that the petition shall be accompanied by the certificate of two disinterested members of the Bar of this Court and shall be indorsed by two members of this Court as a proper case for rehearing. These requirements, as well as the others therein set out, are absolutely necessary to prevent the Court from being overwhelmed with such applications.

It is probably very rarely the case that counsel who have lost agree with the Court in the result, and if in this speedy and shorthand method a rehearing in every case can be had even before the opinion is certified

down (by which time counsel might some times be more inclined to assent to the correctness of the decision), it will require much of our time to reconsider our opinions as fast as they are filed.

It is possible that the opinion in a case of great public importance, or in which some patent error has been committed, should be held up by the Court *ex mero motu* for fuller examination or consideration upon the matter being called to our attention when irreparable damage would be done by the orderly procedure for rehearings, under our rules; but this case is not of that nature. It is like many other cases in which counsel are fully and sincerely convinced that the Court has made an error. In such case the losing party has his remedy by getting two disinterested counsel to examine the matter, and, if they agree with him, then to present his petition with their certificates to two judges of this Court, and if on consideration by them they indorse it for reconsideration the opinion will then be reconsidered by the Court, with or without argument, as the Court may order.

In the case relied on by the petitioner, *Robinson v. McDowell,* 125 N. C., 337, the Court was asked to withhold an opinion until counsel could prepare and file a petition to rehear, and the Court declined to grant the motion. In *S. v. Council,* 129 N. C., 511, we said: "An appeal to this Court is a right. Not so as to a petition to rehear (*Herndon v. Ins. Co.,* 111 N. C., 384; *Solomon v. Bates,* 118 N. C., 321), which is an appeal from this Court to itself, and only allowable *ex necessitate* when there is no other possible relief from its judgment."

We see no reason in this case to "put in above the ford." The petitioner can still proceed to make his application for a rehearing in the manner prescribed by the Rules of this Court.

Motion denied.

WALTER M. KLUTTZ AND MARY WISE v. EDMUND C. KLUTTZ ET AL.*

(Filed 6 December, 1916.)

1. Deeds and Conveyances—Unrecorded Deeds—Color of Title—Purchasers for Value.

Where both parties to an action to recover lands claim by deeds from an heir at law of the deceased owner, one of which had been recorded and the other not, the unrecorded deed is color of title when the grantee in the recorded one does not show that he was a purchaser for value.

2. Deeds and Conveyances—Unrecorded Deeds—Color of Title—Possession—Trials—Evidence—Questions for Jury—Dower.

Where in an action to recover lands the plaintiff claims under a recorded deed from the heir at law of a deceased owner, and defendant under an unrecorded deed from him as color of title; and there is evidence that the defendant had married the widow of the deceased owner, entitled to dower in the lands, and in that capacity had lived thereon and cultivated them; and the evidence is conflicting as to whether his possession was under his deed or by virtue of his wife's right of dower, and as to his unequivocal act showing that he claimed in his own right: *Held*, the question of the sufficiency of his possession was for the jury, and the fact that he permitted the grantee under the registered deed to remain in possession for twelve or fourteen years without objection, and that his deed remained unregistered for twenty years, were circumstances to be considered by the jury as tending to prove that he did not claim ownership thereunder.

CIVIL ACTION tried before *Ferguson, J.*, at February Term, 1916, of ROWAN.

This is a civil action brought by the plaintiff against the defendants in the Superior Court of Rowan County to recover the possession of a 15-acre tract of land described in the complaint, subject to the alleged dower right of the defendant Mrs. L. J. Colly (née E. M. Kluttz). The land in controversy was owned by Edmund Milas Kluttz at the time of his death in 1865. Edmund M. Kluttz left surviving two children and heirs at law, who are Mary Wise, one of the plaintiffs, and Paul S. Kluttz, the father and grantor of Walter M. Kluttz, the other plaintiff. Edmund M. Kluttz left surviving a widow, who shortly afterwards married S. B. Colly. On 5 November, 1881, Paul S. Kluttz executed a deed for his one-half interest in the land to Samuel B. Colly. This deed was properly probated and recorded in the office of the register of deeds on 29 January, 1914, eight months prior to the institution of this suit. On 28 July, 1914, the defendant Mrs. L. J. Colly and the other heirs at law of S. B. Colly conveyed all of the land in question to the defendant Ed. Kluttz.

The deed from Paul S. Kluttz and wife to the plaintiff Walter M. Kluttz is dated 26 January, 1914, and was registered 28 January, 1914.

It appears, therefore, that the plaintiff Walter M. Kluttz and the defendants both claim under deeds from Paul S. Kluttz, and that the deed of the plaintiff was registered one day before the deed of the defendants.

The defendant relies on adverse possession under color of title.

At the conclusion of the evidence his Honor held that the plaintiff Mary Wise was entitled to recover one-half the land, to which there is no exception.

He also held that the deed from Paul S. Kluttz to Samuel B. Colly was color of title, although unregistered, and instructed the jury, if they believed the evidence, to find that the defendant and those under whom he claimed had held possession of the land adversely a sufficient length of time to perfect his title as against Walter M. Kluttz, who excepted and appealed from the judgment in favor of the defendant as to the one-half of the land he claimed.

Vanderford & Coughenour for plaintiff.
T. F. Kluttz and John L. Randleman for defendants.

ALLEN, J. The deed from Paul S. Kluttz to Samuel B. Colly is color of title as against the plaintiff Walter M. Kluttz, although unregistered, because it is not made to appear that Walter M. Kluttz is a purchaser for value (*King v. MacRackan*, 168 N. C., 624, and cases there cited), and we sustain his Honor's ruling in this respect.

We are, however, of opinion that the evidence of adverse possession is not so clear and unequivocal as to warrant the instruction to the jury that if they believed the evidence to find that the defendant and those under whom he claims had held adversely for a length of time sufficient to perfect his title.

The rule as to adverse possession pertinent to the evidence in this record is stated clearly and accurately by *Walker, J.*, in *Locklear v. Savage*, 159 N. C., 237, as follows: "It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim or any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

Let us apply this rule to the evidence, keeping in mind that Samuel Colly, on whose possession the defendant must rely, did not enter into possession of the land in controversy until after his marriage to Leah Jemima Kluttz, mother of Paul S. Kluttz and widow of Edmund Milas Kluttz, the former owner of the land, and that her possession would not be adverse to the heir. *Everett v. Newton*, 118 N. C., 919.

One witness for the defendant, T. D. Link, testified on his examination in chief that Mr. Colly had been in possession of the land ever since he had known him and that he had claimed the land for many years, but on cross-examination he stated that he did not know that Mr. Colly had ever lived on the land and that he never saw him on it.

L. W. Lingle, another witness for the defendant, stated that Mr. Colly had lived on the land for years and that he had been claiming it thirty-five or forty years, but he does not state how long he was in possession, and states on cross-examination that he does not remember when Mr. and Mrs. Colly moved away from the land.

Edmund Kluttz, the defendant, testified that he remembered that Mr. Colly had charge of the land for twenty or twenty-five years. On cross-examination he stated that he did not remember when Mr. Colly lived on the land.

Robertson, another witness, stated that he could not remember when Mr. Colly moved to the land, but he had been there some twenty-five or thirty years, and, on cross-examination, that he lived on the land with his wife and her two children, that they all worked the land together, and that he did not know whether he claimed the land or not.

Luther Peeler, another witness, stated that Mr. Colly claimed the land, that he didn't know who else claimed it, that he held it up to the time of his death, which was about two years before this action was instituted; but, upon cross-examination, he said that he never saw Mr. Colly on the land, that he did not live on it when he knew him, that so far as he knew he never lived on it, and that he never heard Mr. Colly say that he claimed the land in controversy.

A. B. Petree stated that Mr. Colly had been claiming the land for seventeen or eighteen years, and D. T. Lingle, that Mr. Colly had been claiming the land thirty or thirty-five years and that he supposed he had been working it.

Mrs. Colly testified that the land in controversy belonged to her husband, Samuel B. Colly, because he married her, and she then further testified that he had been in possession and had cultivated the land twenty-five or thirty years.

This is a fair summary of the evidence for the defendant, and, on the other hand, the plaintiff offered evidence tending to prove that after the date of the deed from Paul S. Kluttz to Samuel Colly, under which the defendant claims, Samuel Colly and his wife moved from the land and that Paul S. Kluttz entered into possession in 1881 and had the exclusive control and possession thereof for twelve or fourteen years thereafter; that Samuel Colly had never claimed the ownership of the land; that Samuel Colly and wife had been let into possession by Paul S. Kluttz under an agreement that the wife of Colly, who was entitled to dower in the land, should have the land in lieu of dower, and that there was a further agreement at another time with Samuel Colly and his wife that they should have the use of the land free and without rent if they would take care of the children and would educate them.

The jury might well have concluded from this evidence that Samuel Colly and wife were in possession of the land by virtue of the right of his wife to dower, and that there was no unequivocal act showing that he was claiming the land in his own right.

The fact that Paul S. Kluttz was permitted to remain in possession for twelve or fourteen years after the signing of the deed to Samuel Colly without objection, and that this deed remained unregistered for more than twenty years, were circumstances tending to prove that Colly never claimed ownership under this deed.

We therefore conclude that there was error in the instruction given and there must be a new trial.

New trial.

H. T. COOKE v. THOMAS J. JEROME AND HENRY LITTLETON.

(Filed 6 December, 1916.)

1. Automobiles—Statutes—Regulations—Negligence—Rule of Prudent Man—Evidence—Questions for Jury.

Where the driver of an automobile violates the statute by turning to the right to avoid a motorcycle traveling in the same direction upon a public road, and collides therewith, and action is brought to recover damages therefor, and the evidence is conflicting as to whether the motorcycle was unexpectedly turned out in the wrong direction, resulting in the injury, the question of proximate cause depends upon whether the driver of the automobile acted with reasonable prudence under the circumstances, to avoid the injury, or whether the collision was caused by the wrongful and unexpected act of the one on the motorcycle. The instructions of the trial judge, in this case, are approved. Gregory's Sup. Revisal, sec. 2728a.

2. Appeal and Error—Pleadings—Trials—Nonsuit—Assignments of Error.

The question of whether the owner of an automobile is responsible for the negligence of its driver while acting as the agent and in the employment of another is not presented by this appeal, there being no allegation thereof in the answer, no motion to nonsuit or presentation thereof by assignment of error.

CIVIL ACTION tried at February Term, 1916, of ROWAN, before *Ferguson, J.*, upon these issues:

1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: "Yes."

2. Did the defendant contribute to his own injury by his own negligence, as alleged in the answer? Answer: "No."

3. What damages, if any, is plaintiff entitled to recover? Answer: "$941."

J. F. Hudson, T. G. Hudson, and E. S. Delaney for plaintiff.

A. H. Price, Edward C. Jerome for defendant.

BROWN, J. This action is brought to recover damages for personal injuries sustained by plaintiff by reason of the alleged negligence of defendants in causing a collision between defendant's automobile and plaintiff's bicycle. Both were traveling in the same direction, the defendant Littleton driving the car, of which defendant Jerome was the owner.

The alleged negligence consists of a violation of the statute, Greg. Sup., sec. 2728a, viz.: "Any person so operating a motor vehicle shall, on overtaking any such horse, draft animal, or other vehicle, pass to

the left side thereof, *and the rider or driver of such horse, draft animal, or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left.*" Section 20 of same statute provides that "Any person violating any provision of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding $50 or imprisoned not exceeding thirty days."

There is abundant evidence that defendant's machine turned to the right, instead of to the left, as required by statute, in order to pass plaintiff. The evidence of defendants tends to prove that plaintiff first turned to the left, thereby misleading them, then suddenly wheeled to the right in front of their machine, and that this caused the collision. This is denied by the plaintiff, who offers evidence tending to prove that he turned to the right and remained on right-hand side of the road, and was within 4 feet of the cross-ties on that side when struck by the machine; that as soon as the horn sounded (the machine being then only 6 or 8 feet behind him), he turned to right towards street car line and was struck by the machine in two or three seconds. There was evidence upon part of plaintiff that machine was running 25 miles per hour and by defendants that it was running only 10 miles per hour.

There are only three assignments of error, viz.:

1. That the court erred in charging the jury: "The defendant was required under the law to exercise the care that a reasonably prudent man would to avoid injury to the plaintiff, and if the defendant failed to do so, having turned to the right of the road instead of turning to the left, the defendant would be guilty of negligence, and if that was the proximate cause of the injury, it would be your duty to find the first issue 'Yes'; but if by the conduct of the plaintiff, the defendants, as the party operating the machine, the owner of it, had reasonable grounds to believe and believed that the safe way to do was to pass to the right, and it was unsafe to attempt to pass by going to the left, then it would not be negligence upon the part of the defendants to pass or attempt to pass turning to the right. Were the defendants excusable from going to the left by reason of the conduct of the plaintiff? This is a question of fact for you."

2. That the court erred in charging the jury: "If you answer the first issue 'Yes,' then it becomes necessary to answer the second issue and find from the evidence whether or not the plaintiff turned to the left, he on his bicycle and they in their car; and did the defendant have reason to believe that if they proceeded on the left that they would come together and be a collision, but to turn to the right they would be safe? And did the plaintiff, after he turned to the left, realize that

he had made a mistake in regard to the rules of the road, and then attempt to turn to the right without seeing the danger he was approaching, and ran in front of the car, and was that the proximate cause of his injury? If you so find, it will be your duty to answer the second issue 'Yes.' But if you fail to so find, it would be your duty to answer it 'No.'"

3. That the court erred in charging the jury: "The defendant contends that the plaintiff turned to the left, misled them, then suddenly turned to the right and thereby the injury was caused. Plaintiff denies that; says that he turned to the right—that is his contention—the way he had a right to go. If he did not mislead the defendants by turning to the left, he would not be guilty of contributory negligence, and it would be your duty to answer the second issue 'No.'"

We cannot discover any error in the above instructions. It is admitted by defendants that the driver of the machine turned to the right in violation of the statute. It is attempted to justify this by showing it was necessary, owing to the conduct of plaintiff. As the evidence is conflicting as to such conduct, the court properly submitted the matter to the jury. We think the charge presents the controversy to the jury clearly and fairly and gave defendants the full benefit of all they were entitled to.

It was contended on the argument that defendant Jerome is not liable, although he owned the car, because the evidence shows that it was in the control of defendant Littleton and in the temporary service of the Belmont Land Company at the time, and that defendant Jerome, although the owner of the machine, was only a passenger.

This defense is not set up in the answer. There was no motion to nonsuit and it is not presented by any assignment of error.

No error.

E. C. BLAKE ET ALS. v. ANNIE SHIELDS ET ALS.

(Filed 6 December, 1916.)

Estates Tail—Statutes—Fee Simple.

An estate granted to B. "and to the heirs of her own body," etc., "it being expressly understood that the hereinafter described premises are to descend at her demise to the heirs of her body," etc., with tenendum, "to have and to hold the above particularly described premises to the said party of the second part and to her heirs forever," conveys an estate in fee tail to B. which our statute converts into a fee simple absolute. Revisal, sec. 1578.

PETITION for partition, instituted before the clerk of the Superior Court of MONTGOMERY County, transferred upon the coming in of the

answer to the Superior Court for trial in term-time, and tried at April Term, 1916, before *Long, J.* From the judgment rendered, plaintiffs appealed.

C. C. Broughton, R. T. Poole, R. L. Brown for plaintiffs.
Charles A. Armstrong for defendants.

BROWN, J. The single question presented in this case is whether Mary C. Blake took an estate in fee in the lands in controversy under a deed executed by Anderson Green, dated 14 February, 1883; if so, the judgment of the Superior Court, it is admitted, must be affirmed. The conveying clause of the deed reads as follows: "Has bargained, given, granted, sold, and conveyed to the aforesaid Mary C. Blake and to the heirs of her own body, and by these presents do give, grant, sell, and convey to her and her heirs forever, it being expressly understood that the hereinafter described premises are to descend at her demise to the heirs of her body," etc. The tenendum is as follows: "To have and to hold the above particularly described premises to the said party of the second part and to her heirs forever."

It is contended by the plaintiffs that this deed conveys only a life estate to Mary C. Blake. We think the point has been determined adversely to that contention by numerous decisions of this Court. It is decided in *Harrington v. Grimes,* 163 N. C., 76, that an estate to B. and his bodily heirs under the old law would have conferred a fee tail, which, under our statute, where a contrary intent may not be gathered from the instrument, construed as a whole, is converted into a fee simple.

There are cases where the words "bodily heirs" are a *descriptio personarum* and are sometimes construed to mean children, but that is only where it is plainly manifest from the deed that the words are used in the sense of children. Such is not the case here. The point presented in this case was decided in a case almost on all-fours at this term. *Revis v. Murphy, ante,* 579. In that case the limitation was to Avey Revis, her heirs by the body of F. H. Revis. *Mr. Justice Walker* says: "This was at one time a fee-tail estate special (2 Blk. Com., 113, 114), but by our statute of 1784 (Rev., sec. 1578) it was converted into a fee simple absolute. The form of a limitation here and the one in *Jones v. Ragsdale,* 141 N. C., 201, are the same. It was held in the latter case that the wife, Zilphia S. Jones, acquired a fee simple under and by virtue of the provisions of the statute, and our ruling in this case must be the same, viz., that Avey Revis by the deed of the Bairds to her got a fee-simple estate."

The judgment of the Superior Court is

Affirmed.

C. R. SMITH v. J. L. HOPPER.

(Filed 6 December, 1916.)

1. Appeal and Error—Costs—Findings—Parol Evidence—Contracts—Objections and Exceptions.

The Supreme Court will not disturb on appeal the findings of a trial judge, in taxing costs, that a parol agreement construed with a written agreement constituted a contract between the parties, when exception thereto has not been aptly taken.

2. Appeal and Error—Costs—Findings—Trespass—Stock Law—Impounding Cattle—Demand.

Where it is found by the trial judge on an appeal from taxing cost of an action that the parties were lessors and lessees of certain lands, with a further agreement that defendant would pasture plaintiff's cow, had breached his contract in this respect by turning the cow out of the pasture and had later impounded her while straying on other of his lands in stock-law territory; that defendant threatened to turn out plaintiff's cow, as stated, unless he came for her, which he refused to do: *Held*, the plaintiff's cow was rightfully in defendant's pasture; this was no act of trespass; the cow was wrongfully impounded; the evidence established a refusal of defendant's demand, and the costs were properly taxed against him.

CIVIL ACTION tried before *Webb, J.*, at January Term, 1916, of CLEVELAND.

This is an action to recover possession of a cow, commenced before a justice of the peace, who rendered judgment in favor of the plaintiff for the cow and for costs.

The defendant appealed from that part of the judgment taxing him with the costs, and upon the hearing in the Superior Court the following facts were found:

Plaintiff was a tenant of the defendant for the year 1915, and in addition to renting the plaintiff certain lands, the defendant agreed that the plaintiff should have the right to keep not exceeding two cows in defendant's pasture, although this part of the agreement was not included in the written contract of rental; that in pursuance of this agreement the plaintiff kept one cow in the defendant's pasture during the year 1915 continuously, along with defendant's cows, and until the defendant, in the fall of 1915, while gathering his corn and hauling it along the road which passed through the pasture, notified plaintiff three times to take his cow out of the pasture and keep it until the defendant finished hauling the corn.

The plaintiff refused to take his cow out of the pasture, and defendant left the bars down and plaintiff's cow went out of the pasture into

defendant's cornfield, whereupon defendant took the cow into his possession and carried her away nearly one-half mile, and placed her in his lot. Plaintiff telephoned to defendant, requesting that he return his cow to pasture by 10 o'clock next morning, and notified him that if he did not do so he would take out claim and delivery papers for his cow, whereupon the defendant replied that plaintiff could get his cow any time he wanted her if he would keep her up until he had finished hauling his corn. The plaintiff waited until after the time expired in which he had notified defendant to return the cow to pasture, and the cow not having been returned, plaintiff procured a justice of the peace to issue claim and delivery papers and instituted suit for the possession of his property.

His Honor sustained the judgment of the justice's court, including that portion which taxed the defendant with the costs of the action, to which judgment defendant excepted and appealed.

Ryburn & Hoey for plaintiff.
L. B. Wetmore and Quinn, Hamrick & Harriss for defendant.

ALLEN, J. The principal reasons urged in the brief of the defendant against the judgment rendered are (1) that parol evidence was not admissible to prove the agreement that the plaintiff was to have the right to keep two cows in the pasture of the defendant, as there was a written contract of lease; (2) that the plaintiff was a licensee or trespasser, and it was his duty to take the cow out of the pasture when required to do so; (3) that the cow was in the stock-law territory and the defendant had the right to impound her; (4) that there was no demand for possession before the commencement of the action.

The answer to these positions is that there was no objection to the parol evidence, and upon it the court has found as a fact that a valid contract subsisted, which gave the plaintiff the right to keep his cow in the pasture.

If so, the plaintiff was not a licensee or trespasser, but was acting as of right, and the defendant could not wrongfully turn out the cow in his own field and then impound her.

These findings also establish a demand and refusal, because under them the defendant had no right to take the cow from the pasture, nor to impose as a condition for a return of the cow that the plaintiff should "keep her up."

Affirmed.

ATLAS BRADSHAW ET ALS. v. CITIZENS NATIONAL BANK ET ALS.

(Filed 6 December, 1916.)

1. Appeal and Error—Motion to Dismiss Action—Final Judgment.

An appeal from the refusal of a motion to dismiss an action is premature and will not lie, the proper procedure being for the movant to except, and reserve the exception in appealing from an adverse judgment rendered, after a trial or hearing upon the merits of the case, with proper assignment of error.

2. Nonsuit—Statutes—Costs—New Action.

Revisal, sec. 370, providing, among other things, that a new action upon the same subject-matter between the same parties may be commenced within one year after nonsuit, as amended by chapter 211, Laws 1915, with proviso that the costs in such action shall have been paid before the commencement of the new suit, etc., does not forbid the commencement of a second action without paying the costs of the first, but annexes this as a condition to bringing the new action free from the bar of the statute, if pleaded; and a motion to dismiss it before answer filed, upon the ground that the costs of the former one had not been paid, will be denied.

CLARK, C. J., concurs in the result.

CIVIL ACTION heard, on motion to dismiss, by *Shaw, J.,* at April Term, 1916, of MITCHELL.

The following facts were found by the judge:

"Prior to 1 January, 1915, a suit between the same parties, plaintiffs and defendants, as those in this case was instituted in the Superior Court of Yancey County, and was not brought in *forma pauperis,* but the plaintiffs gave bond in that suit for the costs. The action in the Superior Court of Yancey County and this action were both brought for the identical relief by plaintiffs against defendants; that prior to 1 March, 1915, the plaintiffs in the suit in Yancey County took a voluntary nonsuit; that on 12 October, 1915, the plaintiffs in the suit in Yancey County brought this action in the Superior Court of Mitchell County, against the parties who were defendants in that suit; that the costs of the suit in Yancey County were not paid before the commencement of this action, nor as late as 11 April, 1916."

The court refused to dismiss the action, and defendants appealed.

S. J. Ervin and Pless & Winborne for plaintiffs.

Hudgins & Watson, J. Bis Ray and A. Hall Johnston for defendants.

WALKER, J., after stating the case: The appeal was prematurely taken, or, to be more accurate, an appeal does not lie from the refusal

of a motion to dismiss an action. The defendants should have noted their exception to the adverse ruling and proceeded with the trial, and at the final hearing the exception could be reserved to them and reviewed in this Court by an appeal from the final judgment upon a proper assignment of error. This has been the uniform practice in such cases. We said in *School Trustees v. Hinton,* 156 N. C., 586: "This appeal is premature and, upon motion, is dismissed. The exception should have been noted and, when a final judgment is rendered, an appeal may be taken," citing *Hendrick v. R. R.,* 98 N. C., 431; *R. R. v. Warren,* 92 N. C., 620; *Tel. Co. v. R. R.,* 83 N. C., 420. And in *Chadwick v. R. R.,* 161 N. C., 210: "We are of the opinion that the motion to dismiss this appeal (from the clerk) because it is premature should be allowed. It was the duty of the defendant to have noted every exception and let the cause proceed to the hearing under the statute, and then, if dissatisfied with the final result, upon exceptions properly taken, the cause could be heard in the Superior Court, and then by appeal to this Court." See, also, *Crawley v. Woodfin,* 78 N. C., 4; *Cooper v. Wyman,* 122 N. C., 784; *Clinard v. White,* 129 N. C., 250; *Jester v. Steam Packet Co.,* 131 N. C., 54; *Johnson v. Reformers,* 135 N. C., 385; *Beck v. Bank,* 157 N. C., 105. Many cases upon the proposition that an appeal will not lie from the refusal of a motion to dismiss are collected in Clark's Code (3 Ed.), p. 738. The general question was fully considered in *Chambers v. R. R., ante,* 554, with citation of authorities. If every ruling not decisive of the case could be brought to this Court for review by an immediate appeal, without waiting for the final judgment, litigation would be greatly prolonged and become almost interminable, costs would be enormously increased, and much valuable time would be wasted. The rule is not one that can safely be departed from, as to do so would encourage unnecessary appeals and in many cases result in a delay, and, perhaps, a denial of justice. Similar views to these were expressed in *Pritchard v. Spring Co.,* 151 N. C., 249, and approved in *Beck v. Bank, supra.* But we will consider the merits of the appeal, as has been done in other cases of a like kind. *S. v. Wylde,* 110 N. C., 500; *Clinard v. White Co.,* 129 N. C., 250; *Meekins v. R. R.,* 131 N. C., 2.

The defendants' motion to dismiss was based on the ground that Revisal, sec. 370, was amended by Public Laws 1915, ch. 211, by adding a proviso thereto, and in its amended form reads as follows: "If an action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited, or a judgment therein be reversed on appeal, or be arrested, the plaintiff or, if he die and the cause of action survive, his heir or representative, may commence a new action within one year after such nonsuit, reversal, or arrest of judgment: *Provided,*

that the costs in such action shall have been paid by the plaintiff before the commencement of the new suit, unless said first suit shall have been brought in *forma pauperis.*" Gregory's Revisal Biennial (1915), p. 354 (sec. 370).

The contention necessarily is that, by this section, the bringing of a second action at all, after nonsuit in the first, is forbidden except upon condition that the plaintiff, at the time of commencing the second, has paid all the costs of the first action. But this is, we think, too narrow a construction. A nonsuit did not prevent the bringing of a new action, 14 Cyc., 393, as it decided nothing on the merits, and therefore did not operate as *res judicata* or as an estoppel. "A nonsuit is in many instances of importance, because it gives the party the right to commence the same suit again, and alter its status by additional testimony, whereas if he answers and hears the verdict he must stand on the case as then presented and rely upon his exceptions and upon obtaining a reversal of the judgment on appeal." 14 Cyc., 393, note 8, citing *Hall v. Schuchardt,* 34 Md., 15. Our doctrine is the same, a fresh action after nonsuit, for the same cause, being permitted, even when the first suit is dismissed for want of jurisdiction. *Anonymous,* 3 N. C., 231 (2 Hayw., 63); *Pearse v. House, ibid.,* 588 (386); *Skillington v. Allison,* 9 N. C., 347; *Straus v. Beardsley,* 79 N. C., 59; *Dalton v. Webster,* 82 N. C., 279; *Harris v. Davenport,* 132 N. C., 697. "At common law suits frequently abated for matter of form. In such cases plaintiff was allowed a reasonable time within which to sue out a new writ. This time was theoretically computed with reference to the number of days which the parties must spend in journeying to the court. Hence the name, 'journey's account.' Such renewed suit was but a continuance of that which had abated, and of necessity was in the same court, against the same parties, and for the same cause of action. This ancient remedy is not now recognized in this country, but in lieu thereof nearly every State has provided by statute for the renewal of actions which have failed for some matter not involving the merits. Such a statute does not contemplate a revival or a continuance of a former suit as at common law under 'journey's account,' but that a new and distinct suit may be brought. The statutes on this subject vary greatly in their scope. Some limit the right to bring a second action to cases in which there has been an involuntary nonsuit; others to dismissals by the court for some matter of form not involving the merits; others to dismissals as the result of a reversal; others to cases where the judgment in favor of plaintiff has been arrested or set aside; still others include various combinations of the above provisions." 25 Cyc., 1313, and also pp. 1314, 1319, where the subject is fully discussed. But the section in which the proviso was inserted by the amendment

of Public Laws 1915, ch. 211, is a part of chapter 12 of the Revisal relating to limitations of actions, and must be construed, according to the usual rule, by the context of section 370, as thus amended; and when so considered, it clearly appears what the Legislature meant. It was not the intention to forbid the commencement of a second action merely without paying the costs of the first (*Freshwater v. Baker,* 52 N. C., 255), but to annex a condition to the right of bringing the new action free from the bar of the statute, and, for that purpose, to prevent counting the time which had elapsed during the pendency of the first action, the condition being that the costs of the prior action should be paid. Where, therefore, the statute is pleaded, the reply of the nonsuit would not avail the plaintiff unless he had paid the costs of the former suit. There has been no plea of the statute as yet, but only a motion to dismiss, and on this phase of the case the amendment of 1915 has no bearing, as it only applies to the bar of the statute.

Appeal dismissed.

CLARK, C. J., concurring in result: Revisal, 370, which allows a new action within twelve months after a nonsuit without restriction, was sometimes abused by action after action being instituted after a cause was nonsuited for which the only remedy was a bill of peace. As some restriction the Legislature enacted a proviso to that section, Laws 1915, ch. 211, as follows: *"Provided,* that the costs in such action shall have been paid by the plaintiff before the commencement of a new suit, unless said first suit shall have been brought in *forma pauperis."* It would seem that this statute meant what it plainly said, and that it is a restriction upon the hitherto unlimited liberty of bringing new actions after a nonsuit, if brought in one year. Unless it has this effect there was no purpose in its passage.

This is a condition precedent, on noncompliance with which the defendant was entitled to have the action dismissed, as on failure to give prosecution bond, Revisal, 450; or appeal bond, Revisal, 593; or on failure of defendant to file defense bond, Revisal, 453, unless the court should extend the time.

BLACK MOUNTAIN RAILROAD COMPANY ET ALS. v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

(Filed 6 December, 1916.)

1. Contracts—Independent Contractor—Owner—Indemnity — Parties—Damages.

Where the owner is not relieved by independent contract from liability to his contractor's employees for personal injuries received while engaged in doing the work, and the contractor enters into a contract with a liability company to indemnify the owner against such damages, running in the name of the contractor but for the benefit of the owner, with the full knowledge and consent of the indemnity company, the owner who has compromised an action against it which was covered by the policy, and has paid the loss, may maintain an action against the indemnity company to recover the amount so paid.

2. Contracts—Independent Contractor—Partnership—Indemnity.

Where a member of a firm of contractors takes out a policy of indemnity for the benefit of the owner in his name, instead of that of the firm, in an action against the indemnity company to recover for a loss covered by the policy: *Held*, each partner is responsible for a partnership loss, and is entitled to the indemnity, and it is immaterial as to the indemnity company whether the policy sued on was taken out in the name of one of the partners or in the name of the firm.

3. Contracts—Independent Contractor—Indemnity—Parties—Misjoinder—Demurrer.

In an action by a contractor and owner against an indemnity company to recover a loss, covered by the policy, which the owner had sustained, a demurrer by the defendant for misjoinder of parties plaintiff is bad, for there can be but one recovery and it cannot be prejudicial. *Gorrell v. Water Co.*, 124 N. C., 328, cited and approved.

APPEAL by defendants from *Shaw, J.*, at July Term, 1916, of McDOWELL.

J. J. McLaughlin, Pless & Winborne for plaintiffs.
F. W. Gatlin, Alf S. Barnard, and A. Hall Johnston for defendant.

CLARK, C. J. The complaint alleges that the plaintiff Ruffin entered into a contract with the Black Mountain Railroad Company to build the road and deliver it free of all claims and liens, which he undertook to accomplish by making a contract of indemnity with the Ocean Accident and Guarantee Corporation, and that this contract was "for the protection of the Black Mountain Railroad Company and for its benefit and with full knowledge of the defendant that said insurance was for the benefit of the said Black Mountain Railroad Company."

An injury having occurred to one of the workmen (Thomas Ruffin), who was known by the defendant to be the agent of the Black Mountain

Railroad Company, it become liable for the injured workman, and this action is brought to recover the loss incurred, which further it is alleged has been paid by the owner under a compromise in an action brought therefor.

The indemnity company knew that Ruffin was under contract to pay any judgment or just claims arising from such injuries as this, and wrote this policy to indemnify him. When the suit was brought the defendant took part in making the defense. It is immaterial that Ruffin was not a party to the action which was brought by the injured employee directly against the plaintiff railroad company. The injury was for the negligent use of explosives, and the railroad company, therefore, was not released from liability by reason of the fact that Ruffin was an independent contractor.

Upon the statement in the complaint, the demurrer was properly overruled. The railroad company suffered the loss, Ruffin or Ruffin & Harris (of which firm he was a partner) is responsible to the railroad company for the amount of said loss, and under his indemnity is entitled to be protected in turn by the indemnity company, the defendant. If there are any defenses, they can be presented by the answer. It is immaterial that the indemnity was taken out in the name of Ruffin & Harris, for as one of the partnership he is responsible to the railroad company for the loss and can require the indemnity company to make the loss good. The demurrer for misjoinder need not be discussed. If there are unnecessary parties plaintiff, they might object on account of the costs or fear of judgment against them, but it is no prejudice to the defendant.

Both the railroad company, the beneficiary of the contract, which claims to recover under the doctrine of *Gorrell v. Water Co.*, 124 N. C., 328, and Ruffin, the obligee in the contract, are parties plaintiff, and as there can be but one recovery, it is a question between them and not a prejudice to the defendant. Nor can there be a misjoinder, for there is but one single cause of action, the injury to the employee and the responsibility of the defendant by reason of the contract of indemnity.

Affirmed.

SAME v. SAME.

CLARK, C. J. This action is between the same parties for injury to another employee (Forney), who has recovered a judgment against the plaintiff railroad for his damages, which was sustained in this Court. *Watson v. R. R.*, 164 N. C., 176.

The judgment overruling the demurrer is

Affirmed.

EMMA GARLAND v. CAROLINA, CLINCHFIELD AND OHIO RAILWAY COMPANY.

(Filed 6 December, 1916.)

1. Torts—Damages—Proximate Cause.

A wrong-doer is responsible in damages resulting directly and proximately from the tort he has committed; but if the cause is remote in efficiency and does not naturally result from the tort, it will not be considered as proximate.

2. Same—Carriers of Passengers—Negligence—Intervening Cause—Trials—Courts—Questions of Law.

Where a railroad company has negligently carried a female passenger a mile or two beyond her station, causing her to walk that distance to her home with a suitcase, and the failure of her husband to meet her; and it appears that, at the time, the weather was clear and pleasant, but she was caught in a storm before she reached home, after having stopped a while on her way at a friend's: *Held*, the damages she may have sustained by reason of the storm were caused by an independent, intervening act, the act of God, and not those arising proximately from the carrier's tort, and are properly excluded as an element of damages as a matter of law.

3. Torts—Carriers—Damages—Contracts—Proximate Cause.

Where a carrier is sued for damages in tort for a neglect of its duty in negligently carrying a passenger to a station beyond her destination, the rule that the damages must have been within the contemplation of the parties, applying to breaches of contract, has no application.

CIVIL ACTION tried at August Term, 1916, of YANCEY, before *Shaw, J.*, upon these issues:

1. Did the defendant wrongfully carry the plaintiff by Forbs station, as alleged? Answer: "Yes."

2. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: "$87.50."

From the judgment rendered, the plaintiff appealed.

Hudgins, Watson & Watson for plaintiff.

J. J. McLaughlin, Pless & Winborne for defendant.

BROWN, J. The plaintiff testified that in September, 1915, she purchased a ticket from Erwin to Forbs, a flag station on defendant's railway. The conductor took up her ticket, and slowed down at Forbs, but did not stop the train, in consequence of which plaintiff was carried to Toecane, 2½ miles from Forbs. She alighted from the train and walked to Forbs and crossed the river there and started home carrying

a heavy suitcase. Her husband was to have met her at Forbs, but as the train did not stop, she failed to meet him. Plaintiff started home by a near path to her home, 2 miles from Forbs. She carried the suitcase as far as Wesley Deaton's and left it. She stopped there a while and then walked on to her home.

She further testifies: "It was right pleasant when I got off at Toecane, but there came up a storm in the evening before I reached home." She had then left Deaton's and was about 1½ miles from her home. It did not rain at all until after she left Deaton's. Plaintiff testifies that her body was wet and that she suffered materially because of it. William Garland, the husband, testified that he was working at Wesley Deaton's, that he went to Forbs to meet his wife, but as the train did not stop, he returned to Wesley Deaton's to his work; that later in the day plaintiff came bringing the suitcase; that she went on home, leaving the suitcase for him to bring home that evening.

The plaintiff requested the court to charge the jury that "the plaintiff is entitled to recover for the personal injury, inconvenience, annoyance, discomfort, and the physical effort incident to and flowing from defendant's failure to put her off at her destination, and for the injury she suffered, if any you find she suffered, by *getting wet* and carrying her suitcase."

The court instructed the jury fully, but stated that plaintiff was not entitled to any damage for getting wet, and that they should not award plaintiff any damage on that account. To this charge the plaintiff excepted.

This assignment of error is substantially the only question presented on this appeal.

In actions founded on tort the wrong-doer is liable for all injuries resulting directly from the tort, whether they were in the contemplation of the parties or not. The rule laid down in *Hadley v. Baxendale,* that the damage must be within the contemplation of the parties, applies only to breaches of contract. But in torts the damages must be the legal and natural consequences of the wrongful act and such as according to common experience and the usual course of events might have been reasonably anticipated. The legal proximate cause of all damage must be the tort.

If the cause is remote in efficiency and does not naturally result from the tort, it will not be considered as proximate. To be such it must be "a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Ramsbottom v. R. R.,* 138 N. C., 42; *Brewster v. Elizabeth City,* 137 N. C., 392.

Lord Bacon says: "It were infinite for the law to judge the causes of causes and their impulsion one on another. Therefore, it contenteth itself with the immediate cause and judgeth of acts by that without looking to any further degree." Maxims Reg. 1. No rule of damage embraces within its scope all the resulting consequences of a given act. Such a rule would be a serious hindrance to the ordinary affairs of life. The effect would be to impose a liability entirely disproportionate to the act committed, or to the failure to perform the duty assumed, as well as to the compensation received therefor. There must be a limit, and the courts have set it at a point "where for the purpose of the law a particular cause may be said substantially to have spent its force and to have fallen into the great mass of circumstances which has ceased to be an active force." 1 Sutherland on Damage, 111 b. Therefore, common carriers are held responsible only for the ordinary and proximate consequences of their negligence and not for those that are remote and extraordinary. *Causa proxima, non remota, spectatur.* "Compensation is recoverable for consequential losses only when they are proximate. Consequences are natural and probable only when, according to common experience and the usual course of events, the effect of the wrongful conduct is to set in operation the intermediate cause; that is to say, when the intermediate cause was not independent." Hale on Torts, p. 213.

Following these well settled principles, this Court held that though a carrier negligently delayed to forward goods delivered at its depot for shipment, it was not liable for the loss of the goods by fire when it was not negligent in respect to the fire. *Extinguisher Co. v. R. R.,* 137 N. C., 278. Likewise it is said that in case of delay by a carrier in the delivery of goods whereby they are destroyed by flood, when the connection between the delay and the flood is merely accidental and fortuitous the loss of the goods is a remote consequence of the delay. 1 Sutherland on Damages, sec. 119.

It is held in the Federal Circuit Court of Appeals that where by reason of delay in constructing a vessel it was crossing the sea at a later time than was intended, and was caught in a hurricane and destroyed, the loss of the vessel was a remote and unexpected consequence of the delay in construction. *D. E. Ford v. Steel Co.,* 113 Fed., 72.

A passenger was carried a short distance past his station on a dark night, and on leaving the train was misinformed by the conductor as to where he was. He soon discovered that he was south of a cross road he meant to take in going home, instead of north of it, as he was told when he landed. In nearing a cattle-guard en route home his eyes deceived him, his foot slipped, and in trying to recover his balance he fell into the culvert, which he supposed was farther off, and was se-

riously injured. *Held,* that the carrier's negligence in carrying plaintiff past the station, and in misinforming him, was not the proximate cause of the injury, which was purely accidental, and he could not recover for it. *Lewis v. Ry. Co.,* 54 Mich., 55.

It was held by the Wisconsin Court that where a railway company carried a woman passenger beyond her destination, and she voluntarily and needlessly walked back instead of waiting for a returning train, the road was not liable for injuries sustained by her from exposure on her walk back, the damages not being the proximate result of the road's breach of duty. *Le Beau v. Minneapolis, St. P., and S. S. M. Ry. Co.,* 159 N. W., 577.

In *Elliott v. R. R.,* 166 N. C., 482, the plaintiff was carried beyond her station and compelled to alight at another station on a cold, snowy night, and remain at the depot for some time. There was no station-house, as it had been burned down. In consequence of being carried beyond her own station and put off in the cold, sleet, and snow at a station without proper accommodation, and compelled to wait there some time, plaintiff was made ill and suffered serious injury. It was held that her injury was the proximate result of the carrier's negligence. The distinction between that case and this is too obvious to need discussion.

The sudden storm that caused plaintiff to get wet was an independent, intervening, and unexpected cause and the act of God, for which defendant was in no way responsible. If she had not stopped at Deaton's, or if she had remained there longer, she might have escaped entirely. The negligence of the defendant did not set that independent cause in motion. It was one of those accidents against which human foresight cannot provide, and was not the proximate result of the carrier's negligence.

As said by *Chief Justice Cooley* (*Lewis v. Ry., supra*), "It was after the plaintiff had been brought there that the cause of the injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now."

We are of opinion that the court properly excluded from the consideration of the jury the injuries sustained solely as the result of the thunderstorm. As there is no dispute as to the facts, and as only one deduction is possible to be drawn from them, proximate cause thus became a question of law.

No error.

JAMES HUNTLEY ET AL. v. T. C. MCBRAYER.

(Filed 6 December, 1916.)

1. Deeds and Conveyances—Possession and Support—Conditions Subsequent —Waiver.

A conveyance of land with provision that the grantors should retain possession thereof during their natural lives and that the grantees should support them for that period of time operates by way of condition subsequent, and the right of forfeiture by reason of the condition to support having been broken, until entry or proper claim made, is not regarded as an estate in the grantors, but only a right of action to be enforced by proper procedure, and may be destroyed or waived by the persons entitled to performance of the condition, either by formal deed of release or by the conduct of the grantors.

2. Same—Equity—Limitation of Actions.

A husband and wife conveyed his lands to two of their sons upon condition subsequent that they retain possession and receive support from the grantees for life. The husband died, and the wife joined one of the grantees in a conveyance of the lands in fee simple with warranty and covenants of title to another, from whom the defendant purchased. In a suit by the heirs at law of the husband to recover the lands upon allegation that grantees failed in the performance of the condition subsequent for the support of the wife, who is still living, it is *Held*, equity will interfere to prevent an insistence on such claim; and the deed for full value, with covenants assuring title, will operate as a release of the wife's claim to support and relieve the estate of liability to forfeiture on that account. The statute of limitations does not apply to the facts of this case.

THIS cause was before the Court on appeal from a judgment of nonsuit, 169 N. C., 75. The decision affirming the nonsuit having been certified down, the present action was instituted by same plaintiffs and proceedings had as follows:

This was a civil action tried before his Honor, W. J. Adams, judge, and a jury, at February Term, 1916, of the Superior Court of Rutherford County. The trial resulted in a verdict and judgment in favor of the defendant, and the plaintiffs appealed.

Plaintiffs brought their action in the Superior Court to term to remove a cloud from their title and recover an interest in land. They alleged in the pleadings and contended upon the trial that they are the owners of eleven-twelfths in fee in the land in controversy upon the following state of facts: That William Henson, deceased, ancestor of plaintiffs, was the owner of said land, and in the year 1885 executed a deed together with his wife, Jane Henson, conveying the land to W. A. Henson and Jason Henson, two sons, upon the condition subse-

quent that they would support and properly maintain the grantors during their lives, and that upon their failure to do so said deed should be void. The grantors also retained possession of the land during their lives. William Henson died within a few months after the execution of said deed, and that his widow survives him and is still living.

Plaintiffs alleged and contended further that after the death of William Henson in the year 1885 the grantees in said deed, W. A. Henson and Jason Henson, failed and refused to properly maintain the widow of William Henson, and that such failure and refusal was continuous from the death of William Henson in the year 1885 till the death of Jason Henson, about 1905, and has continued to the present time. Plaintiffs alleged that the defendant was the owner of one undivided eleventh of the land in controversy by virtue of a deed executed by the said Jason Henson to C. M. Roberson and by C. M. Roberson to defendant, but that he claimed to be sole owner and denied the title of the plaintiffs. Defendant admitted that the plaintiffs are the heirs at law of William Henson, deceased, but denied the allegation in the complaint that the condition in the deed from William Henson and wife to W. A. Henson and Jason Henson had been forfeited, and averred that it had been fully met and performed. Defendant in his further answer also alleged that the widow, Jane Henson, both by her conduct and by a deed executed by herself and Jason Henson and wife to C. M. Roberson, abandoned and waived the condition in the deed aforesaid, and thereby put an end to such condition. Defendant pleaded adverse possession and the statute of limitations as a defense.

Plaintiffs, replying to the further answer of defendant, denied any waiver of the condition in said deed by the widow of William Henson as alleged by defendant or otherwise, and denied that plaintiff's cause of action was barred by adverse possession or the statute of limitations.

On the trial, there was evidence offered on the part of plaintiff to the effect that William Henson died soon after the execution of the deed from himself and wife to his two sons, and that, after that time, there was an entire failure on the part of the grantees or either of them to furnish support to his widow, Jane, the other grantor in the deed.

There was evidence on the part of defendant tending to show that after the death of her husband, William Henson, Jane Henson continued to reside on the property for some time, receiving the rents and profits of same; that two of her children lived with her and that the conditions of the deed requiring support were properly complied with by the grantees or their assigns; that later, in January, 1903, Jason Henson having acquired and taken a deed for the interest of the

other grantee, he and his wife and Jane, the widow, sold the land to one C. M. Roberson for full value and all joined in the execution of a deed conveying the land to the purchaser and containing covenants of seizin, of right to convey in fee, that same was free from encumbrances, and of warranty, etc. That said purchaser took possession under his deed and later on, in January, 1903, C. M. Roberson conveyed same for full value to the present defendant. It appeared that Jane Henson, the widow, is still living.

On issues submitted, there was verdict for defendant, "that plaintiffs were not the owners of the land or any interest in them."

Judgment on the verdict for defendant, and plaintiffs excepted and appealed.

R. S. Eaves for plaintiffs.
McBrayer & McBrayer and Tillett & Guthrie for defendant.

HOKE, J. The deed in question by which William and Jane Henson conveyed the property to two of their sons, W. A. and Jason Henson, contained provision that the grantors could retain possession during their natural lives, and stipulation, also, for the support of such grantors during such period, operating by way of condition subsequent. *Huntley v. McBrayer,* 169 N. C., 75; *Brittain v. Taylor,* 168 N. C., 271; *Underhill v. R. R.,* 20 Barbour, 455.

In deeds of this character the right of forfeiture by reason of condition broken, until entry or proper claim made, is not regarded as an estate in the grantors, but is only a right of action to be enforced by proper procedure, and may be destroyed or waived by the persons entitled to performance of the condition, either by formal deed of release or by conduct. *Harwood v. Shoe Co.,* 141 N. C., 161; *Ruch v. Rock Is. Ry.,* 97 U. S., pp. 693-696; *Sharon Iron Co. v. City of Erie,* 41 Pa. St., pp. 341-351; *Ludlow v. Ry.,* 12 Barbour, 440; *Hubbard v. Hubbard,* 97 Mass., 188; *Chalker v. Chalker,* 1 Conn., 79.

In the decisions on the subject this right of forfeiture or the waiver of it has been usually made to depend on the action of the grantors or their privies in blood, and it may be that the widow in this instance, being one of the grantors, comes directly within the purview of such cases; but, conceding that the mere formal right of reëntry, for condition broken, descended to the heirs of William Henson, the husband and former owner, we see no reason, on the facts presented, why, in a case of this kind, a stipulation for support, the widow, who on the death of her husband had become alone entitled to the benefits of performance, could not formally release her right to the grantee and relieve the estate entirely of the burden. If she had refused to accept

support from the grantee, on tender made, or otherwise acted so as to render performance impossible, a forfeiture could not have been insisted on, and it would seem that such a result would follow from her formal deed.

It was intimated on the former appeal in this cause or in a cause between the same parties, 169 N. C., 75, that authority favored such a position, and it was so directly ruled in *Tanner v. Van Bibber,* 33 Ky., 550, and *Andrews v. Lenter,* 32 Me., and *Berenbroick v. St. Luke's Hospital,* 48 N. Y. Supp., 363, affirmed in 153 N. Y., 655, seem to be in recognition of the principle.

In 2 Washburn on Real Property (5 Ed.), p. 454 (marginal), it is said: "As a condition subsequent may be excused when its performance becomes impossible by the act of God, or by the act of the party for whose benefit it was created, or is prohibited or prevented by act of the law, so it may be waived by the one who has the right to enforce it." And in Greenleaf's Cruise on Real Property, p. 498, title, "Estates on Condition," subsec. 25: "A condition may be excused by the default of the person to whom it is to be performed, as by tender and refusal or by his absence in those cases where his presence is necessary for performance, or by his obstructing or preventing performance," etc.

It is an accepted principle of our jurisprudence that forfeiture of estates are not favored, and that conditions and stipulations providing for them are to be strictly construed. *Ludlow v. R. R.,* 12 Barbour, 440, and *Barrie v. Kelley,* 47 Mich., 130; and on the facts of this record, it appearing that the widow, the sole beneficiary of this stipulation, had joined with one of the grantees, he having acquired the estate of the other, in conveying the property to a purchaser for full value and with covenants, assuring the quiet enjoyment of the estate, and that the title was free from encumbrances, even if the technical right of reentry has descended to the heirs of William Henson, a case is presented where equity would interfere to prevent an insistence on any such claim. *McGinnis v. Knickerbocker Ice Co.,* 112 Wis., 385, reported in 69 L. R. A., with notes containing further authority in favor of equitable interference.

Having held that the joinder of the widow in the deed for full value and with covenants assuring the title should operate as a release of her claim to support, so far as this property is concerned, and relieve the estate of the grantee of liability to forfeiture on that account, it is not necessary to consider and pass upon the question of the statute of limitations.

We find no error in the record, and the judgment for defendant is affirmed.

No error.

W. R. HINSON v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 6 December, 1916.)

1. Commerce—Railroads—Federal Employers' Liability Act—Federal Decisions—State Courts.

One employed by a railroad company as hostler for locomotives for its interstate trains is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, and where he is injured on the company's yard in going home from his work thereon, in his action to recover damages alleged to have been inflicted by the negligence of defendant's employees on its yards, brought in the State courts, the Federal decisions control, and not those of the State court.

2. Same—Assumption of Risks—Trials—Evidence—Nonsuit.

An employee of a railroad company in interstate commerce attempted at night to go between connected cars on a "lay off" track, on defendant's yard, uncoupled to a locomotive, though there was afforded him a safe way around the train, and while beneath the drawheads and stretching forward his leg to get out on the other side a locomotive ran upon the cars from another track, without signal or warning, caused the wheel of the car to run over his leg, which was afterwards amputated in consequence thereof. The employee looked to see if there was danger before attempting to cross, and assumed there was none, and there was evidence that employees of the road frequently crossed there in this manner. There was no evidence that the engineer on the locomotive knew of the employee's presence or of his peril. *Held*, under the Federal authorities, controlling upon the facts of this case, the employee assumed the risk, and his own negligence barred his recovery in his action for damages.

CLARK, C. J., dissenting.

CIVIL ACTION tried at September Term, 1916, of MECKLENBURG, before *Justice, J.*

From a judgment of nonsuit, plaintiff appealed.

C. A. Cochran, Stewart & MacRae for plaintiff.

O. F. Mason, F. M. Shannonhouse, W. S. Beam for defendant.

BROWN, J. The only evidence taken was that offered by plaintiff. Taking that to be true, the court did not err in sustaining the motion to nonsuit.

Plaintiff was a hostler in the yards of Southern Railway Company, lessee of defendant, in Charlotte. On the evening of 20 December, 1914, he started home across the yards and switching tracks of defendant. On his way he encountered a train of coal cars connected together that had been run in on one of the side-tracks that day. Plain-

tiff looked up and down the train of cars and decided to cross the track underneath the cars, and started across underneath the drawhead connecting two of the cars. While he was under the drawhead and putting his leg out across the rail to get out, an engine struck the train with sufficient force to move the train and drive a wheel over his leg. When the engine struck the train plaintiff states he was under the drawhead and had extended his leg across the track to get out. He could not have been seen from the engine or tender nor from the cars.

Plaintiff testifies that before he went under the train he heard the switch engine over in the junction yard, 175 yards away, and felt perfectly safe in so doing, as it was usually the business of the switch engine to move the cars on the set-off tracks. He further states that the path he was going was used by other employees, and that he had seen them, as well as a boss man, cross over the drawheads between cars when the path was blocked by trains. Plaintiff admits that there were other safe ways for him to go home provided by the company and that he could easily have walked around either end of this train. He says: "The reason I did not walk around this string of cars is because I did not think there was any danger." "If I had walked around I don't suppose I would be here today with a lost leg." Plaintiff further testified that he was engaged in preparing engines engaged in interstate commerce for use; that he had just finished preparing Engine No. 4619 to be taken on its run to Greenville, S. C., at 6 p. m., and he was hurt an hour later.

As it appears from the evidence of plaintiff that both he and his employer were engaged in interstate commerce, the case is governed by the Federal Employers' Liability Act, and the law as construed by the Federal courts, and not by the law as expounded by this Court. *Ry. v. Gray,* Advance Opinions U. S. Sup. Court, 22 May, 1916, page 558; *Ry. v. Horton,* 233 U. S., 492; *Mondon v. Ry.,* 223 U. S., 1; *Tel. Co. v. Milling Co.,* 218 U. S., 406; *Lloyd v. R. R.,* 166 N. C., 27.

The facts show that plaintiff had been preparing engines for use in interstate commerce and had within the hour fitted out one to start on its run from Charlotte, N. C., to Greenville, S. C. The road of defendant extends from Charlotte to Atlanta and is under lease to the Southern Railway, a corporation doing business as a carrier in a dozen or more States.

Under such conditions, that plaintiff was a railway employee engaged in interstate commerce has been expressly decided by the Supreme Court of the United States in numerous cases. *N. C. R. R. Co. v. Zachary,* 232 U. S., 348; 58 Law Ed., 591. The following are cases decided in the Federal and State courts.

Round-house employee (an hostler), whose duty it is to clean engines engaged in interstate commerce as well as to operate turntables. *Cross v. Ry. Co.,* 177 S. W., 1127; *Lloyd v. R. R.,* 166 N. C., 27. Employee carrying bolts used in repairing bridge. *Pederson v. Ry.,* 229 U. S., 146. Employees engaged in repairing switches and side-tracks, *Jones v. R. R.,* 149 S. W., 951; *Tuesdale v. R. R.,* 159 Ky., 718; *Lombardo v. R. R.,* 223 Fed., 427.

This subject is elaborately discussed by *Mr. Justice Myers,* Supreme Court of Indiana, in *Railway v. Howerton,* 105 N. E., 1026.

Plaintiff's evidence fails to disclose wherein the defendant failed to discharge any duty it owed him. The habit of employees going under trains instead of around them is not sufficient to charge an engineer with notice that plaintiff was under the drawhead. Plaintiff was a workman of long experience and entirely familiar with the uncertain movements of engines and cars in the yards. The defendant had a right to move cars and engines on the yards as the necessities of its business required, and the only duty under the circumstances that it owed plaintiff was to refrain, if possible, from injuring him in case his precarious condition had been discovered. There is no pretence that plaintiff's condition was discovered, and as he was under the train, it is manifest it could not have been discovered by any one on the engine or tender. The defendant is not required to ring bells and blow whistles every time a car is shifted or a train moved on its switching yards, for the reason stated by *Justice Brewer* in *Aerkfetz v. Humphreys,* 145 U. S., 418: "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars and enabled him to step one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected."

Before the plaintiff went under the cars he examined the situation, weighed the chances, and deliberately decided to take the risk. He admits there were other and safe ways to his home, and that he could have easily gone around either end of the train, and candidly said that if he had done so he would not have lost his leg. The ruling of the

court below is upheld by this Court in *Covington v. Furniture Co.*, 138 N. C., 374; *Dermid v. R. R.*, 148 N. C., 183; *Bryan v. Lumber Co.*, 154 N. C., 485, and other cases.

In the *Covington case Mr. Justice Connor* says the plaintiff should not have taken chances in the presence of a well known danger; "and if he did so, and was hurt, he cannot place upon the employer the blame or responsibility."

The same doctrine is declared by the Federal courts. *Cooper v. Headrick,* 159 Fed., 683, and cases cited.

The case of *LeGwin v. R. R.*, 170 N. C., 359, cited in support of the contention of plaintiff, is not decisive of this case. There the railroad company purposely left open spaces between the cars for the employees of the lumber company to pass and repass. Plaintiff was not an employee of the railroad company, but of a lumber company on whose premises the railroad company had run a spur-track to load lumber from the mill. The cars were not coupled together, but spaces were left between them so that the employees of the lumber company could pass to and fro on the latter's yards. Under such conditions LeGwin had a right to expect that the railroad company would not back its engines and cars violently against the separated and uncoupled cars and drive them together without giving proper signals and taking reasonable precautions for the safety of the employees of the lumber company.

As LeGwin was not an employee of the railroad company, his case was tried under the State law, and he was permitted to recover upon the ground above stated. This case comes under the Federal law, which recognizes assumption of risk, and if there was ever a case in which plaintiff assumed the risk of his reckless conduct, it is this.

Affirmed.

CLARK, C. J., dissenting: On 20 December, 1914, the plaintiff was a hostler in the yards of the Southern Railway Company, the lessee of the defendant, at Charlotte. Having finished his work for the day, and it being nearly dark, he started home along the path which had been used by employees of the company for twenty years past. This path crossed a number of railroad tracks, on one of which there was a train of dead cars, standing on what is known as the "set-off" track. The cars ready for movement were on another track, known as the "pick-up" track. When the plaintiff came to the cars on the set-off track he stopped, looked, and listened, according to his evidence, which must be taken as true on this nonsuit, in order to locate the yard engine. There was no bell, whistle, or other signal, nor did the plaintiff see any switchman or brakeman with lights which would have

indicated that these cars were about to be moved. But, on the contrary, he heard the yard engine, the only engine which had a right under the rules and customs of the railroad company to move these cars, in another part of the yard some 175 or 200 yards away.

The plaintiff also testified that under the rule and custom of the defendant, when there was a train of dead cars on this "set-off" track across the path, the employees were in the habit of crossing under them, over them, or between them. There was a beaten path at this point which had been thus used by the employees of the defendant ever since the round-house was built in 1896. The plaintiff seeing no switchman with lights on the train of cars, it being dark at this time, and hearing the yard engine, which alone had the right to move these cars, some distance away, started to cross underneath the drawhead of these cars. Immediately the road engine struck this train of cars with violent force, running one wheel over the plaintiff's leg and cutting it off. The engineer of this road engine testified that he had started to get his train, which was 400 or 500 yards away in another section of the yard, and was backing his engine, and that he could not see in the yards nor could the switchman see, and that it was his engine that struck the train of dead cars which caused the plaintiff's injury, and that he did not know that this train of dead cars was on this "set-off" track, and further that if he or the switchman had known this, the switchman would not have thrown the engine onto this track, but would have followed another track which was open.

After the road engine struck this train of cars by reason of this mistake of the engineer and switchman, it moved back off the set-off track to the other track, which was clear and which should have been used, and went to another section of the yard and got the train of cars which had been made up for it to carry to Greenville, S. C.

Upon this evidence the switchman of the engineer threw the wrong switch and ran the road engine on the wrong track, contrary to the custom and rules of the yard, and cut off the plaintiff's leg. This engine was run backward at a rapid and reckless rate of speed in violation of the rules of the company and in violation of law, without any notice being given of its movement, either by ringing the bell or blowing the whistle or giving any other warning or notice of its approach and movements. There was evidence that the employees, including the bosses, had been in the habit of crossing this track of dead cars at that place since 1896, and that the yard foreman had done so but a few moments before. The evidence thus stated succinctly was very full and complete and was amply sufficient to go to the jury to show negligence on the part of the defendant.

In *Meroney v. R. R.*, 165 N. C., 611, it is said: "This case showed greater negligence on the part of the defendant than *Edge v. R. R.*, 153 N. C., 213. In that case an employee of the defendant was injured while crossing the track underneath the coupling of two box cars. Just before going into this place of danger he had seen an engine standing near the car with steam up and the engineer looking towards him. The Court held that it was a question for the jury whether the defendant could have avoided injuring the plaintiff by the use of ordinary care. In *Hudson v. R. R.*, 142 N. C., 198, it was held culpable negligence where the defendant cut loose a car on a spur-track on a down grade, whereby it crashed into five other cars with sufficient force to drive them, as in this case, causing the death of the plaintiff. In *Beck v. R. R.*, 146 N. C., 455, where the plaintiff started to go between a string of cars in accordance with the established custom, was caught and injured by the sudden attachment, without lookout, signal, or warning of the engine, unseen by him, and in a manner in which he could not reasonably have anticipated, the Court held that the negligence of the defendant was the proximate cause of the injury, and that if the question of contributory negligence should arise upon the facts, it was one for the jury."

In *Williamson v. R. R.*, (Va.) 113 Am. St., 1032, it is held: "If the right of way of a railroad corporation at a particular point has long been in use as a walkway, and this is well known to the company, it is under the duty of using reasonable care to discover and not to injure persons whom it might expect to be on its track at that point."

There was sufficient evidence of negligence to be submitted to the jury upon all our precedents, in some of which the evidence for the plaintiff was by no means as strong as in this case. Whether there was contributory negligence was a matter of defense, and should have been submitted to the jury, for the evidence of the plaintiff showed that he looked and listened and used the track as other employees, including the bosses, had been in the habit of doing for many years, and having first ascertained that the only engine which had a right to move on that track was in another part of the yard, some distance away.

Besides, the defendant in its answer alleged: "If the plaintiff was then in the service of the Southern Railway Company, both he and said company were at that time engaged in interstate commerce, and the defendant alleges that the act of Congress, commonly known as the Federal Employers' Liability Act, applies to and governs this case." If so, contributory negligence is not a defense, but the case should have been submitted to the jury to apportion the abatement on that account from the amount of damages otherwise recoverable. The plaintiff was unquestionably in the service of the defendant from the

time he entered the yard of the defendant on his way to his work, and until he left the yard on his way home, which he had not done when he was struck and injured by the negligence of the engineer in running his engine on the wrong track without lights or signal and injuring the plaintiff when he was using the accustomed way in crossing the track of dead cars, as had been done by all the employees to the knowledge and with the implied permission of the defendant for eighteen years—since 1896.

In *Zachary v. R. R.,* 156 N. C., 496, where an employee was killed in crossing a track on the railroad yard (which was reversed on writ of error, but not on the question of negligence or contributory negligence), *Mr. Justice Brown* said: "Was the evidence of negligence sufficient to justify the court in submitting the matter to the jury? We think so. The evidence offered by the plaintiff tends to prove that the deceased was compelled to cross the several tracks of the railroad to go from his engine to his residence; that it was customary for all employees to pass to and fro over these tracks; that it was dark at the time, and the switching engine was running backwards; tender foremost, from 15 to 20 miles an hour. Two witnesses testify that there was no light whatever on the end of the tender that was moving forward, nor any flagman there. This is ample evidence of negligence to go to the jury. *Ray v. R. R.,* 141 N. C., 84; *Smith v. R. R.,* 132 N. C., 819; *Purnell v. R. R.,* 122 N. C., 832."

In *LeGwin v. R. R.,* 170 N. C., 359, where the plaintiff was injured by going between two railroad cars, the Court held: "It was negligence for the railroad company, without warning or signal and without a proper lookout on the train or in the yard to warn the plaintiff, to back the engine and strike the car which injured the plaintiff." In that case the Court held that contributory negligence was not shown by evidence that had the plaintiff gone 60 or 70 feet around the car he could have crossed in safety. To same effect, *R. R. v. Price,* 221 Fed., 228.

There was no evidence of assumption of risk, for this is not a risk incident to the nature of the employment, but the injury was caused by the negligence of the defendant company in running over the plaintiff when passing out of the yards in the accustomed manner, which had been used so many years by the employees.

The case should have been submitted to the jury upon the evidence to pass upon the issues of negligence and contributory negligence, and, if these were found in favor of the plaintiff, to assess the damages.

C. A. BARBEE ET ALS. v. GEORGE T. PENNY.

(Filed 13 December, 1916.)

1. Wills—Executors—Power of Sale—Trusts—Naked Title—Heirs at Law.

Where the testatrix names three of her sons as executors of her will, directing that they shall lay off certain of her lands into lots and sell the same in lots of such size as they deem best, with provision that any of the testatrix's children could purchase before the sale in accordance with a specified method of valuation, to be charged against such child so buying in the distribution of the estate, and with further direction that the testatrix's children should express their opinion as to the management of the estate, the majority to decide what is reasonable: *Held*, the executors under the terms of the will are given a naked power of sale, with the legal title in the heirs, subject to be divested upon a legal or proper execution of the power.

2. Same—Deeds and Conveyances—Contracts — Beneficiaries — Parties—Appeal and Error—Costs.

Where the executors of a will are given only the naked power of sale of certain lands of the testatrix, and the title is vested in the testatrix's children, whose wishes in the administration of the estate are to be ascertained in a certain manner and regarded, and the executors have entered into a certain agreement with another for the sale of the lands at a certain price, for certain commissions of sale, etc., and then bring suit to set aside this contract as a cloud upon the title to the lands, alleging that the heirs at law had demanded such action on their part, and the defendant insists upon the specific performance of the contract, and also demands damages for its breach, alleging that the executors were clothed under the terms of the will with authority to make it, which the plaintiffs deny: *Held*, the children of the testatrix, the beneficiaries under the trust, are necessary parties to the action and entitled to set up matters of benefit or disadvantage under the contract of sale; and it being necessary that they should be parties so that the final decree as to title will conclude them, on appeal to the Supreme Court, the case will be remanded to that end. The costs of appeal in this case are taxed equally against both parties.

3. Trusts—Statutes—Beneficiaries—Parties.

Revisal, sec. 404, providing that "a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted" does not apply so as to exclude the beneficiary as a necessary party in a suit involving the question as to whether the trustee has exceeded his authority under the terms of the instrument creating the trust, and wherein the interests of the beneficiary may be seriously affected.

4. Same—Wills—Executors—Interests—Merits—Appeal and Error.

Where in a suit by the executors to remove a cloud upon the title to lands where they had contracted with the defendants to sell upon certain terms, the question involved affects the right of the executors to make

the contract under the terms of the will, they alleging in their own behalf and in behalf of the beneficiaries the want of such power, and the defendant insisting on a specific performance of the contract, and also asking damages for its breach; and it appears that the beneficiaries are necessary parties to the suit, but were not so made: *Held*, questions as to whether the executors acted within the powers conferred, or whether they had divested themselves of the power to sell advantageously, etc., affect the merits of the cause, and consideration thereof will be postponed until they shall have properly been made parties thereto.

CIVIL ACTION tried before *Cline, J.*, at May Term, 1916, of GUILFORD.

This action was brought by the plaintiffs as the executors of Mrs. Louisa C. F. Barbee for the cancellation of a certain contract for the sale by the defendant of a tract of land containing 150 acres described in the will of Mrs. Barbee and therein directed by her to be sold by her executors. The provisions of the will relating to the matter are as follows:

"6. It is my will, and I so direct, that my farm of about 150 acres in northeast part of High Point, N. C., being developed by my three sons, C. A. Barbee, W. F. Barbee, Fred C. Barbee, by contract, with my consent, shall be laid off in lots and sold in lots of such size as may be deemed best by my executors.

"7. It is my will and desire, after these lots are laid off, if any or all of my children desire to purchase a lot or lots, they have a right to do so before a sale, three good reliable citizens of High Point to value said lots and my executors to make deeds to the same, provided they shall accept the lots at the valuation placed upon them by the appraisers and be charged to them as part of their distributive share of my estate. Also one lot known as the Warren Pemberton lot, on the south side of the Barbee farm, 100 feet front, 200 feet depth, containing one-half acre, more or less, between Anthony Tilman and M. J. Wrenn's property, to be sold and the proceeds to go to my estate.

"8. I give my executors power to sell all lots or property of any kind, either privately or publicly, as may be deemed best by all concerned. I want all my children to express their opinion as to the management of the estate, but in case they cannot agree upon what is reasonable, then let the majority decide.

"10. All the balance of my estate shall be equally divided among my children, share and share alike, as follows: A. E. Barbee, C. A. Barbee, W. F. Barbee, F. G. Barbee, F. M. Barbee, C. C. Barbee, and Mrs. L. L. Wellborn."

The children of Mrs. Barbee entered into a written agreement with her executors, the material part of which is as follows:

"Whereas, further, A. E. Barbee, F. M. Barbee and wife, Edna Barbee, C. C. Barbee and wife, Josephine Barbee, J. S. Wellborn and

wife, L. L. Wellborn, all the heirs at law of the said Louisa C. F. Barbee, with the exception of C. A. Barbee, W. F. Barbee, and F. G. Barbee, heirs and executors, are desirous of waiving all rights and privileges which they may now or hereafter have under items 7 and 8 of the last will and testament of the said Louisa C. F. Barbee, in so far as the said items 7 and 8 apply to the property lying in the northeast part of the city of High Point, and mentioned in item 6 of the said last will and testament, and to that end do waive and relinquish all such rights and privileges in and under the said items 7 and 8 of the said last will and testament, vesting in the said executors, C. A., W. F., and F. G. Barbee, full power and authority to sell all lots or property as mentioned in items 7 and 8 of the said last will and testament, either privately or publicly, as they may deem best, with the right to fix and establish prices from time to time as in their opinion are just and proper, and to make all deeds, bonds for title, and other necessary papers for the proper management and disposition, selling and marketing the said property as mentioned in item 6 of the said last will and testament."

The executors contracted with the defendants to sell for them the said tract of land at the aggregate sum of $85,000 upon terms and conditions as to size of lots, prices for the same, and commissions, or compensation to be paid by the plaintiffs, as executors, to the defendants out of the surplus for the services rendered by the latter and the costs and expenses of the sales.

In section 8 of the complaint, the plaintiffs alleged: "That the heirs at law and devisees of plaintiffs' testatrix, other than the plaintiffs herein, have notified and demanded that plaintiffs rescind the contract and agreement aforesaid with the defendants herein, the said heirs contending that the plaintiffs herein had no power or authority as executors of the last will and testament to make and enter into such a contract and agreement with the defendants."

The defendants, in their answer, aver that they have no knowledge or information sufficient to form a belief as to the truth of the allegations of section 8 of the complaint above set forth. They also aver that since the contract was made by them with the executors, they have made the necessary surveys to be made for the purpose of dividing the land into lots, about five hundred and sixty in all, and have had streets and sidewalks laid out on the same, and have advertised the lots for sale and have been put to much labor and expense in attempting to perform their part of the said contract, the sums actually expended and the reasonable value of their services amounting in all to about $5,000, and that all they had done in the performance of the contract was known to and approved by the executors and the beneficiaries named

in the will of Mrs. Barbee. That defendants have sold a number of the said lots at the total price of $1,940, with the knowledge and approval of the plaintiffs and the beneficiaries under the will, and that since said sales were thus made the plaintiffs have interfered with the defendants in their efforts to sell the remaining lots, to their damage $15,000. Defendants pray that the contract be specifically enforced and for an injunction restraining the plaintiffs from further interfering with the sale of the lots and the execution of the contract.

Plaintiffs allege that the contract is a cloud upon the title to the real estate, and pray for judgment, "That the paper-writing purporting to be a contract and agreement between the parties thereto (plaintiffs and defendant) in regard to the real estate aforesaid be declared void and of no effect, and that it be canceled of record, and for other and further relief to which they may be entitled."

Plaintiffs moved in the court below for a judgment upon the pleadings, and demurred *ore tenus* in this Court to the answer, defendant agreeing to treat the motion also as a demurrer.

The court denied the motion for judgment, taxed the plaintiffs with the costs of the motion, and they appealed.

Brooks, Sapp & Williams for plaintiffs.
King & Kimball for defendants.

WALKER, J., after stating the case: We are unable to decide the questions raised upon the argument and discussed in the briefs of counsel, for the reason that all the necessary parties to be affected by the judgment are not now before the Court. It will be observed that this is not the case of a devise of the land to the executors, as trustees, for the purpose of sale, but the will merely gives them a naked power of sale, and when this is the case 'Whatever is not given away to some person must descend.' The heir takes, not by the bounty of the testator, but by force of the law, even against the express declaration of the testator to the contrary. If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will, as if his name had been inserted in it as devisee. But in the meantime the land descends, and the estate is in the heir. The power is not the estate, but only an authority over it and a legal capacity to convey it. These are elementary maxims." *Ferebee v. Proctor,* 19 N. C., 439, 446; *Clifton v. Owens,* 170 N. C., 607, 617. The legal title, therefore, is in the heirs, subject to be divested upon a legal or proper execution of the power. This is not a case where in all things respecting the trust estate the trustees represent the *cestuis que trustent,* for the suit is not one to normally ad-

minister the trust, where the trustees have admittedly acted within the limits of their powers as conferred by the will. The very question involved is whether they have done so, the plaintiffs alleging that they have not acted within their authority, and defendants, on the contrary, averring that they have. When the question is whether the trustees have or have not exceeded their powers as defined in the instrument creating them, the beneficiaries of the trust are the ones vitally concerned in the proper decision of that question, as the ultimate decision may seriously affect their interests. If the trustees have exceeded the limit of their power, the *cestuis que trustent* would not be bound by their acts, and where the validity of such acts is attacked by the trustees themselves, and strangers to the trust are seeking to take advantage of what has been done upon the ground that the acts of the trustees are valid, it produces such a controversy as requires the presence of the beneficiaries to protect their own interests. It may be that the contract of the trustees is favorable to them, and, if so, they should have the opportunity in court to show it, so that it may stand, if valid, or it may be unfavorable, and injurious to their interests, in which event they should be heard in order to prevent the damage, if valid. It is apparent that the trustees do not occupy such a neutral position as to represent and act for them impartially. They may do so in fact, but the beneficiaries are not regarded in law as having proper and sufficient representation. A reference to some of the authorities confirms us in this view. "Trustees and *cestuis que trustent* are the owners of the whole interest in the trust estate; and, therefore, in suits in equity in relation to the estate by or against strangers both the trustees and *cestuis que trustent* must be parties representing that interest." Perry on Trusts (5 Ed.), sec. 873.

In a case substantially like this in principle, it being a suit by a trustee to remove a cloud from the title, the Court said: "It is presented as fundamental error that Mrs. Rice and her children were necessary parties to the suit by the trustee. It is a general and well established rule that in suits by or against a trustee for the recovery or defense of property the beneficiaries are necessary parties. There are exceptions to this rule, as where the number of the beneficiaries would render it inconvenient to make them parties and where it may be presumed that it was the intention to invest the trustee with power to prosecute or defend suits in his own name. This case does not come within the exceptions. The deed does not clothe the trustee with authority to prosecute or defend suits for the property, and the circumstances do not raise a presumption that it was intended to give him such power. This was a proceeding in equity to cancel certain transfers and enforce a trust, and a chancery court will not entertain

a bill unless all the parties in interest are before it. This is a wise and salutary rule, for, without it, the trustee might by collusion, through the medium of a court, deprive the beneficiaries of the trust of valuable rights, when, if notified of the suit, they might protect themselves." *Monday v. Vance,* 32 S. W., 559, citing authorities. "The general rule in cases of this sort is that in suits respecting the trust property, brought either by or against the trustees, the *cestuis que trustent,* or beneficiaries, as well as the trustees also, are necessary parties. And when the suit is by or against the *cestuis que trustent,* or beneficiaries, the trustees are also necessary parties; the trustees have the legal interest, and, therefore, they are necessary parties; the *cestuis que trustent,* or beneficiaries, have the equitable and ultimate interest, to be affected by the decree, and, therefore, they are necessary parties." Story on Equity, sec. 207. *Hall v. Harris,* 11 Texas, 300, 303. "The *cestui que trust* should be a party to a bill to set aside a contract made with his trustees. 22 Enc. of Pl. and Pr., p. 180, citing *Tavenner v. Barrett,* 21 W. Va., 656. See, also, *Burney v. Spear,* 17 Ga., 223; *Dunn v. Seymour,* 11 N. J. Eq., 220; *Goddard v. Prentice,* 17 Conn., 546, 555; *Turner v. Hind,* 12 Sim., 414; *Blake v. Allman,* 58 N. C., 407.

It is generally said that a trustee represents the *cestuis que trustent* to such an extent that he may sue in his own name touching matters which affect the proper execution of the trust, and this may be taken as true for most purposes. Our statute declares that "a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." Revisal, sec. 404. This section applies where the trustee is in a position, and wholly free, to represent the *cestui que trust* impartially and without having any interest of his own to subserve or protect; but we do not deem it applicable, so as to exclude the beneficiary as a necessary party where the trustee has exceeded his powers or the question is whether he has done so and the interests of the beneficiary may be seriously affected by its decision. *Sampson v. Mitchell,* 125 Mo., 217, 228. Under the section the trustee represents the *cestui que trust* when he is acting within the limit of his power or according to the terms of the instrument conferring the power and in furtherance of the interests of the *cestui que trust*, but not where there is, or may be, a question between the trustee and him and a third party as to the proper exercise of the power, as is the case here. 22 Enc. of Pl. and Pr., p. 168; *Sampson v. Mitchell, supra.* In the case last cited the Court, after stating that, "In cases of trust the general rule, in equity, is that the beneficiaries in the trust are necessary parties

(Story's Eq. Pl., sec. 207)," says: "Our statute declares that a trustee of an express trust may sue in his own name without joining the person for whose benefit the suit is prosecuted. This is but a legislative assertion of an established exception to the general rule before mentioned, and it has no application to a case like the one in hand, where the object of the suit is to give the trustee powers not conferred upon him by the instrument creating the trust." Here the defendants are insisting that the executors in making the contract for a sale of the land were exercising a power given by the will, while the beneficiaries, as stated in the complaint, deny that this is true, as also do the executors. *Moseley v. Hankinson,* 22 S. C., at p. 332.

If the contract between the executors and the defendants was authorized by the terms of the will creating the power, and is beneficial to the *cestuis que trustent,* they have the right to enforce it; and if not so, and it is injurious to them, they should have the right to be heard in protection of their interests, and, besides, in the latter case, the trustee could not be said to be their proper representative.

In *R. R. v. Bowler, infra,* it is said: "If the *cestui que trust* bring a suit against a third person, to whom the trustee has assigned the property in violation of the trust, the trustee should be made a party, for he is ultimately bound for the due fulfillment of the trust. (Story's Eq. Pl., sec. 209; *Bust v. Dennet,* 2 Brown's Ch., 225; *Land v. Blanchard,* 4 Hare, 28.) Notwithstanding the assignment to Ernst and Keith, Bowler continued to occupy the relations of trustee for appellant and in an action by the beneficiary to recover the trust property his representative should be made a party. But if it be doubtful, in cases in which no settlement of accounts is necessary, whether the representative of the deceased trustee is an indispensable party, there can be no doubt but that Bowler's heirs are necessary parties to this action. This suit is in respect to the property held, in trust for them, by Ernst and Keith. It is not prosecuted merely to establish a debt, or create a charge which the trustees will be compelled to satisfy out of the trust property, but it involves an absolute recovery of the property itself. In such a case the beneficiaries, who have the equitable and ultimate interest to be affected, as well as the trustees, are necessary parties. (Story's Equity Pl., sec. 207; Mitford's Equity Pl., by Jeremy, 176-179.)" *C. and L. Railroad Co. v. Bowler's Heirs,* 72 Ky. (9 Bush), 468, 484. "*Cestuis que trustent* are not, it seems, necessary parties to suits against trustees to compel the specific performance of contracts except where some question arises touching the power of the trustees to execute the contract or their authority to act under it. But where a bill in equity involves the title to the *cestuis que trustent* to the prop-

erty in dispute, or where they are interested not only in the fund or estate respecting which the question at issue has arisen, but also in that question itself, they are necessary parties."

Here the executors have a naked power to sell and convey, the legal title being in the heirs or devisees, which cannot be divested except by a valid execution of the power.

It is contended by the plaintiffs, and they allege, that the beneficiaries join in this contention, that the contract with the defendants is invalid as not in its nature being within the scope of the power given by the will, there being no limit as to the time of its performance, and, further, that by its terms the executors have divested themselves of the power to sell the property advantageously, and have in other respects abdicated their power and office as trustees. These questions affect the merits, and are postponed for consideration until all necessary parties are brought in, so that they can be concluded by the final decree.

Whether the instrument executed by Josephine Barbee and others to the executors conferred any greater power than the latter already had under the will, or whether by it Josephine Barbee and others merely waived the right to buy the lots, under section 7 of the will, and the right to be heard as to the management of the estate, under section 8, we need not decide, as the legal effect of the instrument must be determined with the other questions involved after they are made parties. It would, therefore, seem, in any view of the case, that those interested in the property under the will should be made parties, and especially is this course essential where the suit is one to clear the title and it is important that all interests be foreclosed by the decree.

The case is remanded that further proceedings be had therein not inconsistent with this opinion. The costs of this Court will be divided between the parties, the plaintiffs paying one-half and the defendants the other half.

Remanded.

J. W. BAILEY v. H. F. LONG.

(Filed 13 December, 1916.)

1. Pleadings—Interpretation—Demurrer.

The allegations of a complaint tending to show a cause of action must be taken as true upon demurrer.

2. Abatement—Death—Damages—Husband and Wife—Hospitals—Negligence—Mental Anguish.

In an action for damages brought by the husband against one operating a hospital, for the alleged wrongful death of his wife, the complaint alleged that owing to the negligent defective construction of the room in which the wife was confined as a patient the rain beat in and water stood, at times, for hours on the floor, one inch deep, and in consequence his wife caught a severe cold, which developed into pneumonia, from which she died, and that the defendant had contracted with the plaintiff to furnish his wife a suitable room, care and medical attention. *Held*, sufficient to sustain a recovery by the husband for the loss of services of his wife during her last sickness to the time of her death, for the loss of the society of his wife occasioned by such sickness, and for the mental anguish he may have sustained on seeing her suffer and die, caused by the defendant's wrong; and that an action for damages of this character does not abate at the death of his wife.

CIVIL ACTION heard at August Term, 1916, of BURKE, upon demurrer to complaint, *Webb, J.*, presiding.

The court sustained the demurrer. Plaintiff appealed.

Avery & Ervin, M. H. Yount, D. L. Russell for plaintiff.
S. J. Ervin, W. D. Turner, Spainhour & Mull for defendant.

BROWN, J. The cause of action as stated in the complaint, upon demurrer, must, as to the facts alleged, be taken to be true. The facts alleged are substantially these: Plaintiff's wife was suffering with a broken hip and taken to defendant's hospital at Statesville by the plaintiff for treatment. "The defendant not only undertook and contracted to attend and care for her in a proper and skillful manner as a physician and surgeon, but also undertook and contracted to provide for her a suitable and safe room in his said hospital, and to give her proper nursing and attention while an inmate of his hospital."

The complaint further alleges that by reason of the defective condition and construction of defendant's hospital, and especially on account of the defective condition and construction of the windows of the room where plaintiff's wife was placed by defendant, the rains beat into the room to such an extent that the floor of the room was covered with

water to a depth of more than one inch on several occasions while plaintiff's wife was a patient, and was allowed to remain so for the space of several hours, thus rendering the said room cold and damp, by reason of which the health of plaintiff's wife was greatly impaired, and on account of which she contracted a severe cold, which grew gradually worse, on account of the failure of the defendant to properly and skillfully treat, provide, and care for plaintiff's wife, which cold developed into pneumonia, from which she died on or about 15 November, 1913. That the unhealthy and improper condition of said room in which the sick wife of the plaintiff was placed by the defendant was due to the gross carelessness and negligent acts of the defendant, and his failure to have said room properly constructed and kept in repair for the purposes for which it was intended, that is to say, for the reception of sick patients while under treatment by said defendant in said hospital, and by reason of the careless and negligent acts and failure in duty of the defendant as hereinbefore set out, this plaintiff has been greatly and seriously damaged and suffered great pain and mental anguish, as follows:

(*a*) To his feelings and sympathies in witnessing the agony and suffering of his said wife while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom.

(*b*) In the loss to plaintiff of the society of his said wife, and the comfort, pleasure, and happiness which he was accustomed to enjoy in the marital relations existing between them.

(*c*) In the loss to plaintiff of the services of his said wife, who was in every way industrious, saving, and helpful to him in the management and conduct of his household affairs; the plaintiff by her death being left without any assistance and with no one to look after or care for the conduct of his domestic affairs.

The ground of the demurrer is that no cause of action is stated in the complaint that survived the death of the wife.

At common law the right of action for an injury to the person abated upon the death of the person injured, under the maxim, *Actio personalis moritur cum persona.* . But causes of action accrued to those who stood to the deceased in the relation of master, parent, or husband, for recovery of damages for loss of service or society.

In *Baker v. Bolton,* 1 Camp., 493, *Lord Ellenbrough* held that the husband could recover for the loss of the wife's society, and the distress of mind the plaintiff had suffered on her account, from the time of the injury until the moment of her dissolution; "and," says Mr. Tiffany, "this distinction has been followed." Death by Wrongful Act, sec. 16, and notes.

It was further held in England in 1875 that when a passenger on a train was injured and, after an interval, died in consequence, his personal representative might, in an action for breach of contract of safe carriage, recover the damages to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. It was subsequently held in *Leggatt v. Ry.* (1 Q. B. D., 599), by the Queens Bench, that a prior recovery as administrator under Lord Campbell's Act was no bar to an action by such administrator to recover damages to intestate's personal estate by his inability to attend to his business from the time of the injury until death, as plaintiff sued in a different right in each case.

The Supreme Court of Michigan, 3 Mich., 180, held that when death does not at once ensue a person entitled to the services of the one injured may recover for the loss accruing between the injury and the death, and that such action is not barred by death.

It was again held in Kentucky, where a minor son was injured by a street car and subsequently died from the injury, that the father could recover all expenses incurred for the same care in nursing, etc., and for the loss of service from the date of injury to death. In addition, we think plaintiff can recover damages for the mental suffering and injury to his feelings in witnessing the agony and suffering of his said wife while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom.

We see no reason why, if the husband can recover damages from a telegraph company for mental anguish for delay in delivering a telegram informing him of his wife's illness, he should not recover for the mental anguish occasioned by witnessing her suffering and death against the alleged author of such suffering and death.

The demurrer is overruled, and the defendant will be allowed to answer.

Reversed.

C. D. TAYLOR, IN BEHALF OF HIMSELF AND OTHER CREDITORS OF A. E. HAYES, v. A. E. HAYES AND WIFE AND F. M. AND F. W. RICHARDS.

(Filed 13 December, 1916.)

1. Reference—Findings—Evidence—Appeal and Error.

Findings of fact of a referee, supported by legal evidence and affirmed by the Superior Court judge, are not reviewable on appeal.

2. Appeal and Error—Insufficient Assignments—Court's Discretion.

The Supreme Court on appeal may consider, in its own discretion, assignments of error not set out in sufficient conformity with Rules of Court, 19 (2) and 27.

3. Appeal and Error—Reference—Attachment—Nonresidents—Evidence.

When levies in attachment are sought to be set aside on the ground that the debtor was not a nonresident of this State, as alleged, the findings of the referee that he was, at the time, a nonresident, having changed his place of residence to another State, supported by legal evidence and affirmed by the Superior Court, will not be disturbed on appeal.

4. Attachments—Judgments—Liens—Homestead.

Where there are levies in attachment against the land of a debtor who had, prior to the time, become a nonresident of this State, and there has been no lien by judgment thereon entitling him to his homestead, the property may be subjected to the payment of his debts.

5. Reference—Contradictory Findings.

The findings of the referee in this suit to set a deed aside as fraudulent against the grantor's creditors, with his conclusions in plaintiff's favor, are held not to be contradictory, or inconsistent with the matters alleged in the complaint.

CIVIL ACTION heard at July Term, 1916, of AVERY, by *Lane, J.*, upon report of referee and exceptions filed thereto by defendants. All of the exceptions were overruled and the report confirmed. Defendants excepted and, from judgment rendered, appealed, assigning error as follows:

1. That his Honor committed error in overruling defendants' exception No. 1.

2. That his Honor committed error in overruling defendants' exception No. 2.

3. That his Honor committed error in overruling defendants' exception No. 3.

4. That his Honor committed error in overruling defendants' exception No. 4.

5. That his Honor committed error in overruling defendants' exception No. 5.

6. That his Honor committed error in not sustaining defendants' motion to set aside and vacate the order of attachment heretofore issued in this cause on the ground that the defendant A. E. Hayes was not at the time of levying of the attachment, is not now, a nonresident of the State, but that he was then, is now, a resident of said State, and especially when it appears from the record made at the hearing before the referee that the said defendant A. E. Hayes, in his own proper person and through his counsel, moved to set aside and vacate said order of attachment on the ground above set forth, on which motion the referee made no ruling.

7. The prayer for relief in the complaint of C. D. Taylor being in the alternative, the referee concludes as a matter of law that the two

deeds executed by the defendants Hayes and wife to F. W. Richards are fraudulent and void, and at the same time concludes as a matter of law that F. W. Richards is a trustee for F. M. Richards, and his Honor committed error in overruling defendants' exception to the referee's tenth conclusion of law on the ground that such conclusion is in plain terms inconsistent with the relief prayed, and contradictory.

Lowe & Lowe for plaintiffs.
T. L. Lowe and J. W. Ragland for defendants.

BROWN, J. This action, in the nature of a creditors' bill, is brought by the creditors of A. E. Hayes to subject certain lots of land in the town of Banner Elk to the payment of certain debts of said Hayes. The complaint alleges that the lots were conveyed by said Hayes and wife to F. W. Richards for the use and benefit and in trust for F. M. Richards, the brother of the grantee, and that said deeds were made for the purpose of hindering, delaying, and defrauding the creditors of the grantor Hayes.

The case was referred to a referee, who heard the cause and reported his findings of fact and conclusions of law. After due consideration the court, *Lane, J.*, upon hearing the exceptions of defendants, adopted the findings of fact and conclusions of law and rendered judgment condemning the lots to be sold for the payment of the debts according to priority.

It is contended in plaintiff's brief that the first five assignments of error are insufficient and do not comply with Rule 19, subdivision 2, and Rule 27 of this Court. This point seems to be well taken. *Thompson v. R. R.*, 147 N. C., 412; *Lee v. Baird*, 146 N. C., 362.

However, in our discretion, we have looked into those assignments and are of opinion that they are without merit and must be overruled. They relate to findings of fact made by the referee and adopted by the Court, and as there is sufficient evidence to support such findings, they are binding on us.

The sixth assignment of error relates to the refusal of the court to vacate the attachment levied upon the property. The referee finds that when the attachment was levied the debtor Hayes had left this State with no intention to return, that he was not a resident of this State, but had removed to the State of Texas and thence to the State of Washington. There is abundant evidence to support such findings as made by the referee and adopted by the judge. As no homestead had been allotted to the debtor Hayes at the time of the levy of the attachment and no judgments had been rendered and docketed against him constituting liens upon the land, he was not entitled to homestead,

and being then a nonresident, the property could be subjected to the payment of his debts.

The remaining assignment of error, the seventh, is likewise without credit.

The findings of fact are that the lots were conveyed to F. W. Richards for the benefit of and in trust for F. M. Richards; that the conveyances were made with intent and purpose to hinder, delay, and defraud the creditors of Hayes. We see nothing inconsistent in the referee's findings, and they appear to be supported by sufficient evidence. The conclusions of law naturally follow from the findings of fact.

The judgment of the Superior Court is

Affirmed.

THE PEOPLES BANK v. MAGGIE A. LOVEN, ADMINISTRATRIX.

(Filed 13 December, 1916.)

1. Usury—Pleas—Counterclaim—Cross Action.

A plea of usury by a surety in an action against him on the note, by way of counterclaim, is in effect a cross action.

2. Same—Statutes—Principal and Surety—Actions—Counterclaim.

Revisal, sec. 1951, providing that in any action brought to recover upon a note, etc., it shall be lawful for the one who has paid usury thereon to plead the penalty as a counterclaim, recover twice the amount of the interest paid, and the forfeiture of the entire interest, should be construed in the light of the history of legislation on the subject, to ascertain the legislative intent; and when so construed it is *Held*, that when the principal debtor has become bankrupt, after having paid interest at an usurious rate, and the surety is sued on the note, the defendant may set up such payment by way of counterclaim. *S. v. Johnson*, 170 N. C., 169, cited and applied.

3. Same—Subrogation.

Where the principal of a note has paid usurious interest to the payee thereof, and the payee sues only the surety, the surety is entitled to all of the defenses of the principal debtor, and he may set up the usury paid by his principal as a counterclaim; for otherwise the payee could collect the usurious interest, and nevertheless recover the whole amount of the debt by suit against the surety alone.

4. Statutes—Interpretation—Existing Law—Presumptions—Reasonable Construction.

In construing a statute, the General Assembly is presumed to have acted advisedly and with knowledge of the meaning of the language of existing law, and it will never be assumed, if any other conclusion is permissible, that the statute is meaningless in giving a right theretofore conferred by an existing statute still in force.

BANK *v.* LOVEN.

CIVIL ACTION tried before *Shaw, J.*, at April Term, 1916, of AVERY.

This is an action instituted by the plaintiff against the defendant, the administratrix of J. G. Loven, to recover the amount of certain notes executed by J. L. Banner, as principal and indorsed by J. G. Loven. J. L. Banner, who had been discharged in bankruptcy and who was not a party to the action, had been charged by the plaintiff and had paid interest at the rate of 12 per cent per annum on account of the loan evidenced by the notes sued on, and during the course of the dealings paid to the plaintiff on said loan the sum of $867.10 usurious interest.

The defendant prayed a forfeiture under the statute of the entire interest on the note, that the sum paid by J. L. Banner as interest be applied as a credit on the indebtedness, and a penalty in double the amount of the usurious interest paid, to be applied in discharge of the indebtedness, and the referee to whom the cause was referred and the court on exception to the report of the referee, sustained the contentions of the defendant, and, granting her prayer, discharged her from liability on the notes sued on, the payments made on the notes and the penalties allowed being more than sufficient to discharge the indebtedness.

Judgment was entered accordingly, and the plaintiff excepted and appealed.

L. D. Lowe for plaintiff.
S. J. Ervin for defendant.

ALLEN, J. This appeal involves the construction of the first proviso in section 1951 of the Revisal, which reads as follows: "That in ANY action brought in ANY court of competent jurisdiction to *recover upon any such note or other evidence of debt*, it shall be lawful FOR THE PARTY AGAINST WHOM THE ACTION IS BROUGHT *to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid* as aforesaid, *and also the forfeiture of the entire interest.*" (Emphasis ours.)

The question arising under the proviso is whether the surety, who has paid nothing to the payee in a note, can, when sued on the note, avail himself, by way of defense or counterclaim, of the penalty of twice the amount of usurious interest paid by the principal in the note.

Considering the proviso alone, the first impression would naturally be that as a surety has paid nothing, he has no right of action against the payee, and as a counterclaim is in effect a cross action (*Whedbee v. Leggett*, 92 N. C., 469), and as the right given in the proviso to the party against whom the claim is brought is by way of counterclaim,

that it was not intended to embrace the surety; but we cannot deal with the proviso by itself, but must place it in its proper setting, knowing that frequently the historical development of legislation indicates clearly the public policy to be subserved, and leads to a correct understanding of the legislative mind and intent.

"We should also construe the entire statute, and keep in mind constantly that the general legislative intent is a key to its meaning, and a statute should be considered also as an entirety with reference to the whole system of which it is a part." *Roberts v. Mfg. Co.,* 169 N. C., 34.

Let us then see what has been the public policy in reference to usury as shown by previous legislation.

"Anciently, in England, many doubts were entertained as to the propriety of taking a price or reward for the use of money, *in foro conscientiæ,* and at one time it was held to be a misdemeanor and indictable as such, on the idea that it was an iniquity and criminal. Afterwards the taking of interest was impliedly authorized by 37 Hen. VIII., which fixed on 10 per cent as being the ultimate limit to which the lender might go, and by different enactments the rate was changed from time to time, until at last the legal rate was fixed at 5 per cent as the ultimatum, at which it has ever since stood and now stands, with a statutory declaration of invalidity of every contract or security tainted with usury and a *qui tam* action to any one who would sue for the same." *Bank v. Lutterloh,* 81 N. C., 146.

In the twelfth year of the reign of Queen Anne (1714) an act was adopted by Parliament on which the first act in North Carolina relating to usury was modeled (ch. 28, Laws 1741), the principal differences between the two being that the North Carolina statute increased the rate of interest in the English statute from 5 to 6 per cent, and decreased the penalty from treble to double the amount of money, etc., paid. See 39 Cyc., 890.

This act of 1741 provided that when a greater rate of interest than 6 per cent was charged, the contract should be utterly void, and that the party charging such rate should forfeit double the value of moneys, wares, merchandise, and other things so lent, bargained, exchanged, or shifted, *"one-half of which should belong to the State and the other half to him or them that will sue for the same by action of debt."* (Italics ours.)

This was reënacted in chapter 117 of the Revised Statutes and by chapter 114 of the Revised Code of 1856, and continued in force until chapter 24 of the Laws of 1865 and 1866.

This last act repeals chapter 114 of the Revised Code and enacts that 6 per cent shall be the legal rate of interest, with the right to stipulate on a loan of money for 8 per cent, and provides further that the con-

tract in any event shall be valid as to the principal sum, and that the only forfeiture shall be the interest on the plea of the borrower.

This last act was not changed until chapter 84 of the Laws of 1874 and 1875 was enacted. This act provided for a legal rate of interest at 6 per cent, and declared that when a greater rate was charged that the contract was void and that the lender would be guilty of a misdemeanor. It also provided for a forfeiture of double the value of the goods, money, etc., exchanged or lent *to any one who should sue for the same.*

This act continued in force until chapter 91 of the Laws of 1876 and 1877 was enacted. This last act recites that it is enacted because of a decision of the Supreme Court of North Carolina based on a decision of the Supreme Court of the United States deciding that the penalties imposed by the usury law then existing could not be enforced against National banks. This last act substantially readopted the law of 1865 and 1866, with a forfeiture of the interest and a remedy given to the party who had paid the usurious interest or his legal representative to recover back double the amount of the usury paid in an action of debt.

This last statute was reënacted in the Code of 1883 and is to be found in sections 3835 and 3836, and as amended by chapter 69 of the Laws of 1895, is now section 1951 of the Revisal, which, as material to this inquiry, reads as follows: "The taking, receiving, reserving, or charging a greater rate of interest than 6 per cent per annum, whether before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid may recover back twice the amount of interest paid, in an action in the nature of an action for debt: *Provided*, that in any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it shall be lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest."

It is thus seen that in England the taking of illegal interest was condemned, that the practice was regarded as hurtful to the State, and that the penalty was not given alone to the borrower, but to any one who would sue for the same, for the reason that as the borrower was under the control and domination of the lender, he frequently would not sue, and if the policy of the Government to prevent usury was to be maintained it was necessary that the right to sue should be by the popular or *qui tam* action.

It also appears that this policy was adopted in this State in colonial days, that it was retained when North Carolina became a State, and that it was continued in force until 1866, a period of 125 years.

The act of 1865-66 marks a notable change in this policy growing out of the conditions existent just after the War Between the States, when there was little or no money in the State to be had at any price, and consequently the penalty was abolished, and the only forfeiture was of the interest.

In 1874-5 there was a return to the policy existing prior to 1866; the penalty of double the amount of money, etc., was restored, and was given to any one who would sue for the same.

Again there was a change by the act of 1876-7 which retained the penalty, but restricted the right of action to the party paying the usurious interest; but this change was not brought about because of any doubt as to the wisdom of the policy that had theretofore prevailed, but, as recited in the act, on account of a decision of the Supreme Court of the United States holding that the penalties could not be enforced against National banks.

It was under these conditions that the act of 1895 was passed, and if we follow the plain language of the statute it but confers on *all* who are sued on the usurious contract, principal and surety, the right of action that existed for more than a hundred years in favor of any one who would sue.

The statute says *"in any action"* brought *"in any court"* to recover on the usurious contract *"the party against whom the action is brought"* may plead *"as a counterclaim the penalty above provided for, to wit, double the amount of interest paid."*

The defendant, a surety, is one "against" whom the action is brought, and is within the language of the statute, and, when the policy of the State is considered, within its spirit, and the rule is, "If a statute plainly expresses the legislative purpose and meaning on its face, it must be enforced exactly as it stands, and without any regard whatever to the result which will flow from it; and there is then said to be no reason for a construction of it." *S. v. Johnson,* 170 N. C., 691.

This construction also conforms to the general principle that the surety is entitled to all the defenses of the principal debtor, and it is a necessary construction if the penalty is to be enforced, as otherwise the lender may collect usurious interest from the principal and then sue the surety alone and recover on the usurious contract the whole of the principal sum due.

Again, the General Assembly is presumed to have acted advisedly and with a knowledge of the meaning of language and of existing law (*S. v. Lee,* 164 N. C., 533), and it will never be assumed, if any other

conclusion is permissible, that it has done a vain and foolish thing; and if we were to adopt the construction contended for by the plaintiff and hold that the amendment of 1895 only confers the right on the party who has paid the usurious interest to plead the penalty, it gives no new right and is meaningless, because the penalty could be pleaded by him as a defense and a *counterclaim* before the act of 1895. *Cobb v. Morgan* 83 N. C., 213.

The case of *Meares v. Butler,* 123 N. C., 206, throws no light on the construction of the statute, because, although decided after the amendment of 1895, it makes no reference to the change in the law, probably because the contract then before the Court was executed prior to the amendment.

We are therefore of opinion that his Honor gave a proper construction to the statute.

Affirmed.

M. E. BAILEY v. MANLY T. BAILEY.

(Filed 13 December, 1916.)

1. Mortgages—Husband and Wife—Surplus—Power of Sale—Entireties—Interests.

A mortgage of the husband's land, joined in by the wife, with power of sale and direction that the surplus, after paying the mortgage debt, be paid to "the parties of the first part, their executors and administrators," does not, by this direction, vest the surplus, after foreclosure, regarded as lands, in the husband and wife in entireties, so that she will take the whole by survivorship, but should be construed as meaning that the surplus should be paid to them as their several interests may appear.

2. Mortgages—Surplus—Equity—Deeds and Conveyances—Support of Grantor—Charge Upon Lands—Husband and Wife—Dower—Descent and Distribution.

Where before marriage a wife has conveyed her lands to her husband in consideration of her support for life, and thereafter she joins in his mortgage of the lands, which after his death has been foreclosed, with surplus over the mortgage debt and costs of sale, etc., in the hands of the trustee: *Held*, the surplus is regarded as realty descending to the heirs at law of the husband before the execution of the power of sale, subject to the widow's dower, and, in addition, charged with her support during her life.

CIVIL ACTION tried before *Shaw, J.,* at September Term, 1916, of MCDOWELL.

This is an action to determine the rights of the parties in a certain fund, derived from a sale of land under a deed of trust in excess of

the expenses of sale and the debt secured, heard on the following agreed statement of facts:

1. That the plaintiff is the widow of J. Washington Bailey.

2. That the defendants are the heirs at law and distributees of the said J. W. Bailey, deceased.

3. That on 25 September, 1888, Mrs. Elizabeth Ervin, now Mrs. M. E. Bailey, the plaintiff, executed and delivered to J. Washington Bailey a deed conveying a certain tract of land, the material parts of which are as follows:

"This deed, made this 25th day of September, 1888, by Mrs. Elizabeth Ervin of McDowell County and State of North Carolina, of the first part, to J. Washington Bailey of McDowell County and State of North Carolina, of the second part:

"Witnesseth, That said Mrs. Elizabeth Ervin, in consideration of $791 and my maintenance during my natural life to me paid by J. Washington Bailey, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does bargain, sell, and convey to said J. Washington Bailey and his heirs and assigns, certain tracts or parcels of land in Finley's Township, McDowell County, State of North Carolina, adjoining the lands of J. S. Brown, J. L. Wilson, and others, bounded as follows, viz.: [Here follows description.]

"Second tract. (Not involved.)

"Third tract. (Not involved.)

"Fourth tract. (Not involved.)

"To have and to hold the aforesaid tracts or parcels of land and all privileges and appurtenances thereto belonging to the said J. Washington Bailey, and his heirs and assigns."

(Signed and sealed.)

Probate: Regular.

Registered: 28 September, 1888.

4. That on 4 October, 1888, the said J. Washington Bailey and the said Mrs. Elizabeth Ervin were married and lived together as man and wife until the death of the said J. Washington Bailey in the month of June, 1915, to which union no children were born.

5. That on 1 March, 1912, the said J. W. Bailey and his wife, M. E. Bailey, the plaintiff, executed and delivered to D. E. Hudgins, trustee. a certain deed of trust, with power of sale, conveying the said Morrel tract of land, which was conveyed by the deed set out in paragraph 3 hereof, as security for a debt due W. A. Conley, which deed of trust made the following disposition of proceeds in the event of sale:

"The money arising from such sale shall be applied, first, to the expenses of sale, including a commission to the trustee of 5 per cent;

secondly, to the amount due on the bond above mentioned, principal and interest up to day of sale, and, thirdly, the balance shall be paid to J. W. Bailey and wife, M. E. Bailey, parties of the first part, their executors and administrators."

6. That upon application of the *cestui que trust* in said deed of trust, D. E. Hudgins, trustee, advertised and sold said land on 21 February, 1916, and of the proceeds, after discharging the expense of sale, including commissions to the trustee and the amount due on the bond secured thereby, there remained in the hands of said trustee a surplus sum of $1,739.89.

7. That the plaintiff demanded of said trustee that said surplus be paid to her, and the defendants demanded payment to them, and the said trustee refused to pay to either, but stands ready to pay said surplus fund under the direction of the court.

It was agreed that upon the foregoing statement of facts his Honor should render judgment upon the following issues:

1. What are the rights of the parties in and to the surplus fund now in the hands of and held by D. E. Hudgins, trustee?

2. What are the dower rights of the plaintiff?

His Honor rendered judgment adjudging the plaintiffs to be the owners of one-half of said surplus and the administrator of J. W. Bailey to be the owner of the other half, and both parties appealed.

Pless & Winborne for plaintiff.
W. T. Morgan for defendants.

ALLEN, J. We were impressed by the argument of the learned counsel for the plaintiff, urging us to hold that the provision in the deed of trust directing the surplus of the proceeds of the sale of land to be paid to J. W. Bailey and wife, M. E. Bailey, their executors and administrators, created an estate by the entireties, and that upon the death of J. W. Bailey the whole of the surplus belonged to his wife by right of survivorship; but this question is foreclosed against the plaintiff by the decision in *Harrington v. Rawls,* 136 N. C., 66.

In the *Harrington case* the land belonged to the wife, Mrs. Briley, and she and her husband, J. A. Briley, conveyed the same by mortgage to secure a debt in which there was a power of sale, with direction in the mortgage that in the event of a sale, and after the payment of the debt, the mortgagee should "pay over the surplus, if any, to J. A. Briley and wife, Elsie." The land was sold after the death of Mrs. Briley and there was a net surplus arising from the sale of $1,920.65, and the question was raised as to who was entitled to the surplus. The Court, dealing with this question, said: "Had the land been sold prior

to the wife's death, the surplus would have passed to her administrator as personalty. But being sold after the death of the wife, it had previously to such sale descended to her heirs charged with the mortgage and the husband's tenancy by the curtesy, and the surplus must be treated as realty. The provision in the mortgage, 'pay over the surplus, if any, to J. A. Briley and wife, Elsie,' means only, as in other joint mortgages, 'as their several interests shall appear.' It is not a conveyance of any interest by one mortgagor to the other."

This case is also authoritative against the ruling of his Honor dividing the surplus equally between the plaintiffs and the defendants, as it construes the direction to pay to the husband and wife as meaning "as their interest may appear," and the rights of the parties in the surplus must therefore be determined according to their rights in the land at the time of the execution of the deed of trust.

At the time the deed of trust was executed the title to the land was in J. W. Bailey, but he held it under a deed executed to him by the plaintiff nine days before their marriage, in which the consideration is stated to be "$791 and my maintenance during my natural life."

The meaning and effect of a provision for maintenance, frequently found in deeds and wills, have received different constructions, depending on the placing of the provision and upon other terms of the instrument in which it appears.

In some of the cases it is dealt with as a personal covenant (*Taylor v. Lanier,* 7 N. C., 98; *Ricks v. Pope,* 129 N. C., 55; *Perdue v. Perdue,* 124 N. C., 163; *Lumber Co. v. Lumber Co.,* 153 N. C., 50), in others as constituting a charge on the rents and profits from the lands (*Gray v. West,* 93 N. C., 442; *Wall v. Wall,* 126 N. C., 408), and in others as a charge on the land itself (*Laxton v. Tilly,* 66 N. C., 327; *Helms v. Helms,* 135 N. C., 171).

In the *Lanier case,* which is typical of the first class, the provision for maintenance was not named as a part of the consideration for the deed, but was an independent stipulation and agreement.

In *Gray v. West,* which belongs to the second class, the provision was that "Arey Gray is to have her support out of the land," and in *Wall v. Wall* there was a conveyance of land with a reservation of the care and support of the daughter of the grantor.

The case of *Laxton v. Tilly* is in all material respects like the one before us. In that case it is stated in the deed that it is made "for and in consideration of the sum of $200 and the faithful maintenance of the said Thomas Laxton and wife, Polly Laxton," and the Court said: "The maintenance of the plaintiff is not a charge upon the personalty of the estate of Levi Laxton, deceased, in the hands of the defendant, his administrator, but it is a charge upon the land which

Thomas Laxton sold to Levi Laxton with the stipulation that Levi should support the plaintiff."

This case and other authorities are reviewed in the case of *Helms v. Helms*, and while there was additional language in the deed considered in that case, it was held, independent of this, that a provision for maintenance in a conveyance of land is a charge upon the land, the Court saying: "The uncertainty into which title would be thrown is a strong reason for construing provisions for support as covenants and not conditions is recognized by the courts. To treat them as mere personal covenants, having no security for their performance save the personal liability of the grantor, would often lead to injustice, leaving persons who had made provisions for support in old age or sickness without adequate protection or relief. The courts have almost uniformly treated the claim for support and maintenance as a charge upon the land, which will follow it into the hands of purchasers. In this way the substantial rights of both grantor and grantee are preserved. 'The grantee by accepting the deed and entering into possession under it becomes bound by the agreement providing for the support of the grantor, and the provision for support thus becomes equivalent to a life annuity.'"

Of course, in this case the purchaser at the sale under the deed of trust takes the title free from the charge, because the plaintiff executed the deed of trust; but the charge would exist as to the surplus not needed for the payment of the debt secured.

We are therefore of opinion that the provision for maintenance in the deed executed by the plaintiff to J. W. Bailey was a charge upon the land conveyed in the deed, and that at the time the deed of trust was executed Bailey was the owner in fee, subject to the charge, and that after a sale the charge was transferred from the land to the surplus.

If so, and if the surplus is realty, as was held in the case of *Harrington v. Rawls, supra*, the plaintiff is entitled to dower in the surplus, and, in addition, can charge the surplus with her support during her life, to be paid out of the income or the principal sum.

The costs will be divided between the plaintiff and the defendants.

Reversed.

JOEL INGRAM ET ALS. v. W. E. JOHNSON ET ALS., BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY.

(Filed 13 December, 1916.)

Elections—Suffrage—Electors—Special Tax—Constitutional Law.

Where the validity of a levy for a special school tax depends upon whether certain persons who had voted in favor thereof had paid their taxes for the previous year according to the requirements of Article VI, secs. 1 and 4, and Article V, sec. 1, of the Constitution, it is *Held*, that the constitutional requirements must be met in order that they may exercise the privilege of voting, though they are permitted to wait until May 1st to pay them, if they so choose.

CIVIL ACTION heard upon injunction, November Term, 1915, of BUNCOMBE, before *Long, J.* The action is brought to restrain defendants from levying special school tax, upon the ground that the election, held 21 April, 1914, was invalid.

The court finds these facts: "That the seven voters, above referred to in the agreement of counsel, voted in favor of the tax and were at the time within the poll-tax age and liable for poll tax, and had not paid their taxes for the year 1912, that is to say, following it, on 29 April, 1912, which was payable according to Article VI, sec. 4, of the Constitution, on or before 1 March, 1913; that two of the voters, as above stated subject to poll tax, voted against said tax who were due for the poll tax of 1912, and also payable on or before 1 May, 1913."

The judge finds further that if the seven voters were not qualified to vote it is conceded that the election fails by a vote of 19 to 22, and thereupon renders the following judgment:

"Upon the foregoing findings of fact, and in view of the provision contained in the Constitution, Article VI, sec. 1 and sec. 4, and Article V, sec. 1, the court construes the words, 'Every person presenting himself for registration, etc., and before he shall be entitled to vote, he shall have paid, on or before the first day of May of the year in which he proposes to vote, his poll tax for the previous year,' as meaning what it says, that if he proposes to vote he must pay his poll tax for the previous year. If there is no election before the first of May he has the option to wait until the first day of May in which to pay his poll tax; but if he seeks the privilege of his sovereign right to vote before the first day of May, and he has not paid his poll tax for the previous year, as required by the Constitution, then I hold that he must pay his tax as a condition precedent before he votes. This must be the intention of the Constitution, otherwise the voter at an election held in the spring of the year will have some peculiar advantage, or

may evade tax and thus be on a different footing from the voter who votes in November. For this reason the court holds that the election failed and was void and that any levy of tax made under it is also void, and that the injunction heretofore ordered by Judge Webb is made permanent. It is further ordered that the costs be paid by the defendant, to be taxed by the clerk."

From the judgment rendered, defendant the board of commissioners appeal.

No counsel for plaintiffs.
J. W. Haynes for defendant.

BROWN, J. The interpretation of the Constitution of the State by the learned judge of the Superior Court is, in our opinion, correct and his reasoning conclusive. The judgment is

Affirmed.

BALL-THRASH COMPANY v. A. H. MCCORMACK ET AL.

(Filed 13 December, 1916.)

1. Arbitration and Award—Agreement—Award—Pleas in Bar.

Averment and proof of an agreement submitting controverted matters to arbitration, when an award is pleaded in bar of an action, is necessary in order to give the award of the arbitrators the binding effect between the parties required.

2. Same—Form of Award—Finality—Obscurity.

Where an oral (or written, if so required by law) agreement of arbitration has been sufficiently entered into between the parties it must be followed by a consideration of the matters submitted and an award of the arbitrators; and unless the articles of submission prescribe certain formalities, the arbitrators may express their conclusion in any form they choose, and their decision therein expressed is conclusive if its terms can be understood, and it is so expressed that the intention of the arbitrators can be clearly gathered therefrom, and not couched in conditional, obscure, or dubious form.

3. Same—Expert Opinion—Evidence—Trials.

In an action upon notes given for the balance of the purchase price for furnishing and installing a heating plant in defendant's residence, an award proposed to be introduced as a defense which purported upon its face to be only the advice of a supposed expert, who had given the arbitrators figures, based upon his estimate as to shortage of heat radiation and his opinion that certain pipes would have to be changed, not stating how and to what extent, and having no finality as to cost, amount to be deducted, or final direction, is properly excluded, as too uncertain for enforcement.

4. Appeal and Error—Trials—Instructions—Evidence—Prejudicial Error.

Exceptions to the admission or refusal to admit evidence upon the trial of a cause, or to the judge's charge, will not be sustained on appeal, and a reversal of the judgment ordered, when such do not affect the real merits of the controversy and no substantial prejudice will result to the appellant.

5. Instructions—Narration of Evidence—Statutes—Substantial Compliance.

As to whether the trial judge is compelled to read the stenographer's notes of the evidence, on request of a party, *quere;* but where a request therefor has not been made, it is a sufficient compliance with the statute, Revisal, sec. 535, for him to state the substance of the evidence in his charge.

6. Contracts—Compliance—Verdicts—Quantum Meruit—Appeal and Error.

In this action to recover upon a contract for furnishing and installing a heater in defendant's residence, the jury having found by the amount of their verdict as fixed by the contract price that plaintiff had performed his part thereof, it is *Held*, that a recovery upon a *quantum meruit*, while evidently considered, was excluded by the verdict, and *Steamboat Co. v. Transportation Co.*, 166 N. C., 582, and other like cases, were not applicable on appeal.

7. Instructions—Misrecitals—Appeal and Error—Objections and Exceptions.

Misrecitals of the evidence or contentions of the parties by the trial judge should be called to the attention of the court at the proper time; and when this has not been done, exceptions thereto will not be considered on appeal.

CIVIL ACTION tried before *Harding, J.,* and a jury, at Spring Term, 1916, of BUNCOMBE.

The plaintiff sued upon two promissory notes, each for $228, given for the balance due on a contract between the parties by which plaintiff agreed to furnish and install a heating plant in defendant's residence at Asheville, N. C. The court submitted issues to the jury, which, with the answers thereto, are as follows:

1. Are the defendants indebted to plaintiffs, as alleged in the complaint, and if so, in what amount? Answer: "$459, with interest on notes from maturity."

2. Are plaintiffs entitled to a laborer's, mechanic's, and material furnisher's lien on the property described in plaintiffs' complaint, as alleged therein? Answer: "Yes."

3. Are plaintiffs indebted to defendants, as alleged in the defendant's counterclaim, and if so, in what amount? Answer: "No."

The case was before this Court at Spring Term, 1913, on appeal by the plaintiff from a judgment of nonsuit, and a new trial was ordered because of error in granting the nonsuit (162 N. C., 471), the court having dismissed the action because plaintiffs were not the owners of

the notes when the action was commenced. We held that there was evidence of such ownership which must be taken as true, and remanded the case for another trial. On the last trial the defendant, among other defenses, relied upon an arbitration and award as binding upon the plaintiff, and contended that the award showed that plaintiff had not complied with their contract in furnishing and installing the heating plant according to specifications. The court excluded the award from the consideration of the jury, and defendant excepted. There were other exceptions which will be stated and considered hereafter, so far as they are material.

Judgment was entered upon the verdict, and the defendant appealed.

Lee & Ford for plaintiffs.

Marcus Erwin, James H. Merrimon, and Mark W. Brown for defendants.

WALKER, J., after stating the case: If it is conceded, for the sake of discussion, that there is sufficient evidence of a submission of this controversy to arbitration, we are of the opinion that the attempted award was invalid. The averment and proof of the making of an agreement of submission and its contents constitute necessarily the first step towards enforcing the award. The validity of the award is primarily and essentially dependent upon the agreement of the parties. Ordinarily this will be easily proved by a production of the paper, if it was written; but if no submission be produced, and there be no evidence of it, the mere fact of the existence of an instrument purporting to be an award, though ancient, will not be allowed to have any effect. The instrument will not be treated as having the force of an award. Morse on Arbitration and Award (1872), p. 601. But when there has been a proper submission, either in writing when required or orally when not necessary for it to be written, it must be followed by a consideration of the matters submitted and an award of the arbitrators. This instrument, or award, need not be in any particular form, unless the articles of submission prescribe that certain formalities shall be observed in the execution of it; but otherwise the arbitrators may express their conclusion, or the final result of their deliberations, in any form they choose, as no special formula is required and no technical characteristics are essential to its validity. Any language which states an actual decision is sufficient, provided the terms of that decision can be understood and are so expressed that they can be enforced. The decision, of course, must be final and intelligible, and not couched in any conditional, obscure, or dubious form. It is sufficient, though, if the intention of the arbitrators can fairly be gathered from the award. Watson on Arb. and Award,

p. 251 *et seq.;* 3 Cyc., 664. "The certainty of an award is one of its indispensable and essential properties; if lacking in this requisite it cannot be sustained. It must be complete and definite. It must leave open no loophole for future dispute and litigation. It should, as a general rule, leave nothing to be performed but the mere ministerial acts needed to carry it into effect. It should be certain as a judgment of court. The object of an arbitration is to prevent future dispute, and this object can hardly be said to be carried into effect when, in defining rights of the parties, terms are used which might require another lawsuit to fix their meaning." 2 Ruling Case Law, p. 384, sec. 30.

We are of the opinion that the paper-writing signed by G. L. Guischard and J. W. Grimes does not constitute a valid and binding award, and the judge properly ignored it. It does not profess to decide anything definite as to what should be done, but in that respect is indefinite and wholly uncertain. The arbitrators took the advice of a supposed expert, who gave them certain figures, based upon his estimation, as to shortage of heat radiation, and also advised that, in his opinion, the pipes would have to be changed; but how and to what extent is not mentioned. What is claimed as an award seems to be only a statement of certain facts as to conditions found to exist, and a reference to the opinion of the expert. There is no sufficient determination as to what should be done by the plaintiffs or as to how much they should pay, or allow as a deduction from their claim, for any deficiency in the work of installation or in the results obtained. If this paper were accepted as an award, it would not end litigation, but prolong it. There would at once be controversy as to what it means, and what, and how much, is required by it to be done to supply any shortcoming of the plaintiffs. Besides, it is not the formulated judgment of the arbitrators, but merely the opinion of Mr. Way, the expert. The alleged award left open and unsettled the very thing in dispute.

The Andrews circular of specifications, if irregularly introduced, could not have worked any harm to the defendants. There was no question as to what the contract was, and its content was clearly stated to the jury by the court. They could not have been misled as to what they were called upon to decide. We may also say that, after reading the entire evidence, it does not appear that the paper was not sufficiently identified, even if it was not harmless.

The testimony of the witness LeRoy Ball, as to what was said by the workman when he returned from defendant's home, was not prejudicial, if incompetent, as Ball stated just previously, and without objection, the same thing in substance, and perhaps in a more positive way, when he spoke of McCormack's refusal of his offer to do the extra

work if that would end the controversy. Courts will not order reversals upon grounds which do not affect the real merits and where no substantial prejudice will result. Litigation would be interminable if any other course were adopted, and the administration of justice greatly delayed. We have not considered, it being unnecessary to do so, whether the answer was competent or whether the objection was too late. We do not see how it was prejudicial to exclude an answer of the witness J. B. Merrimon that he had said something to some person who had talked with him, nor that what he said to Ball and Thrash was material, and it does not appear what was said so that we can see its relevancy. The witness had gone over the transaction very carefully in his testimony, and it appears that he covered the ground very fully, and was called to the stand twice by the defendants. Besides, the judge, perhaps, thought that enough had been said upon the subject, and stopped further examination. At any rate, we do not perceive that there was any prejudice sufficient to warrant a reversal.

The court was not requested to read the stenographer's notes of the evidence to the jury, if he was compelled to do so had such a request been made. He sufficiently complied with the statute (Revisal, sec. 535) by stating the substance of the evidence to the jury. *Simmons v. Davenport,* 140 N. C., 407.

There were many exceptions to the charge, but none of sufficient merit to establish any substantial error. The jury could not have misunderstood the issues, and the court stated to them with sufficient fullness and accuracy the question as to the ownership of the notes, construing the charge as a whole, the only proper way to view it (*Kornegay v. R. R.,* 154 N. C., 389). The defendant was not injured if the court placed the burden upon the plaintiff to prove the defendant's contention; but we do not think this was done. It was merely stated that if the plaintiffs had failed to satisfy the jury that they had complied with their contract, and the jury so find, their answer to the first issue would be "Nothing"; but if they had performed the contract the plaintiff would be entitled to recover the amount of the notes. The contract was entire, and plaintiff must have shown full performance in order to recover upon the contract itself, and according to its terms, that is, in order to recover the price fixed by it for the work (*Tussey v. Owen,* 139 N. C., 457), and the court so charged the jury, if we give a reasonable interpretation, as we should do, to what was said.

We need not discuss the principles stated in *Steamboat Co. v. Transportation Co.,* 166 N. C., 582, or *Gorman v. Bellamy,* 82 N. C., 497; *Chamblee v. Baker,* 95 N. C., 98; *Dumott v. Jones,* 23 Howard (U. S.), 220, and the other cases cited therein, as the jury have evidently found

in this case that plaintiffs had performed their part of the contract, having given their verdict for the full amount of the notes, with interest, in response to the first issue, and having answered the third issue, as to the counterclaim, against the defendant. If the court told the jury that plaintiffs might recover for what their work was reasonably worth, the jury have not returned a verdict for such a sum, but for the full amount claimed by plaintiffs to be due on the notes, thereby clearly finding that there had been a full compliance with the contract by the plaintiff.

If there was any unintentional misrecital of the evidence, it should have been called to the attention of the court at the time, so that it might be corrected; and the same may be said in regard to the statement of any contention of the parties. *S. v. Blackwell,* 162 N. C., 672; *Jeffress v. R. R.,* 158 N. C., at p. 223; *S. v. Cox,* 153 N. C., 638; *S. v. Lance,* 166 N. C., 411; *Bank v. Wilson,* 168 N. C., 557.

The case has been fairly submitted to the jury by the court, upon the issues and contentions of the parties and upon the evidence, and the law bearing upon it has been correctly stated for their guidance. They have manifestly decided the facts against the defendant, in the first place, that the plaintiffs owned and held the notes at the commencement of this action, and, in the second, that they had fulfilled the contract, which entitled them to recover the full amount of the notes. We find no error in the record; but if there was any slight departure from the straight line of the law, it surely did not affect the result and affords no ground for a reversal. *Smith v. Hancock, ante,* 150. We, therefore, affirm the judgment.

No error.

YOUNG FERRELL, AND YOUNG FERRELL, ADMINISTRATOR OF FREEMAN FERRELL, v. DURHAM TRACTION COMPANY AND SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 19 December, 1916.)

1. Negligence—Trespass—Torts of Third Persons.

The rule that one who is a trespasser upon lands cannot maintain an action against the owner for negligent injuries received by reason of conditions upon the premises has no application when the injury complained of was caused by the wrong of a third person having no connection with the owner or his proprietary rights.

2. Railroads—Statutes—Riding on Trains—Invitation—Criminal Intent.

Revisal, sec. 3748, prohibiting persons other than employees from riding on trains, etc., was intended to punish such persons who ride on the

trains without permission of the conductor or engineer, with the intent of being transported free, and does not necessarily and as a conclusion of law apply where the person has been requested by an employee of the company to get on the train "to help unload freight at the next station"; and as to them no criminal intent will be imputed.

3. Negligence — Telephone Companies — Torts — Reasonable Anticipation — Damages.

The intestate was riding on top of a car of a freight train at the request of the company's employee to do so and help with the freight at the next station, and was struck from the top of the car to his death by a low hanging wire of a telephone company stretched across the railroad company's right of way. In an action by the intestate's administrator against the telephone company, wherein the defendant's negligence has been properly established, it is *Held*, the death of the intestate should reasonably have been expected to follow from the defendant's wrongful act, and a recovery will not be denied.

BROWN, J., dissenting; WALKER, J., concurring in dissenting opinion.

CIVIL ACTION tried at March Term, 1916, of DURHAM, before *Devin, J.*, and a jury.

On motion made in apt time there was judgment of nonsuit as to the railroad company, and the cause being submitted to the jury as to liability of the traction company, the following verdict was rendered:

1. Was plaintiff's intestate injured and killed by the negligence of the defendant Durham Traction Company, as alleged in the complaint? Answer: "Yes."

2. Did plaintiff's intestate by his own negligence contribute to his injury and death, as alleged in the answer? Answer: "No."

3. What damages, if any, is plaintiff entitled to recover of defendant Durham Traction Company? Answer: "$575."

Judgment on the verdict for plaintiff, and defendant the traction company appealed, assigning for error chiefly the refusal to nonsuit as to appellant because of the alleged fact that intestate, at the time he was killed, was a trespasser on the train of its codefendant, and was also there in violation of the criminal laws of the State.

Manning, Everett & Kitchin and S. C. Brawley for plaintiffs.
W. L. Foushee and W. J. Brogden for defendants.

HOKE, J. The action was originally instituted against the Durham Traction Company and the Seaboard Air Line Railway, and there is evidence on the part of plaintiff tending to show that on 7 April, 1915, about 7 p. m., the intestate, at the invitation of an acquaintance, a brakeman on a freight train of defendant railroad, was on top of a car of said train as it moved out of East Durham going north; that

the brakeman was giving the intestate and his brother this ride with the view and under promise of having them help in unloading freight at a near-by station on the route. There was testimony also to the effect that the train hands were accustomed to get help in this way, and that at previous times it had been done with the conductor's knowledge; that not far from East Durham, while intestate was on the car and going back towards the caboose, a power wire of the traction company, which had been stretched across the railroad and negligently allowed to sag so low as to threaten the safety of all persons on the car or trains of that character, struck the intestate as he was stepping from one car to the other, knocked him down between the cars, and he was run over and killed.

On these, the facts chiefly relevant, the court rendered judgment of nonsuit as to the railroad company, and, on issues submitted, there was verdict establishing that the intestate was killed by the wrongful negligence of the traction company, "as alleged in the complaint"; that there was no contributory negligence on the part of the intestate, and assessing the damages at $575. Judgment having been entered on the verdict, the traction company excepted and appealed, assigning for error chiefly the refusal to order a nonsuit as to appellant also.

It is undoubtedly the general rule that a trespasser cannot maintain an action against the owner for negligent injuries received by reason of conditions existent upon the premises, but this is a principle growing out of and dependent upon the right of ownership and considered essential to their proper enjoyment. All of the decisions in this jurisdiction, cited in support of defendant's exceptions, are cases of that character. *Briscoe v. Lighting and Power Co.,* 148 N. C., 396, and others. Even as to suits of that kind, the position has been very much qualified, as in case of technical trespass, etc., 29 Cyc., p. 443. But the principle referred to and relied upon has no necessary or proper application to the facts of this record, where the injury was caused by the wrong of a third person having no connection with the owner or his proprietary rights. In such case the general rule is the other way, and recovery is not ordinarily denied merely because of the fact that the injured party is himself a trespasser. Such fact may or may not be a relevant circumstance on the question of proximate cause, but is not allowed to defeat the action as a matter of law.

The distinction is very well presented in a case from New Jersey Law, p. 276, the relevant facts and the decision of the Court therein being as follows:

"The injury was caused by the guy wire breaking and falling on an electric light wire belonging to another company. The broken end fell in the grass in a field belonging to Gulick. Across this field people

were accustomed to travel without objection, but, as far as appears, without other right. The boy's body was found still in contact with the guy wire shortly after the shock. It does not appear that he had any right to be on Gulick's property except such as may be inferred from the facts stated. The contention of the defendant is that it was under no duty to the decedent for the reason that he was a trespasser on Gulick's property, or at best a mere licensee. The liability of the defendant rests upon the fact that it was maintaining wires which might become charged with a deadly current of electricity. *New York, etc., Tel. Co. v. Bennett,* 62 N. J. L., 742, 42 Atl., 759; *Brooks v. Consolidated Gas Co.,* 70 N. J. L., 211, 56 Atl., 168.

"The duty to exercise care is established as to travelers upon the highway and employees of the defendant or of another company who in the exercise of their rights are likely to come in contact with the wires, and of persons who are lawfully in a place of proximity to the wires. The question presented in this case is whether the duty exists also as to third persons who are not at the time in the exercise of any legal right. The principle underlying the case is stated by *Chief Justice Beasley* in *Van Winkle v. American Steam Boiler Co.,* 52 N. J. L., 240, 19 Atl., 472, to be that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons, known or unknown, the law, *ipso facto,* imposes as a public duty the obligation to exercise such care and skill.

"The test of the defendant's liability to a particular person is whether injury to him ought reasonably to have been anticipated. In the present case the guy wire was stretched over an open field, across which people were accustomed to travel without objection by the landowner. The adjoining field was used as a ball ground. It was probable that if the guy wire broke some one crossing the field would come in contact with it. That whoever did so was a trespasser or a bare licensee as against the landowner cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the landowner alone, not a public wrong nor a wrong to the defendant.

"The case differs from one where a trespasser or licensee seeks to recover of the landowner. A landowner may in fact reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount."

In Watson on Damages for Personal Injuries, speaking to the question, the author says: "At the outset it may be stated, as a general rule, that the mere fact that the plaintiff at the time of the injuries received

is engaged in the commission of an unlawful act is not sufficient to relieve the author of the wrong for liability in damages therefor. 'The question how far a person can defend an otherwise indefensible act,' it has been said, 'by showing a criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result generally reached is that no man can set up a public or private wrong committed by another as an excuse for a willful or unnecessary or even negligent injury to him or his property. This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases.' Thus the fact that the plaintiff was upon the platform of a street car in violation of a municipal ordinance is not of itself sufficient to defeat a recovery in an action against the driver of a vehicle by whom the driver was injured. And that a motorman was running his car at a higher rate of speed than allowed by law when a tree fell upon the car and injured him is not a defense in an action against the municipality, merely because had he been going at the legal rate the tree would have fallen before he reached the point in question."

And the general principle is approved in many well considered decisions of other courts. *Phil., etc., Ry. v. Towboat Co.,* 64 U. S. (23 Harvard), pp. 209-218; *Sutton v. Wanwatosa,* 29 Wis., 1; *Delaware, etc., Ry. v. Trautweine,* 52 N. J. L., 169; *Cameron v. Vandegrift,* 53 Ark., ...; *Electric Co. v. Melville,* 210 Ill., 70; and Curtis on Electricity, sec. 462, is to the same effect. There are many other authoritative cases in support of the principle as stated: that an injured party is not barred of recovery for a wrong done him because of the mere fact that he was, at the time, a trespasser upon the premises of a third person. Such a fact in itself is ordinarily allowed no significance in determining the rights of the parties on such an issue, a position emphasized in this case by facts in evidence tending to show that the traction company was itself a trespasser in carrying its wires over the railroad company's line. *Daltry v. Power Co.,* 208 Pa. St., 403; *Caglione v. M. T. Morris Electric Co.,* 67 N. Y. Supp., 10. It is suggested for defendant that the intestate was in violation of State statute in being on the car at the time. Revisal, sec. 3748. This statute was enacted to punish persons who ride on a train without permission of the conductor or the engineer and with intent of being transported free, and would seem to have no application to this case, where the intestate had been invited to get on by an employee of the company "to help unload freight" at the next station. Assuredly a criminal intent to avoid payment of fare should not be decided against him as matter of law when there are facts in evidence tending to show that he "was to pay his fare by helping to unload"; that he had done

this several times with the knowledge and approval of the conductor, and, at the time he was struck, was going along the top of the car to the caboose.

In some of the authorities cited in support of appellant's position, as in *Tel. Co. v. Martin,* 116 Ky., 554, and others, the Court does not seem to have been sufficiently advertent to the recognized distinction in cases where the action by a trespasser was against the owner of the premises and when against third persons; but, in any event, these decisions should not be allowed as controlling on the facts of this record. In *Drum v. Miller,* 135 N. C., 204, the Court held, in effect: "In order that a party may be liable for negligence, it is not necessary that he could have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission, or that consequences of generally injurious nature might have been expected," a statement of the doctrine contained in 21 A. and E. Enc. (2 Ed.), p. 487.

A like ruling was soon thereafter made in *Hudson v. R. R.,* 142 N. C., 198, and the principle has been again and again approved in our decisions. *Robinson v. Mfg. Co.,* 165 N. C., 495; *Ward v. R. R.,* 161 N. C., 184; *Sawyer v. R. R.,* 145 N. C., pp. 24-28; *Kimberly v. Howland,* 143 N. C., 399, and numerous other cases could be cited.

Speaking to the question in *Drum v. Miller,* 135 N. C., 214, *Walker, J.,* said: "When, therefore, a willful wrong is committed, or a negligent act which produces injury, the wrong-doer is liable, provided in the latter case he could have foreseen that harm might follow as a natural and probable result of his act; for if he can presume that harm might naturally and probably follow, he must necessarily intend that it should follow or he must have acted without caring whether it would or not, which, in effect, is the same thing. It may be stated as a general rule that when one does an illegal or mischievous act which is likely to prove injurious to another, or when he does a legal act in such a careless or improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, nor, indeed, any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and in the other he will be presumed to intend that which, in the exercise

of the care of a prudent man, he should see will be followed by injurious consequences."

The verdict in this case has established that the traction company has negligently allowed its power wire to sag so low over the line of the railroad that it was likely to kill or seriously injure any and every one on the top of the railroad company's trains. The intestate was killed because of this negligent wrong. It was the result likely—in fact, almost certain—to occur from its wrong, and, in our opinion, the defendant's responsibility for it has been correctly and properly established.

There is no error, and the judgment of the lower court is affirmed.

No error.

BROWN, J., dissenting: I am of opinion that the motion to nonsuit should have been allowed. The evidence, taken in its most favorable view for plaintiff, tends to prove these facts:

The intestate was killed on 7 April, 1915. At the time he was on top of a running freight train of the railway company, walking towards the caboose. He was caught by two wires belonging to the traction company, stretched across the railway right of way by its consent and fastened to juniper poles 143 feet apart, one on the east and one on the west side of the right of way about 2 miles from Durham. The intestate was thrown to the ground between the cars and killed. The intestate was not an employee of the railway company, but was riding on top of the rapidly running freight train without the knowledge or consent of the conductor or of any proper authority of said company.

It is in evidence that one Howard Holeman, a brakeman, invited the intestate to ride on the train. No one else knew of it. There had been an extraordinary snowstorm and wind, 2 and 3 April, 1915, that had caused the wires to sag so low that they caught the intestate about the shoulder and threw him under the wheels. The wires were in proper position on 2 April, and defendant traction company had no notice that they were sagging as result of the storm.

That the intestate was a trespasser as to the railway company, and violating the statute, Revisal, 3748, making it a misdemeanor to ride on top of the freight train under such circumstances, cannot successfully be questioned. *Vassor v. R. R.*, 142 N. C., 68; *Bailey v. R. R.*, 149 N. C., 169.

The statute is explicit, and forbids any person other than a railway employee in the discharge of his duty from riding or attempting to ride on top of any car, coach, engine, or tender on any railroad without authority from the conductor of the train or the engineer, and

makes it a misdemeanor to do so. If the intestate was a trespasser, the railway company, the owner of the premises, owed him no duty except to refrain from inflicting willful or wanton injury; and the defendant, the traction company, owed him no greater duty than did its lessor, the railroad company. The poles of the traction company were put on the land of the railroad company and its wires crossed its tracks by its consent. It was not required to foresee that the plaintiff would violate the statutes of the State and put himself in a position of danger where he would possibly come in contact with its wires. *Willis v. R. R.*, 122 N. C., 909; *Vassor v. R. R., supra; Peterson v. R. R.*, 143 N. C., 260; *Quantz v. R. R.*, 137 N. C., 136.

If the plaintiff had been an employee of the railroad company, or rightfully on top of the car, it would be different. If the railway company, the owner of the right of way, over which the wires of the defendant were stretched, owed the plaintiff's intestate no duty except to refrain from inflicting willful or wanton injury, then the defendant could not be held to a higher degree of care than the owner of the premises, upon which rested the primary duty of keeping its premises and right of way reasonably safe.

The railway company owned the right of way and had the right to stretch its telegraph and telephone wires along and across its right of way with its wires. If mischief happened to a trespasser by reason of the wires being stretched across the right of way, it is his fault. He is held to assume the risk. The implied duty to prevent harm from unsafe premises does not exist in favor of a trespasser. *McGhee v. R. R.*, 147 N. C., 147.

The *Benton case*, 165 N. C., 354, does not controvert this well settled proposition. Benton was not a trespasser upon the service company's property, but had climbed a tree and come in contact with a sparking wire with defective insulation. The question presented by this appeal is well settled and fully discussed in many cases, and we need not dwell on it further. *Briscoe v. Lighting Co.*, 148 N. C., 396; *Telephone Co. v. Odom*, 70 S. E. Rep., 1116; *Telegraph Co. v. Martin*, 116 Ky., 554; *McCaughna v. Electric Co.*, 129 Mich., 407.

MR. JUSTICE WALKER concurs in this opinion.

MARY J. GURLEY, ADMINISTRATRIX, v. SOUTHERN POWER COMPANY AND G. C. HOWARD.

(Filed 19 December, 1916.)

1. Negligence—Attractive Nuisances—Reservoirs.

A tank 30 feet long, 35 feet wide, and 11 feet deep, used by a manufacturing concern on its own premises for a water supply, does not fall within the doctrine of dangerous instrumentalities and attractive nuisances so as to impose on the owner the same degree of care in guarding them against the trespass of children.

2. Same—Master and Servant—Employer and Employee—Principal and Agent—Scope of Employment—Respondeat Superior.

Where a manufacturing concern has a reservoir on its own premises for its water supply, well guarded by a fence around it and a sign forbidding trespassing, and situated at a substation in charge of an employee, who had been instructed to prohibit boys from bathing there, but the employee, in violation of his instruction, secretly permitted the boys to bathe, making a small charge for bathing suits, and one of the boys is drowned, the doctrine of *respondeat superior* has no application, upon the principle that the acts of the employee were not within the scope of his employment and done against the command of the master; and the refusal of the defendant's special requests for instruction to this effect, with supporting evidence, is reversible error in the action of the intestate's administrator for damages.

3. Master and Servant—Negligence—Imputed Knowledge—Inspection—Ordinary Care—Requests for Instruction—Appeal and Error.

Where there is evidence tending to show that an employee at a manufacturing plant permitted boys to bathe in a reservoir used by it for the purpose of a water supply, against his employer's instruction, and in a secret and concealed manner, it is *Held*, in an action against the company for damages for the alleged negligent drowning of the plaintiff's intestate, a boy, that the refusal of defendant's special instruction that the plaintiff would not be fixed with implied knowledge of the conditions if it had used ordinary care in inspection, etc., is reversible error.

4. Executors and Administrators — Negligence — Wrongful Death — Entire Damages—Parent and Child—Statutes.

The right of action to recover damages for a wrongful death exists exclusively by statute, and is given only to the administrator, who may recover the entire damage in his action; and the question as to the parent may recover for the negligent killing of a minor child is one between the parent and the administrator. Revisal, secs. 59, 60.

CLARK, C. J., dissents in part.

APPEAL at February Term, 1916, of GUILFORD, from *Cline, J.*, upon these issues:

1. Was the death of the plaintiff's intestate caused by the negligence of the defendants, as alleged in the complaint? Answer: "Yes; both of them."

2. What damage, if any, is plaintiff entitled to recover of defendant? Answer: "$10,000."

From the judgment rendered, defendants appealed.

Peacock & Dalton, Brooks, Sapp & Williams for plaintiff.
King & Kimball for defendant Howard.
Osborne, Cocke & Robinson for defendant Power Company.

BROWN, J. This is an action by the administratrix of Samuel Shropshire, a boy of 13 or 14, who was drowned in a tank at a substation of the Southern Power Company at High Point. In this substation there is a reservoir, the walls of which are made of cement, which tank is 30 feet long, 35 feet wide, and 11 feet deep. The sides are straight down, very slick, and with moss on them. A wire ran along the top of the walls of the bank, about 10 inches above it, fastened to iron rods extending out of the cement wall. Another wire extended from side to side about the center of the tank. This tank is about 15 feet from the wall of the substation and about that distance from its nearest door. On the day in question the tank lacked 6 or 8 inches of being full of water.

On Sunday, 30 May, 1915, plaintiff's intestate, together with a 12-year-old boy, went to this substation, passed through the gate, saw the defendant Howard, who had charge of the premises, paid him 10 cents apiece for their bathing suits, and went into this tank. Bathing suits were kept at the substation by Howard and furnished all boys desiring them. They were charged 10 cents each. When the intestate went in there were eleven or twelve boys then in the pool swimming or playing in the water.

The defendant power company requested the following instruction: "If you find from the evidence that when the Southern Power Company inclosed the pool, through one of its servants, Moser, it directed Edwards to cease to use the pool as a bathing pool, and thereafter it was run secretly, in a secret manner as far as the Southern Power Company was concerned, and unknown to the Southern Power Company or any of its officers, and purposely concealed from the Southern Power Company, then I charge you that the Southern Power Company would not, in any wise, be responsible for the death of the plaintiff's intestate; and if you should answer the first issues 'Yes,' you will go further and find, when you come to designate the defendant whose negligence was the cause of the death of the plaintiff's intestate, 'the defendant Howard.'" That there is ample evidence to support the instruction tendered does not seem to be disputed.

This prayer was not given either in words or substance. It is undisputed that Howard was running the pool for himself, and not for the power company, and that he alone received the emoluments. If, as the sixth request required the jury to find, Howard was acting secretly, without the knowledge of the power company and contrary to its instructions, purposely concealing his conduct, then he was not acting as its agent, and the company can only be liable for the tort simply because it owned the pool.

The doctrine of dangerous instrumentalities and attractive nuisances cannot justify the refusal to give the sixth prayer. It is irrelevant to the case for the reason that the pool is neither, and so held by the overwhelming weight of authority.

It is said, 29 Cyc., p. 464, that, "As to pools or reservoirs, the weight of authority is that they are not to be classed with turntables, and the owner of premises on which a pool or reservoir is situated is under no obligation to keep the premises guarded against the trespasses of children." *Thompson v. Ill. Central Ry.,* 105 Miss., 636; *Peters v. Bowman,* 115 Cal., 345; *Stendall v. Boyd,* 73 Minn., 53; *Moran v. Car Co.,* 134 Mo., 641; *Richards v. Connel,* 45 Neb., 467; *Klix v. Nieman,* 68 Wis., 271; *R. R. v. Beaver,* 113 Ga., 398; *Riggle v. Lens,* 71 Or., 125; *McCabe v. Woolen Co.,* 124 Fed., 283, affirmed in 132 Fed., 1006; *Sullivan v. Hidekopper,* 27 App. D. C., 154; *R. R. v. Moore,* (Tex. Civ. App.) 172 S. W., 568; *Emard v. Kimberly,* 159 Wis., 83; *Charvoz v. Salt Lake City,* 42 Utah, 455.

We will not undertake to quote from these decisions. They all deal with the subject under discussion and hold that a pond or reservoir is not a dangerous instrumentality or an attractive nuisance. In almost every case the owner of the premises knew of the custom of boys entering thereon to bathe in the pool or pond, but was held not liable for any mishap. Bathing pools are nothing new or rare. They abound in almost every public park, gymnasium, and Y. M. C. A. building, as well as many country clubs. It is a well known and general custom for boys to swim in millponds and invade the lands of farmers to bathe in their marl pits. Who will contend that the mill owner and farmer is liable for death or injury of the bathers because of such ownership? Millponds, swimming holes, and marl pits are equally as attractive to boys for bathing purposes as this particular reservoir.

The only other ground of liability as to the power company is the doctrine of *respondeat superior.* If the jury had found the facts (all supported by evidence) as set out in the sixth request, the power company should have been acquitted of responsibility. The reservoir in which the intestate of the plaintiff was drowned was built in 1909 as a

necessary part of the substation of the defendant power company. It was properly constructed and was not dangerous when used for the purposes for which it was intended.

In 1911 the power company built a substantial fence around its substation, inclosing the reservoir, and hearing that persons had been swimming in it, instructed its agent in charge of the substation to discontinue this practice and not to permit any one to enter the inclosure. It also caused a notice of "No admittance" to be placed on the gate. The agent at the substation disobeyed these instructions, and in consequence the intestate of the plaintiff lost his life.

It also appears, if the evidence of the defendant is true, that it was not necessary for the officers of the company to visit the station except at regular monthly intervals, and at other times when notified by the man at the station that repairs were needed; so that the man in charge knew at all times when to expect the officers of the company, and he testifies that he purposely deceived the company, that he was permitting boys to swim in the reservoir secretly and against the instructions of the company, and that he hid the bathing suits and other bathing outfit when officers of the company were expected.

If the jury should accept this evidence (and they alone have the power to pass on its credibility), the defendant power company ought not to be held liable for the negligence of its agent, because it was outside of the scope of his employment. The defendant had the right to have this view presented to the jury, which it endeavored to have done in the prayer for instruction which was denied. This Court said in *Roberts v. R. R.*, 143 N. C., 176: "The test is not whether the act was done while . . . (the servant) was on duty, or engaged in his duties; but was it done within the scope of his employment and in the prosecution and furtherance of the business which it was given him to do?"

In *Bucken v. R. R.*, 157 N. C., 443: "We recognize the well established rule that the master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders or doing his work, but wholly for the servant's own purposes and in pursuit of his private and personal ends."

In *Dover v. Mfg. Co.*, 157 N. C., 324: "In an action for tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable."

Again: "This doctrine of *respondeat superior,* as it is now established, is a just but a hard rule. The master exercises care in the selection of his servant and retains in his service only such servants as are prudent and trustworthy; the servant in the prosecution of the master's business must of necessity pass beyond his sight and out of his control; and yet the law makes the master liable for the conduct of the servant. The application of this principle without working the greatest injustice to every employer of a servant is made possible only by the limitation established by the courts, that when the servant does an act which is not within the scope of his employment the master is not liable. 'Beyond the scope of his employment the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. The rule as it is now established by the later judicial declarations should be strictly held within its defined limits. It is a rule capable of great abuse and much hardship, and the courts should guard against its extension or misapplication.'"

Linville v. Nissen, 162 N. C., 95, is also strictly analogous to the present case. The *Chief Justice,* who wrote the opinion for the Court, cited and approved *Bucken's case* and *Dover's case.* He further lays down this very pertinent rule, with ample citation of authority: "The owner of an automobile is not liable for personal injuries caused by it, merely because of his ownership."

In Shearman and Redfield on Neg. (6 Ed.), sec. 173, it is said: "There is nothing in the nature of real property which requires that its owner should be held to a stricter liability than the owner of personal property, and he is not, therefore, responsible for the negligence of persons employed upon his land, any further than he would be if they were employed about his chattels." *Marlowe v. Bland,* 154 N. C., 140; *Jackson v. Tel. Co.,* 139 N. C., 347; *Daniel v. R. R.,* 136 N. C., 517, are cases cited in point. Also, Labatt Master and Servant, sec. 2274.

We can conceive of only one answer to this position, and that is that the prayer is in itself defective in that the idea is excluded that the defendant might have known of the use being made of the reservoir by the exercise of ordinary care, but there is evidence that the use of the pool was *secret and concealed* from the defendant and *unknown* to it (facts embraced in the prayer), and the defendant was nowhere given the benefit of it in any part of the charge.

The defendant power company excepts to the following charge on the last issue as to damages: "The measure of damages is the present value of the net pecuniary worth of the intestate to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy." This charge was evidently

quoted by the judge from the opinion in *Mendenhall v. R. R.*, 123 N. C., at p. 278, which has been approved often by this Court (see Anno. Ed.), down to *Ward v. R. R.*, 161, at p. 186, and *Massey v. R. R.*, 169 N. C., 245.

The defendants contend that as the plaintiff's intestate was a minor, his parents would be entitled to the results of his labors until he was 21 years of age. Under our statute damages for wrongful death can be recovered only by the administratrix, Revisal, 59, 60; *Killian v. R. R.*, 128 N. C., 261 (see Anno. Ed.). Besides, the plaintiff is his mother. It does not appear that his father is living. But if he were, the plaintiff as administratrix is the only party who can recover, and the question of the father's right to share in the recovery for the prospective wages up to 21 years would be a matter between him and the plaintiff, and is not before us. The question as to who would be entitled to a minor's wages where he survives (*Williams v. R. R.*, 121 N. C., 512) does not arise in an action for wrongful death, where only the administrator can maintain the action. *Killian v. R. R., supra,* where this point was raised and decided.

In *Russell v. Steamboat Co.*, 126 N. C., 967, the Court said: "We see no distinction in the law, nor reason for distinction, between the death of a child and of an adult. The measure of damages is the same; but we frankly admit that the difficulty of its application is greatly increased in the case of an infant. Still the jury must do the best they can, taking into consideration all the circumstances surrounding the life that is lost, and relying upon their common knowledge and common sense to determine the weight and effect of the evidence." The court so charged the jury, and if the Southern Power Company desired more definite or specific instructions it was its duty to ask a special instruction. The charge in regard to measure of damages is in exact accordance with the precedents of this Court.

An action for the recovery of wages of a minor or for injury to him lies in favor of the parent; but if the child dies from the injury the action abates. The only action that lies in such case, in this State, is for wrongful death, as authorized by Revisal 59, and that embraces everything. In such action the value of the life before 21 as well as after 21 years of age is recoverable. No other action lies than this. *Killian v. R. R.*, 128 N. C., 262. In *Davis v. R. R.*, 136 N. C., 115, the subject is again discussed, the Court holding: "An action may be maintained by an administrator for the death of an infant by the wrongful act of another." This case was reviewed and reaffirmed in *Carter v. R. R.*, 138 N. C., 750.

In *Bolick v. R. R.*, 138 N. C., 370, the Court held that even if the action for injuries was brought, yet if it results in death, it abates,

and for wrongful death no action could be maintained except that brought by the administrator, which, of course, covers the entire value of the life that was lost. In *Russell v. Steamboat Co., supra,* the child was only 5 months old; see authorities there cited on p. 968. Whatever may be the rule elsewhere, and it varies greatly in other States, the rule is well settled by our statute and our uniform decisions that there can only be one action brought for wrongful death, and that must be by the administrator and covers the entire value in one action.

The motion to nonsuit made by the Southern Power Company was properly denied. The defendant Howard, so far as the record discloses, made no such motion, took no exceptions, and assigned no errors. As to him the judgment is affirmed. As to the Southern Power Company, there must be a

New trial.

CLARK, C. J., dissenting in part: There was evidence that H. L. Alderman, division superintendent of the Southern Power Company, made regular trips to this station once a month, and that he knew that the boys were in the habit of swimming at this pool. The witness Burns testified that he had told Alderman not to allow the boys to go in swimming there, as it was dangerous. When the intestate was drowned Howard was for some reason absent from the building, and the intestate was not missed until he returned and, seeing the clothes on the floor, asked whose they were. He then went to the corner and got a pole with an iron hook and, finding the body, fished it out. He testified that the boys had been in the habit of going into this pool for some three years before the intestate was drowned.

If the plaintiff's allegations are correct, the defendants were joint tort-feasors, and at her election she could sue them jointly or severally. *Staton v. R. R.,* 144 N. C., 135. The defendant power company excepted to the refusal of the nonsuit. But the defendant Howard did not make such motion.

It would seem clear that for the defendant Howard to permit a boy of that age to go into the pool 11 feet deep while he absented himself and when there was no precaution to prevent drowning would make out at least a prima facie case against the defendant Howard. The question raised by the motion of the other defendant is as to whether it was liable for the default of its agent in charge of the tank. The size and nature of the tank were as stated. There is evidence that the boys had been permitted to go there for bathing purposes from three to five years, to the knowledge of the company. Whether or not the 10 cents paid by each went into the treasury of the company or was permitted to be received by Howard in part compensation for his

services does not appear. But it was a most dangerous instrumentality for boys which the power company permitted the boys to use upon payment of a small fee and without taking care or oversight to prevent fatalities such as this. There was at least an implied invitation on the part of the power company to go upon the premises, and it is responsible for the loss of life due to its want of care and oversight. *Starling v. Cotton Mills,* 168 N. C., 229.

In *Peking v. McMahon,* (Ill.) 27 L. R. A., 206, the Court sustained a verdict and judgment for the death of a child in a pond in a populous city in which the children were in the habit of playing, but which was partially inclosed from the streets, on the ground that such unguarded premises was a dangerous attraction, and the owners were responsible by reason of the implied invitation to children. But here there was an express invitation, and an acceptance of compensation, whether it went to the owner or to its agent in part compensation for his services, and the owner is responsible for the negligence in that there were no safeguards against accident of this kind.

In this case the substation of the power company was situated in a populous neighborhood and it maintained thereon a dangerous pond of water within 60 feet of a public street, which was attractive to children, to which place they had been going for nearly five years prior to the death of this boy. The power company is much more liable than if it had merely permitted an attractive but dangerous locality to remain at that point without being protected by walls. It had through its custodian and representative permitted children to go there, paying for the privilege, with no sufficient protection against drowning, even if the custodian had been on hand, and in his absence there was no protection whatever.

Numerous authorities can be cited to sustain recoveries in cases of this kind, even where there was no invitation, no compensation paid, but merely unguarded premises. Under these circumstances there was ample authority to sustain the liability of the defendant power company.

It was in evidence that the plaintiff's intestate could not swim. No reasonably careful, prudent man would permit a boy to go into a tank of this kind 11 feet deep with numerous other boys without some protection by boats or floats, or otherwise, and without the oversight and presence of some man to guard against accident. The boy, who could not swim, clung to the side of the tank, as his body was found close to where he went in. It seems that the other boys were so engrossed in their sport that they did not know when the plaintiff's intestate sank. It was negligence *per se*, if indeed it was not criminal, for the defendant power company to let the tank be used by the boys without

supervision or safeguard, as it had done for years, and it is responsible for the negligence of its agent Howard, even if they had shown, which they did not, that he had been instructed to remain on hand to guard against accidents, and render help if needed. The evidence shows that the power company was aware that the pool was being thus used, and it must, or should, have known that there were no safety appliances nor any method of resuscitation in case of drowning. The boy dropped out of sight beneath 11 feet of water and no one knew it. The defendants had received his 10 cents and they took no further care or interest. They had been paid.

The defendant urges that it was error for the court to refuse the following prayer for instruction: "If you find from the evidence that when the Southern Power Company inclosed the pool, through one of its servants, Moser, it directed Edwards to cease to use the pool as a bathing pool, and thereafter it was done secretly, in a secret manner, as far as the Southern Power Company was concerned, and unknown to the Southern Power Company or any of its officers, and purposely concealed from the Southern Power Company, then I charge you that the Southern Power Company would not in any wise be responsible for the death of the plaintiff's intestate." This instruction eliminated the implied authority which is recognzed by the law and undertook to confine the jury to the evidence offered to show that the power company authorized the defendant Howard to use the pool upon its premises as alleged in the complaint.

This is contrary to the well settled and necessary principles of law that when a dangerous agency of this kind, located on one of the principal streets of the town, is openly and notoriously used, as is shown by the fact that a large number of boys habitually went there, the responsibility is necessarily upon the owner of the property, who put it in the power of Howard to use it, and by no oversight or supervision took care to ascertain and prevent it. The mere fact, if true, that the company forbade Edwards thus to use it is no excuse or exoneration. Howard was in sole charge of the property, and so far as it was concerned he was the *alter ego* of the corporation. It confided the building to his charge and during the long period that it was used as a dangerous instrumentality it took no care to see that its orders were executed, if it gave such orders. This was the negligence of the company. It sent a man there once a month, and with proper supervision he should have known, if he did not, what the whole town knew, that this dangerous instrumentality was habitually used as a bathing pool. If this supervisor did not ascertain that fact, his negligence was the negligence of the company.

This is not the case where a single act of an employee is done against the orders of the company. Here there was a long course of dealing by a man who was in sole charge of the property, and the company was negligent in not seeing that its orders were obeyed, if they were given. It was negligent in that its supervisor who visited the property once a month did not discover that its other subordinate was using the property in a manner dangerous to the safety of the children in the community. If the corporation is not responsible for the long continued misconduct of the servant in sole charge of the property, and if, further, it is not responsible for the neglect of its supervisor in visiting the property to discover and suppress the notorious disobedience of its orders, then all that is necessary to protect a corporation is to give orders not to do a certain act and leave them to be disobeyed, thus putting the responsibility upon the irresponsible servant and exempting the owner of the property which caused the injury or death. The company cannot obtain immunity by merely giving orders. It must see that they are obeyed. A railroad company instructs its engineers to run on a certain schedule. If they disobey these instructions the company is responsible for any collision that may occur, though the act was done against its orders. Its responsibility to the public is not negatived because its servants disobeyed its orders. In this case Howard was in charge of the building in which this dangerous pool was situated. He was acting within the scope of his employment while in control of the building under his charge, and none the less so because he disobeyed the instructions given him in regard thereto. The supervisor visited the building once a month, and his negligence in not ascertaining the disobedience of orders by Howard, if there were such orders, is none the less the negligence of the company, for in the scope of his employment he was negligent in not ascertaining and stopping the misuse of the building, which was a matter of public notoriety.

Any other doctrine would deprive the public of protection against the dangerous use of railroad engines, pools, or other dangerous agencies by the simple fact that the employee in charge had been told not to use it in a certain manner, though he is left to disobey these orders notoriously for a long period of time, causing such injuries as the wrongful death of the boy on this occasion. These principles are elementary, and, if not maintained, the public would be at the mercy of powerful instrumentalities of danger left in the unsupervised control of subordinates, if it can be shown they were told to be careful.

I concur in affirming the judgment as to Howard, and in sustaining the refusal to nonsuit in favor of the Southern Power Company, and the ruling as to the measure of damages, but dissent as to granting a new trial to the Southern Power Company.

L. A. SMITHDEAL v. W. D. MCADOO.

(Filed 19 December, 1916.)

1. Contracts, Breach—Leases—Landlord and Tenant—Improvements—Damages.

Where a party negotiating for the lease of a store is let into possession and makes changes therein for the business he contemplates conducting, and thereafter voluntarily vacates the premises and sues the lessor for damages for an alleged breach of contract in failing to execute a written contract in accordance with the agreement theretofore entered into by parol: *Held*, the repairs having been made by the plaintiff, having no estate or interest in the premises, he can only recover the amount the defendant's estate was enhanced in value by reason of his improvements and expenditures, though made upon a reasonable expectation that the written lease would be executed.

2. Same—Negotiations—Abandonment—Statute of Frauds.

Where a storehouse has been leased for three years by parol, upon an agreement that a written lease would be accordingly executed, and the lessee has been let into possession and made repairs, and pending a dispute as to the terms of the payment of rent, leases another store, without the lessor's knowledge and when he was prepared to accede to the lessee's demand, and to execute the written lease accordingly: *Held*, the parol contract was enforcible by the lessee, not required to be in writing by the statute, Revisal, sec. 976, and being in possession of the leased premises, without thought of molestation by the lessor, his voluntary relinquishment of his rights will prevent his recovery for expenditures he has placed on the property, and other damages he alleges he has sustained in his action for breach of contract.

CIVIL ACTION tried before *Ferguson, J.*, and a jury, at August Term, 1916, of GUILFORD.

The action was to recover damages for alleged breach of contract to execute a written lease for a storeroom in Greensboro, N. C., belonging to defendant and others, his mother and sister, coöwners; the damages alleged being cost of improvements put upon property by plaintiff $124.77
and damages by reason of injury to plaintiff's stock of goods and delay, etc., attributable, as plaintiff claimed, to defendant's default 264.00

Total damages claimed $388.77

There was denial of liability on part of defendant, with evidence tending to support the position.

On the trial plaintiff tendered two issues, as follows:

1. What amount, if any, is plaintiff entitled to recover of defendant

on account of the shelving and other improvements made by the plaintiff in the defendant's storeroom?

2. What damages, if any, has plaintiff sustained by reason of injuries to his goods and loss of work and time, as alleged in the complaint?

The court declined to submit the second issue, and plaintiff excepted.

On the first issue there was verdict for defendant. Judgment on the verdict, and plaintiff excepted and appealed, assigning for error chiefly the refusal to submit the second issue and the ruling of the court that plaintiff, in any aspect of the evidence, could not recover for the cost of improvements, but only to the extent that the value of defendant's property was enhanced by reason of the same.

N. L. Eure and R. C. Strudwick for plaintiff.
Brooks, Sapp & Williams for defendant.

HOKE, J. There was evidence on the part of plaintiff tending to show that, on or about 13 August, 1915, defendant agreed to lease to plaintiff a storeroom in Greensboro, N. C., the lease to commence on 1 September, following, and to continue to 1 January, 1916, at $30 per month, and thereafter for two years at $35 per month; that a written lease, embodying their terms, was to be executed and delivered by defendant on or before 1 September, 1915; that on or soon after making the agreement the keys were delivered to plaintiff, who entered into possession and had shelving and repairs put into the store in order to render same suitable for plaintiff's business, dealer in books and musical instruments, at a cost for material and labor of the sum of $124.44. That defendant wrongfully failed to have said lease prepared, pursuant to agreement, but, on 1 September, tendered a written lease, containing a stipulation for payment of the monthly rent in advance; that on objection made, plaintiff and defendant entered into negotiations about this feature of the lease, and, on Thursday, 2 September, defendant having failed to tender plaintiff a lease properly drawn or to notify plaintiff that he would do so, on Friday morning, 3 September, plaintiff rented a storeroom from another party and surrendered possession of this one to defendant; that on Thursday, 2 September, the day before he rented the other store, plaintiff had called at defendant's office several times to inquire about the lease, and failed to see defendant or to get any word from him about it. There were facts in evidence tending to show that no definite agreement for a lease had ever been made between the parties, but that the matter was only in negotiation between them unless and until the written lease was executed, and the evidence on the part of defendant tended to show that, on objection made to payment of rent in advance, defendant

told plaintiff that was the usual way his leases were drawn, and to alter it would require that he consult with his coöwners, and he was also to confer with Mr. King on the subject; that plaintiff and defendant were negotiating about the change and were to see each other again about it; that, Thursday morning, the 2d of September, plaintiff passed defendant when the latter was having a business talk with a third person, and neither spoke, defendant supposing that plaintiff was going to defendant's office and would wait for him there; that soon thereafter defendant went to his office and failed to find plaintiff and did not see him again till Friday morning, when defendant told plaintiff it was all right, he would come to his terms; that defendant was ready to tell him the same thing the day before, on Thursday, and thought and had every reason to think that he would delay at the office; that they had agreed to speak about it again, and defendant supposed, of course, he would wait a moment to see him, and that he did not see him till Friday, 3 September, when defendant told plaintiff he would come to his terms about it, and plaintiff replied it was too late, he had rented another place and given up keys, etc. The evidence of defendant tended further to show that the improvements put upon the property by plaintiff did not in any way enhance its value or make it more desirable as a business stand, etc., and, on the contrary, it would cost as much as $75 to restore it to its former condition, etc.

On this, the testimony chiefly relevant to the issue, we are of opinion that there was no error in the way the case was submitted to the jury, and assuredly none that gives plaintiff any just ground of complaint. The weight of the evidence tends strongly to show that there was no definite contract of rental between these parties nor any definite agreemnt to make such a contract. There is much in plaintiff's own testimony and in his conduct in reference to it that supports this position, and, in such case, the repairs were made by plaintiff in a storeroom in which he had no estate or interest, and, even if they were made on a fair and reasonable expectation that such a contract would be awarded him, he could only recover the amount the defendant's estate was enhanced in value by reason of his improvements and expenditures. In that aspect the case is not dissimilar to one where a vendee of land, under an oral contract of purchase, is let into possession and makes improvements on the faith of the agreement which the vendor repudiates. Under our decisions he can recover to the extent that the land is enhanced in value by reason of his outlay and expenditure. *Jones v. Sandlin,* 160 N. C., 150; *Ford v. Stroud,* 150 N. C., 362; *Alston v. Connell,* 145 N. C., 1; *Vaughn v. Craven,* 38 Tenn., 163; Keener on Quasi Contracts, pp. 363-364. Under this position the cause has been submitted and decided by the jury against any recovery by

plaintiff. And assuming, as plaintiff now insists, that there was a definite agreement for a lease, containing all the essentials of a binding contract between them, *i. e.*, definite as to the parties, the property, the length of time when it was to begin, and the amount of the rent, 1 McAdam Landlord and Tenant (3 Ed.), pp. 170-171, and that, in the absence of a stipulation or custom to the contrary, the rent was payable at the end of a term or given period for payment of the rent, this being the recognized position on the subject. *Tignor v. Bradley,* 32 Ark., 781; *Campbell v. Hatchett,* 55 Ala., 548; *Menough's Appeal,* 61 Pa., 432; *Raymond v. Thomas,* 24 Ind., 476; Taylor on Landlord and Tenant (9 Ed.), sec. 391. In that event there can be no recovery by plaintiff for the reason that, being in possession under such a contract, with no one having the power or disposition to molest him, he voluntarily and without adequate cause or excuse abandoned his rights thereunder, surrendered the possession, and rented a storeroom from another. The alleged lease or contract to make one, not being in excess of three years, was not required by the law to be in writing, Revisal, sec. 976, and, on the facts in evidence, the failure of defendant to execute the writing just when plaintiff called on him to do so, even if wrongful, was not vital to the existence of the contract nor required for the protection of plaintiff's rights, and did not, therefore, justify his attempt to sever the contract relation between them. *Weintz v. Hafner,* 78 Ill., 27; *Farham v. Davis,* 32 N. H., pp. 302-312; *Gillett v. Maynard,* 5 Johns, 85; Anson on Contracts, p. 377.

In *Weintz's case* it is held, among other things: "A slight or partial neglect, on the part of one of the contracting parties, to observe some of the terms or conditions of the contract will not justify the other party at once to abandon or rescind the same. In order to justify an abandonment of a contract, and the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by his misconduct or default."

As heretofore stated, and according to all the testimony, plaintiff was in the possession and enjoyment of his term, with a definite contract adequate to his protection, and defendant not only had no right to molest him, but had yielded his position on the question and intended to execute the lease as plaintiff desired. In this aspect of the case, therefore, plaintiff must be taken to have voluntarily relinquished his rights under the alleged agreement, and no recovery should be allowed him.

In *Farham's case, supra,* where plaintiff had refused to take over property which he had improved under a contract, the position is stated as follows: "The next question for consideration is whether,

upon the facts proved, the action can be maintained. The repairs which are the subject of the suit under one of the counts were not made for the defendants, nor upon their account, nor for their benefit. There is no pretense of an express promise to pay for them, and we can perceive no ground upon which the law will imply such promise. They were made by the plaintiff, under the expectation, founded on the agreement of the defendants, acting in behalf of the town, for the sale of the house, that they would inure to his benefit as the future owner of the house; and if he has not derived from them the benefit expected, it is not because of the want of authority in the defendants to make the agreement in behalf of the town, but because, having 'changed his plans,' he preferred to relinquish all the advantage which a fulfillment of the agreement would have secured, and, therefore, refused on his part to fulfill it."

There is no error in the proceedings to plaintiff's prejudice, and judgment is affirmed.

No error.

CHARLOTTE PIPE AND FOUNDRY COMPANY v. SOUTHERN ALUMINUM COMPANY ET AL.

(Filed 19 December, 1916.)

1. Mechanics' Lien—Notice—Trusts—Statutes.

The amount due the contractor and subject to the claims of material men who have filed their statutory notice is not a debt due by the owner to the material men in the ordinary sense, but a fund held in trust for them strictly arising from the operation of the statute, in conformity with its terms; and the statute imposes no duty upon the owner when the material men have not filed the required notice or acquired their lien accordingly.

2. Same—Double Security—Distribution.

The statute furnishes a double security to those furnishing material, etc., to the contractor used in a building and who give the statutory notice to the owner, in giving them a lien upon the property if enforced by suit within six months (Revisal, sec. 2019), and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed pro rata among the claimants thereto entitled (Revisal, sec. 2023), the latter security not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor.

3. Same—Priorities.

One who has furnished material to a contractor, which was used in the building, and who, with others, has given the statutory notice to the

owner, who then owes his contractor, according to his contract, by enforcing his lien by action within the six months acquires no superior right in the pro rata distribution of the trust funds, but only the additional security of his lien. Revisal, secs. 2019, 2021.

CIVIL ACTION tried before *Justice, J.*, at May Term, 1916, of STANLY.

This is an action, brought by plaintiff, the Charlotte Pipe and Foundry Company, for the purpose of enforcing a lien against the property of the Southern Aluminum Company, owner, on account of materials furnished to Stier-March Contracting Company, contractor.

The defendant, the Southern Aluminum Company, admits that the plaintiff's claim is for materials and supplies furnished to and used by Stier-March Contracting Company, contractor, on the land and in the improvement of the land of the said Southern Aluminum Company, described in the complaint; that notice and claim of lien was duly given; that suit was brought for the purpose of enforcing said lien within the time prescribed by law, against Stier-March Contracting Company, contractor, and Southern Aluminum Company, owner; that sufficient funds were, and still are, in the hands of Southern Aluminum Company, belonging to Stier-March Contracting Company, to pay plaintiff's claim in full; that none other of the creditors of Stier-March Contracting Company have brought suit to enforce their lien within six months from date of filing notice of the same with the owner or with the clerk of the Superior Court. But the Southern Aluminum Company contends that all creditors filing notice of claims with the owner are entitled to prorate with the plaintiff in the distribution of the funds in hand, despite the fact of their failure to bring suit to enforce their liens as prescribed by statute.

The amount due the plaintiff is $814.23, the amount due the contractor is $1,250, and the total amount of claims filed is $6,133.47.

Judgment was entered in favor of the plaintiff against the Aluminum Company, requiring it to pay the claim of the plaintiff in full and adjudging the amount to be a lien on its property, and the defendant excepted and appealed.

A. C. Huneycutt and O. J. Sikes for plaintiff.
R. L. Smith for defendant.

ALLEN, J. The lien for labor done and materials furnished is given by statute to enforce the payment of a debt, and the general principle underlying the lien laws is that the relation of debtor and creditor must exist and that there can be no lien without a debt (*Boone v. Chatfield*, 118 N. C., 916; *Weathers v. Borders*, 124 N. C., 610); and it was therefore held in *Wilkie v. Bray*, 71 N. C., 205, that as there is no

contractual relation between the owner of property and one who furnishes materials to the contractor, that the subcontractor could not have the benefit of the lien.

Soon after this decision, however, the statutes were amended to include subcontractors, and the provisions for their benefit are now sections 2019 and 2023, inclusive, of the Revisal.

The injustice was recognized of permitting the labor and material of one man to be used to enhance the value of the property of another without compensation, which would have been the result prior to the amendments if the contractor could not be made to pay, and also that the owner ought not to be required to pay the contractor and then have to pay for labor and material when he had not agreed to do so, and the statute was enacted in an effort to adjust the rights of the parties along lines that would be just to both.

The dominant ideas in the statute are that the laborer and material man may by notice protect themselves to the extent of the contract price; that the owner shall not be liable beyond the amount due the contractor at the time of notice given; and that when a lien upon the property is once acquired by giving notice, the amount due the contractor shall be distributed among the claimants pro rata.

The lien is acquired by notice to the owner, and not by filing with some officer (*Mfg. Co. v. Andrews,* 165 N. C., 294), and the amount due the contractor at the time of notice is not a debt due by the owner in the ordinary sense, but a trust fund. *Bond v. Cotton Mills,* 166 N. C., 23.

The statute furnishes the claimants a double security. It gives to them, upon giving notice, a lien on the property of the owner (Rev., sec. 2019), and then imposes upon the owner the duties of a trustee with respect to the amount due the contractor, and requires him "to distribute the amount pro rata among the several claimants as shown by the itemized statements furnished the owner." Revisal, sec. 2023.

The first of these requires an action to enforce it, and this is the lien referred to in *Hildebrand v. Vanderbilt,* 147 N. C., 641, as "lost if action is not begun thereon in six months," while the second does not in strictness create a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor.

This is the conclusion reached by the Court in *Hildebrand v. Vanderbilt, supra,* and in *Perry v. Swanner,* 150 N. C., 142.

The Court says, in the first of these cases, in which notice had been given to the owner, but action had not been begun to enforce the lien upon the property within the statutory period: "The plaintiff, not having begun this action within six months after giving the statement

of his claim to the owner on 1 October, 1900, has no lien; but he can maintain this action against the owner personally, under Revisal, sec. 2021, which makes it the 'duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for,' to be paid to the laborer, mechanic, or material man whenever an itemized statement of the amount due him is furnished by either of such parties or the contractor"; and in the second, after holding that the contractor is not the trustee of an express trust, and therefore not entitled to sue in behalf of all who had furnished material: "The plaintiff testified that he furnished to defendants written statements of the sums due to the material men, in accordance with the statute (Revisal, secs. 2021, 2023). When that statute is complied with, a direct obligation upon the part of the owner to the material man may be created, upon which the latter may sue in his own name."

The right, however, to share in the fund due by the owner to the contractor and to have that fund distributed pro rata among the claimants is a statutory right, and is dependent upon acquiring a lien on the property by giving the notice to the owner; and if no lien on the property is or can be acquired, no duty or obligation is imposed upon the owner by giving the notice.

This was held in *Hardware Co. v. Schools,* 150 N. C., 680, and in the same case, 151 N. C., 508. When this case was first before the Court the only question considered was whether a public school building was subject to the statutory lien for the materials furnished for its construction, and it was held that a lien could not be acquired upon public buildings.

The plaintiffs then moved in the Superior Court, upon findings of fact which showed that at least some of the claimants had filed itemized statements and notice with the trustees of the school, in accordance with the statute and at a time when there was an amount due the contractor, for judgment for the amount owing by the trustees to the contractor, and this was denied in the Superior Court, and the plaintiffs again appealed, and the judgment of the Superior Court was affirmed.

The Court says on the last appeal: "Even a cursory perusal of our statute (Revisal, ch. 48) will make it plainly appear that a subcontractor or a person who furnishes materials for the construction of the building has no claim against the owner apart from the claim he acquires by virtue of his lien after notice to the owner and before he settles with the contractor. The statute was not intended to change the well settled general principle that there must be privity of contract before any liability by one person to another can arise. . . . Revisal, secs. 2019, 2020, 2021 of ch. 48, clearly import, by their words, that

the subcontractor or material man, if he gives the required notice, shall have a lien; and when he acquires a lien by giving the proper notice, the owner of the property upon which the lien rests becomes his debtor to the amount owing by the owner to the contractor at the time of the notice, and not exceeding the debt."

If a lien upon the property is once acquired and either or both of these remedies are pursued, one against the property and the other against the amount due the contractor, the amount charged upon the property and the trust fund cannot exceed the amount due the contractor, and a claimant who brings an action to enforce his lien against the property gains no advantage over the other claimants in the trust fund, but does have an additional security for the payment of his pro rata part.

This seems to be the correct interpretation of the statute when its history, purposes, and language are considered, and while the question was not then directly presented, it follows from the reasoning in *Mfg. Co. v. Andrews, supra.*

The case of *Hildebrand v. Vanderbilt* recognizes the distinction between the action to enforce the lien against the property and the right to have the fund distributed, because it was there held that although the first right of action had been lost, the claimants were entitled to the fund, and that all who had filed claims with the owner were entitled to share equally.

It follows that there is error in adjudging the plaintiff to be entitled to its claim in full instead of the pro rata part thereof.

Error.

J. N. McCAUSLAND & CO. v. R. A. BROWN CONSTRUCTION COMPANY, M. L. BROWN, A. M. BROWN ET ALS.

(Filed 19 December, 1916.)

1. Indemnity—Insurance—Contracts—Interpretation.

A bond guaranteeing performance of a building contract will be construed with the contract in determining the liability of the sureties to third persons furnishing materials, etc., for the building.

2. Same—Mechanics' Liens—Principal and Surety.

Sureties on a bond indemnifying the owner of a building contracted to be erected are not liable for material, etc., used in the building when by the clearly expressed terms of the bond, construed with the contract, the indemnity is solely for the benefit of the owner, and he has sustained no loss.

3. Same—Mechanic's Lien—Principal and Surety.

Our public policy forbids the filing and enforcement of a lien for material used in the erection of a public building, in this case a building for a public school.

4. Same—Schools—Principal and Surety.

The school committee of a town contracted for the erection of a public school building and required from the contractor a bond indemnifying the committee against liens or claims of material men, etc., and for the proper performance of the contract. In interpreting the bond with the contract in this case it is *Held*, that the interest of the owner or obligee was alone considered and protected, and that the sureties are not liable to material men, who could not enforce a valid claim against the school committee or lien on the completed building accepted and used for the contemplated purpose.

5. Mechanics' Liens—Public Buildings — Indemnity Bonds — Principal and Surety—Statutes.

Chapter 150, sec. 2, Laws 1913, making it a misdemeanor for the authorized persons having charge of the erection of a public building to omit to take a bond from the contractor indemnifying those furnishing the material used therein against loss, does not expressly or by implication provide that a bond taken omitting this provision shall be available to the material men; and where the bond fails in this respect, no liability attaches to the sureties thereon.

Civil action tried before *Carter, J.*, and a jury, at February Term, 1916, of Mecklenburg.

On the trial it was made to appear that in July, 1914, the board of school commissioners of Concord, N. C., contracted with the Brown Construction Company to provide the material and labor for erection and completion of a public school building in said city at a cost of $11,236 and required said contractor to enter into a bond in the sum of $5,000 for the proper performance of the contract, etc. This bond was given by the construction company with the individual defendants as sureties and said building has been "erected, constructed, and completed," and same has been duly accepted by the board and paid for. That during construction of said building, plaintiffs, under a contract with the construction company, furnished the material and labor to put on and complete the roofing on said building, to the amount of $771.41, and the same and every part thereof is now due and owing plaintiff from the construction company. That later the construction company became insolvent and plaintiff instituted the present action against said company and the sureties on the bond to recover the amount claimed to be due.

The court charged the jury, in effect, that if they believed the evidence, both the company and the individual defendants, sureties on the bond, were liable for the debt.

There was verdict for plaintiff against all of defendants for $771.41. Judgment, and the individual defendants excepted and appealed.

McNinch & Justice for plaintiff.
Clarkson & Taliaferro, L. T. Hartsell, and W. G. Means for defendant.

Hoke, J. The contract for the erection of the building makes stipulation, among other things, "That the contractors shall and will provide all the material and perform all the work for the erection and completion of a high school building on the lot of the owners in the city of Concord, etc., at the price of $11,236," etc. And further: "If at any time there shall be evidence of any lien or claim for which, if established, the owners of the said premises might become liable, and which is chargeable to the contractors, the owners shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all such payments are made, the contractors shall refund to the owners all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default." And again: "The contractors further agree to furnish the owners, free of cost to the owners, a satisfactory indemnity bond in the sum of $5,000, to guarantee the faithful performance of the contract and to indemnify the owners against liability from accidents to persons or their property during the erection of the building." The conditions of the $5,000 indemnity bond, signed by defendant, is as follows: "Now, therefore, if the above bounden R. A. Brown Construction Company shall well and truly perform and fulfill all the covenants and agreements mentioned in said contract and specifications for the erection and completion of the said building, to be performed and fulfilled as therein set forth, and to the written approval of the said architects, and will and shall save and keep harmless the said board of school commissioners of the city of Concord and the said building and the land on which the same is erected from all and every claim for materials, labor, or otherwise incurred by reason of erection and completion of said building, and shall turn over the said building to the said board of school commissioners of the city of Concord free and clear from all liens or claims for material or labor, and faithfully perform the said contract and save the said board of school commissioners of the city of Concord against all liability from accident to person or property during the erection of said building, then this obligation to be void; otherwise, to remain in full force and virtue."

Upon these, the portions of the contract and bond more directly relevant, we are of opinion that plaintiff has shown no cause of action against the sureties. There are many decisions with us to the effect that in case of these guarantee bonds or written contracts of indemnity third persons interested and having claims, though not named, may institute action thereon and recover when it appears by "express stipulation or by fair and reasonable intendment that their rights and interests were contemplated and being provided for." *Morton v. Water Co.,* 168 N. C., 582; *Withers v. Poe,* 167 N. C., 372; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *Voorhees v. Porter,* 134 N. C., 591; *Town of Gastonia v. Engineering Co.,* 131 N. C., 363; *Gorrell v. Water Supply Co.,* 124 N. C., 328.

In case of building contracts with bonds guaranteeing performance on the part of the contractor, it is held that in determining the question of the sureties' liability to third persons the contract and bond shall be construed together. *Mfg. Co. v. Andrews,* 165 N. C., 285, and recoveries on the part of claimants of that character, usually laborers and material men, not expressly named, are sustained where it appears that the guarantee bond, in express terms, provides for liability to such persons, as in *Morton v. Light and Power Co., supra; Gorrell v. Water Supply Co., supra;* or when there is stipulation that claims of this kind shall be paid by the contractor, the case presented in *Supply Co. v. Lumber Co., supra,* and *Gastonia v. Engineering Co.*, an application of the principle approved by many authoritative decisions elsewhere. *Knight & Jillson Co. v. Arthur Castle,* 172 Ind., 97, reported also in 42 L. R. A., U. S., 573, with note by the editor; *Ocho v. Carnahan Co.,* 42 Ind. App., 157; *Brown v. Markland,* 22 Ind. App., 652; *Jordan v. Kavanaugh,* 63 Iowa, 152, and cases cited in note to *Cleveland Roofing Co. v. Gaspard,* Anno. Cases, 1916 A, 39 vol., pp. 745-758, or where the language of the instrument is sufficiently ambiguous to permit of construction and the terms of the obligation and the attendant facts and circumstances, relevant and permissible in their proper interpretation, show by fair and reasonable intendment that claimants of that character are to be provided for; an instance presented in *Shoaf v. Ins. Co.,* 127 N. C., 308, and the cases of *Voorhees v. Porter* and *Withers v. Poe* may be referred, in part, to same position. But the principle does not extend to bonds of indemnity in strictness, for the owner or obligee named, as where there is stipulation in express terms that the indemnity is for the owner alone. *Mfg. Co. v. Andrews, supra,* or when, from a perusal of the relevant clauses of the contract, it is clear that the interest of the owner or obligee named is alone considered and protected. *Clark v. Bonsal,* 157 N. C., 270, or where there is a stipulation to relieve from liens,

and the contract, as in this instance, concerns a building for the public, and the assertion of a lien is forbidden and prevented by a public policy, the private right in such cases being properly subordinated to the public interests. *Hardware Co. v. Graded Schools,* 151 N. C., 507; *Smith v. Bowman,* Utah, reported in 9 L. R. A., U. S., 889; *Townsend v. Roofing Co.,* 18 Ind. App., 568.

On careful consideration of this contract and the bond to secure same, it is clear that, so far as the sureties on the bond are concerned, the obligation is one strictly of indemnity towards the owner, and that the claims of laborers or material men were in no way considered or provided for except in so far as necessary to effect the primary purpose. In the contract, the stipulation is, first to provide the material and labor to complete the building, simply the usual form of obligation between the owner and contractor, and otherwise has no special significance. *Mfg. Co. v. Andrews, supra.*

Further on the subject, there is provision if at any time there shall be evidence of any lien or claim for which, if established, the owner might become liable and which is chargeable to contractors; and, again: "The bond is to guarantee the faithful performance of the contract and to indemnify the owners against liability from accidents," etc. And the bond given, providing for the faithful performance: "and will save and keep harmless the said board of school commissioners of the city of Concord, and the said *building* and the *land* on which the same is erected, from all and every claim for material, labor, or otherwise incurred, etc., and shall turn over the said building to said board free from all claims for material," etc. Not a word in either contract or bond, or the two together, looking to any obligation assumed to the material men or for their benefit, but only so far as required to protect the owners and the building and land on which it is situate from liens or claims which might be made effective against them.

The facts in evidence showing that every condition of the bond has been met, the building completed according to specifications and turned over to public authorities free from any and all claims against them, the building or the land on which the same is situate, no liability should attach to the sureties, and the judgment as to them must be reversed. *Townsend v. Cleveland Co.,* 18 Ind. App., *supra.*

We are not inadvertent to a line of authorities cited for plaintiffs that in claims of this kind statutes and bonds looking to the protection of material men and laborers should receive a liberal interpretation, notably, the case of *United States to the use of Hill v. Surety Co.,* 200 U. S., 197. In that case a Federal statute required that persons making formal contracts with the United States for the construction or repair of public buildings should enter into a bond stipulating, among

other things: "That the contractor or contractors shall promptly make payments to all persons supplying labor or materials in the prosecution of the work provided for in the contract," etc., and the bond had been given in terms as required by the law. Applying, as stated, the principle of a liberal interpretation of such statutes and contracts, the Court held that there was nothing to restrict liability in the bond to claimants who furnished material, etc., directly to the contractor, but that the statute, by correct construcion, would extend to and provide for claimants who had supplied subcontractors for use in the building, etc. But neither this nor the other authorities cited, nor the principle upon which they proceed, apply to a case like the present, in which the bond is clearly one of indemnity towards the owner. And, in reference to our own statute requiring that a bond to protect such claimants shall be taken, Laws 1913, ch. 150, sec. 2, if the statute had provided that any bond taken in such cases should inure to the benefit of laborers and material men, this might be construed as constituting a part of contracts to which the statute applied. *White v. Kincaid*, 149 N. C., 415. The law, however, is not so drawn, but requires that "every county, city, or other municipal corporation entering into a contract for constructing, repairing, etc., a public building shall require a contract in a sum specified, conditioned for the payment of all labor and material, etc." While the statute makes the failure to take such a bond a misdemeanor on the part of the official charged with the duty, and while, in case of ambiguity, a presumption might arise in favor of its proper performance, it only directs that a bond to that effect shall be taken, and does not apply to a case where it is clear, as stated, that no such bond was taken and no such obligation assumed. As a matter of fact, it is no doubt true that both parties acted in ignorance of the statutory requirement, and merely filled out a bond in the old form, designed and intended to protect the public and the building and the land on which the same is situate, and a direct obligation to the material men was in no way contemplated or provided for.

There is error, and the judgment against the sureties is reversed and action dismissed.

Reversed.

W. E. HOLLIFIELD v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND J. C. HOLLIFIELD.

(Filed 19 December, 1916.)

1. Removal of Causes—Diversity of Citizenship—Sufficient Petition and Bond—Jurisdiction.

When a nonresident defendant files, in apt time, a petition and proper bond for the removal of the cause to the Federal court for diversity of citizenship, the former of which contains allegations of fact sufficient under the law to entitle him to a removal, the jurisdiction of the State court is at an end, and the issues of fact, affecting the right of removal, properly raised by the petition and papers in the proceedings, are to be determined by the Federal court.

2. Same—Indefinite Averments.

Where a nonresident defendant seeks to remove a cause to the Federal court upon the ground of diversity of citizenship, and alleges in his petition that a resident defendant was fraudulently therein joined to prevent the removal, before the State court is under any duty or obligation to surrender its jurisdiction there must be specific allegation of the facts constituting the alleged illegal or fraudulent joinder, and it is not sufficient to charge generally or by indefinite averment that the joinder is or was intended to be in fraud of the nonresident defendant's rights.

3. Removal of Causes—Diversity of Citizenship—Pleadings—Joint Torts—Fraudulent Joinder.

Where a nonresident defendant is seeking to remove the cause of action to the Federal court for diversity of citizenship, setting up the fraudulent joinder of a resident defendant to prevent his right thereto, the plaintiff is entitled to have his cause of action considered as stated in his complaint; and if it is therein sufficiently alleged that the cause of action arose from a joint tort, he may sue the wrong-doers jointly, and in the lawful pursuance of this right his motives will not be inquired into.

4. Same—Insolvency—Conspiracy.

Where a nonresident defendant seeks to have the cause removed to the Federal court, and the petition of the nonresident defendant sets up a fraudulent joinder of a resident defendant, the right of the plaintiff to sue the resident defendant is the material question involved, and the question of his solvency is immaterial; and where a conspiracy between the defendants is relied upon, the matters constituting the alleged conspiracy must be sufficiently alleged to raise the issue for the determination in the Federal court; and the fact alone that the resident defendant is the son of the plaintiff is insufficient.

5. Same—Relationship—Jurisdiction.

Where the complaint alleges that the resident defendant was the agent of the nonresident defendant, with the right to employ, discharge, and control the plaintiff and other employees in the work of loading tele-

phone poles upon a railroad car; that the agent negligently ordered the work to be done with insufficient help, without instructing the plaintiff, inexperienced in such work, and at the time the agent knew or should have known of the danger, etc., which, in its petition to remove the cause to the Federal court, the principal defendant does not directly controvert, but merely avers that it was not the agent's duty to provide sufficient help, and that he could not have failed therefore in his duty respecting it; that the resident defendant was the son of the plaintiff and permitted a judgment by default for the want of an answer; and that the cause alleged was only against the principal defendant: *Held*, the averment of the principal defendant is not sufficient to raise the issue of fraudulent joinder to have it passed upon by the Federal court, and deprive the State court of its jurisdiction.

6. Appeal and Error—Joint Torts—Default—Final Judgment.

Where two defendants are sued for damages for a personal injury caused by their alleged joint tort, and judgment by default of an answer is taken against one of them, leaving open the inquiry, and issues as to negligence of the other, and the damages as to both, are duly submitted and answered, and judgment against both entered for the amount, the judgment so rendered is a final one against each and both of the defendants, without the necessity of having submitted a special issue upon the inquiry as to the one who failed to answer, the issue of damages submitted applying to both defendants.

7. Appeal and Error—Unanswered Questions—Prejudice.

Where upon the trial of a cause questions asked a witness were ruled out and excepted to, it must appear what the appellant expected to prove by the answers, so that the Court may see in what respect, if any, he has been prejudiced, or the exceptions will not be considered.

8. Principal and Agent—Vice-Principal—Trials—Evidence—Negligence.

Where the principal and his agent are sued for a personal injury alleged to have been caused by the negligence of the latter in ordering the plaintiff and others to do certain work under dangerous conditions, it is competent for the plaintiff to show that the agent was in control of the work and the employees, and that the latter had previously complained to the agent of the danger in doing the work under the surrounding circumstances, and that notwithstanding the complaint he had ordered it to be done.

9. Negligence—Principal and Agent—Trials—Evidence—Opinion.

In an action to recover damages against a principal and his agent for the alleged negligence of the latter in ordering the plaintiff to do dangerous work with insufficient help, it is held competent for the plaintiff to testify how the injury was received, or what caused it, and why more hands were needed, when stating facts within his own knowledge, and it is not objectionable as opinion evidence.

10. Principal and Agent—Vice-Principal—Evidence—Control of Employees—Trials.

The evidence in this case held sufficient for the jury to infer that the agent of the principal defendant represented the latter, and that a re-

fusal by the plaintiff, and the other employees working under him, to obey his orders would be followed by a discharge. *Turner v. Lumber Co.*, 119 N. C., 387, cited and applied.

11. Damages—Negligence—Evidence—Character.

In an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant's vice-principal, it is competent to show that the plaintiff was sober and industrious, upon the question of his earning capacity and the extent to which it had been impaired by the injury.

12. Appeal and Error—Evidence—Expert Witnesses—Personal Injury—Damages—Harmless Error.

In an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff by the defendant, the statement of a medical expert witness that he could form an opinion as to whether the plaintiff's condition would grow worse is not prejudicial to the defendant, when his testimony is solely directed to the extent of the present injury falling under his observation as attending physician.

13. Principal and Agent—Negligence of Agent—Joint Liability—Damages.

An order by the vice-principal directing an employee to do certain work under dangerous conditions, from which an injury resulted to the plaintiff, and which was negligent in him to have given, renders both the principal and his vice-principal jointly liable for the resultant damages.

14. Instructions—Expression of Opinion—Negligence—Contributory Negligence—Assumption of Risks—Burden of Proof.

In an action by an employee to recover damages for the negligence of his employer in failing to furnish sufficient help to do the work required of him, a charge to the jury that being short of hands would not, of itself, legally excuse the defendant was not an expression of opinion forbidden by the statute; and that the charge as to negligence, contributory negligence, assumption of risk, and the burden of proof was free from error.

BROWN, J., dissenting.

CIVIL ACTION tried before *Justice, J.*, and a jury, at February Term, 1916, of MCDOWELL.

This action was brought to recover damages for personal injuries alleged to have been caused by the joint negligence of the defendants.

Plaintiff alleged that on 1 August, 1913, he was employed by the defendant company to load the cars of the C. C. and O. Railway Company with telephone poles 50 feet in length and from 18 inches to 2 feet in diameter at one end and 6 to 10 inches at the other. That the bark had been peeled from the poles, and they were not only very heavy, but "hard to handle with hand-power only." That it would require a dozen men to load the cars with safety, and that the poles are sometimes crooked, which makes them unwieldly and difficult to lift

and place in their proper position without as many as fifteen or twenty men to do the work.

Plaintiff further alleges: "That he was assigned by the defendant Telephone and Telegraph Company, through its foreman and vice-principal, the said J. C. Hollifield, to the work of loading upon cars telephone poles 50 feet long, of the character and kind hereinbefore described, with four other men and said foreman, who at times assisted in the work, and that plaintiff and the four other men with whom he was assigned to work were obliged, with the assistance of said foreman at times, to load the poles upon cars, and to place the poles in position by moving them about and rolling them over upon the cars, and that such number of men was insufficient, and that the defendant company knew, and that the defendant J. C. Hollifield knew, or that each of them ought to have known, that such number of men was insufficient to handle, load, and place the poles as required by the defendant; and that with such knowledge the defendant company and the defendant J. C. Hollifield negligently, and with reckless indifference to the safety of those engaged in the work, assigned plaintiff, with such insufficient number of men, to the work of loading said poles, and in so assigning him to work with such insufficient number of men in the loading and handling of said poles negligently failed to provide for plaintiff a reasonably safe place and reasonably safe surroundings and conditions under which to do the work so assigned to him. That while plaintiff, who had no previous experience at such work, and who had no warning whatsoever from the defendants, or either of them, as to the dangers of the work, on the first day of his employment was assisting, to the best of his skill and ability, in the loading and placing of said poles, that he was negligently ordered and required by the defendant J. C. Hollifield—who had charge of and was directing and superintending the work for the defendant Telephone and Telegraph Company, clothed with the power and authority conferred upon him by said company to employ and discharge laborers who declined or omitted to obey the orders and perform the work required of them—and was therefore ordered and required by the defendant company, to cross over the pole, after it had been rolled upon a flat-car, and hold against the end of the pole while the other men, under the orders and requirement of the said J. C. Hollifield as foreman, engaged in an effort to roll the pole over in the direction in which plaintiff was standing, to place the same in position with other poles which had been loaded, plaintiff being so required to hold against said pole to prevent the end which he was attempting to hold from going beyond the point, alongside the other poles, to which said foreman desired to have it placed; that said pole was very heavy and was very crooked and so hard to handle by the few

men engaged in handling it that it was almost impossible with the utmost exertion which the men could possibly employ, and with great and unreasonable strain upon their part, to roll it over and move it, and that it was impossible for the men who were required to handle this pole to properly handle and so control it as to regulate its movements with any reasonable degree of safety to the men engaged in an effort to handle and move it; that while plaintiff was so engaged by the negligent requirement of the defendants, and each of them, in holding against one end of said pole, that the other men with great effort and exertion succeeded in lifting and rolling up the crooked part of said pole from the floor of the car in order to roll the pole over, and the heavy crooked part of the pole, which was raised up some 2 or 3 feet from the floor of the car, suddenly and with great force fell over upon the floor of the car in the direction of and against plaintiff and the tool with which he was working, and violently struck him and hurled him off and beyond the car against a pile of logs and timbers upon the ground and injured him, as hereinafter alleged."

The telephone company filed a petition for removal of the case to the United States District Court upon the ground that it is a nonresident of this State and that J. C. Hollifield was fraudulently joined with it as a defendant for the purpose of preventing a removal to said court, and, further, that the complaint does not allege any joint cause of action against the defendants, but presents a separable controversy as to the telephone company which entitled it to the removal. The petitioner further alleged that the duty of furnishing a safe place for the plaintiff to work and a sufficient number of hands to assist the plaintiff was not such as defendants owed jointly to him, but that it was the sole duty of the petitioner.

Petitioner further alleged: "That the only negligence alleged in said complaint is the negligence of your petitioner in failing to furnish to the plaintiff a sufficient number of men to perform the work in which plaintiff was engaged, in failing to furnish to the plaintiff a reasonably safe and suitable place in which to work, and in failing to warn the plaintiff of the dangers to which he might be exposed while performing this work; that if these duties were owed to the plaintiff, they were not owed by your petitioner's servants or foremen; that it was no part of the duty of the said J. C. Hollifield to furnish the plaintiff with a safe and suitable place in which to do his work, or to warn the plaintiff of any danger to which he might be subjected while performing said work, and it does not appear from said complaint that the said J. C. Hollifield failed or neglected to perform any duty or duties which he owed to the plaintiff, which failure proximately caused the plaintiff's injury, and your petitioner expressly avers that the said

J. C. Hollifield did not fail or neglect to perform any duty or duties which he owed to the plaintiff, and petitioner expressly denies that the plaintiff's injury, if any he sustained, was proximately caused by any negligence or failure of duty on the part of the said J. C. Hollifield; that the said J. C. Hollifield was simply the boss of the gang of men in which the plaintiff was working, and as such boss assisted the plaintiff and the other employees in loading said poles, and was working with the plaintiff, assisting him, at the time the plaintiff alleges he was injured, and was, as your petitioner is advised and believes, a fellow-servant of the plaintiff, for whose negligence your petitioner was not and cannot be held responsible; and your petitioner avers that if the plaintiff was injured by the turning of the pole, as alleged in the complaint filed in this cause, the turning of said pole was not the result of any act on the part of the said J. C. Hollifield, as the said J. C. Hollifield was not at that time engaged in turning said pole, but was simply assisting the plaintiff in holding same."

Petitioner also alleges that the defendant J. C. Hollifield has not employed counsel to defend him; that he is a son of plaintiff and is insolvent, and that plaintiff has no intention of prosecuting this suit against defendant Hollifield, and that the allegations against him were made for the sole purpose of preventing a removal of the case to the Federal court and in pursuance of a conspiracy between plaintiff and his son for that purpose.

The court refused to remove the case, and the telephone company excepted.

At the trial of the case before a jury a verdict was rendered for the plaintiff as follows:

1. Was the plaintiff injured by the negligence of the defendant Southern Bell Telephone and Telegraph Company, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: "No."

3. Did the plaintiff assume the risk of injury, as alleged in the answer? Answer: "No."

4. What damage, if any, has the plaintiff sustained? Answer: "$5,000."

Judgment was entered upon the verdict against both defendants, and the telephone company, having noted its exceptions, appealed to this Court.

Pless & Winborne and W. T. Morgan for plaintiff.

A. Hall Johnston, A. S. Barnard, and B. J. Clay for defendants.

WALKER, J., after stating the case: We have uniformly decided in this Court that when a verified petition which contains facts sufficient under the law to entitle the applicant to a removal is filed and is accompanied by a proper bond, the jurisdiction of the State court is at an end, and that the issues of fact, if properly raised by the petition and papers in the cause, are to be tried and determined by the Federal court and not by the State court in which the action was brought. *Herrick v. R. R.,* 158 N. C., 307; *Lloyd v. R. R.,* 162 N. C., 485; *R. R. v. McCabe,* 213 U. S., 207; *Wecker v. National Enameling Co.,* 204 U. S., 176. But before the State court is under any duty or obligation to surrender its jurisdiction it must appear affirmatively, and by specific allegation of the facts constituting the alleged illegal or fraudulent joinder of a resident with a nonresident defendant, that the same exists, and it is not sufficient to charge generally or by indefinite averments that the joinder is or was intended to be in fraud and prevention of the nonresident's right of removal. *Hough v. R. R.,* 144 N. C., 692; *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352; *Shane v. R. R.,* 150 Fed., 801.

The plaintiff is entitled to have his cause of action considered as stated in his complaint. If there has been a joint tort committed, he may sue the wrong-doers jointly or separately, at his election, as they are liable to him in either form of action. *Hough v. R. R., supra; Smith v. Quarries Co.,* 164 N. C., 338; *R. R. v. Miller,* 217 U. S., 209; *R. R. v. Thompson,* 200 U. S., 206. When a party is in the lawful assertion of a right in bringing his action, the law attaches no importance to his motive in pursuing a course which he has a right to take. *Hough v. R. R., supra.* It was said in *R. R. v. Dixon,* 179 U. S., at p. 135: "The question to be determined is whether the Court of Appeals erred in affirming the action of the (State) Circuit Court in denying the application to remove; and that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkley and Sidles was immaterial. The petition for removal did not charge fraud in that regard or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry."

Nor does the fact of the resident defendant's insolvency make any difference. It is not the amount that may be recovered eventually, but the right to sue him, that is the material question involved. *Hough v. R. R., supra.* And the mere allegation of a conspiracy to prevent a removal is of no more consequence without the statement of matter

which shows that one existed to do a wrong. The right to removal then turns upon the allegation of sufficient facts upon which to predicate it. "While a case may in proper instances be removed on the ground of false and fraudulent allegations of jurisdictional facts, the right does not exist, nor is the question raised by general allegations of bad faith, but only when, in addition to the positive allegation of fraud, there is full and direct statement of the facts and circumstances of the transaction sufficient, if true, to demonstrate that the adverse party is making a fraudulent attempt to impose upon the court and so deprive the applicant of his right of removal." *Smith v. Quarries Co.*, 164 N. C., 338, 352, citing *Rea v. Mirror Co.*, 158 N. C., 24; *K. C. R. R. Co. v. Herman*, 187 U. S., 63; and numerous other cases. The State court does not hear the proof of the fraud and pass upon the issue, as that is left for the other court to do; but this rule applies only "as to such issues of fact as control and determine the right of removal, and on an application for removal by reason of fraudulent joinder, such an issue is not presented by merely stating the facts of the occurrence showing a right to remove, even though accompanied by general averment of fraud or bad faith; but, as heretofore stated, there must be full and direct statement of facts sufficient, if true, to establish or demonstrate the fraudulent purpose." *Smith v. Quarries Co., supra.*

The defendant company relied upon *Rea v. Mirror Co., supra,* and *Wecker v. National Enameling Co., supra;* but it will be found upon an examination of those cases that there were direct, positive, and specific statements in the petitions to the effect that the resident defendants had nothing to do with the alleged wrongs, and were not even present when they were committed, but were employed in another department of the business not related in any way to the work in which the plaintiffs were engaged, and the facts were fully set forth so that it could be seen that there was a fraudulent joinder. But in this case the plaintiff has alleged in his complaint that J. C. Hollifield was superintendent of the work in which plaintiff was employed at the time he was injured, had general charge and control of it, and was clothed with authority to employ and discharge the plaintiff, and the other hands, for disobedience of his orders, and generally represented his principal, the telephone company, in this respect, and that, holding this position in the service of the company, he directed the plaintiff, who was inexperienced, to perform work which J. C. Hollifield knew to be dangerous, and without proper warning of the danger to his subordinates, or proper instructions to them as to how to do the work with safety. This allegation is not directly controverted or categorically denied, but the petitioner merely avers that Hollifield was a boss of the gang of hands to which plaintiff belonged, and was assisting

him and his coemployees at the time of his injury, and that it is advised and believes that Hollifield was their fellow-servant, and that the duty to furnish a sufficient force to load the cars with the poles was one owing by the petitioner only, and not by J. C. Hollifield, and that the latter did not fail to perform any duty owing by him to the plaintiff which proximately caused the injury. This is not an adequate denial of Hollifield's authority over the gang of workmen, nor is it any sufficient statement of facts showing a case of fraudulent joinder. It would seem to be more an expression of petitioner's opinion as to the nature of the transaction and of inferences it has drawn from undisclosed facts, or from the advice of counsel, rather than a plain and direct statement of relevant facts which are indicative of fraud. This case, therefore, is not like *Rea v. Mirror Co., supra,* or *Wecker v. National Enameling Co., supra,* but is very much like *Smith v. Quarries Co., supra,* except that the allegation of the petition for removal, which was denied, was far more specific, as to the authority of Welsh and Eller and the plaintiff, in that case, and also as to their duties and powers as employees of the nonresident defendant, than is the corresponding allegation in this case. The petition in *Smith's case* was very elaborate in its statements, and charged everything to be found in this petition, and contained far more relevant and material facts, and yet it was held to be insufficient to warrant a removal.

We might well rest our conclusion upon that decision without further discussion. But it is suggested that the plaintiff has not pursued his action against the resident defendant to final judgment. This is a clear error, as the record shows. He failed to plead, and judgment by default was entered against him, which established as against him, under our procedure, and procedure generally, the cause of action alleged in the complaint. *Blow v. Joyner,* 156 N. C., 140; *Graves v. Cameron,* 161 N. C., 549; *Patrick v. Dunn,* 162 N. C., 19; *Plumbing Co. v. Hotel Co.,* 168 N. C., 577. It was not necessary to submit an issue as to his negligence, when he admitted it by failing to answer. *Justice Brown* well says in *Plumbing Co. v. Hotel Co., supra:* "The default is an admission of every material and traversable allegation of the declaration or complaint necessary to the plaintiff's cause of action. 23 Cyc., 752. It admits all the material averments properly set forth in the complaint, and of course everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible," citing *Garrard v. Dollar,* 49 N. C., 176; *Lee v. Knapp,* 90 N. C., 171; *Blow v. Joyner, supra; Graves v. Cameron, supra.* This being so, the only thing left to do in regard to the resident defendant was the assessment of damages, after

ascertaining the negligence of the other defendant. This was done, as the record shows, and a final judgment was then entered against both defendants for the amount of damages, and costs. The language of the judgment is "that plaintiff have and recover judgment against the defendants in the sum of $5,000 and for the costs." The remark attributed to counsel was explained, and the record stands as we have stated it to be.

We have sufficiently considered *Rea v. Mirror Co.*, 158 N. C., 25, which was much relied on by the defendant, and shown that it is like *Wicker v. Enameling Co.*, 204 U. S., 176, in the respect that in both cases the servant injured and the one sued were in different branches of the service, and admittedly so; but in *Smith v. Quarries Co.*, 164 N. C., 338, both servants were engaged in the same employment, as is the case here, and we cannot well remove this suit without seriously impairing that case as an authority, if not overruling it, and we think it was correctly decided and is well supported by authorities in the Federal and State courts. We said in *Hough v. R. R.*, 144 N. C., at 700: "The defendant, who petitioned for a removal, simply controverts the allegation of the complaint, for that is what the petition means, and all that it means. Its vituperative expressions prove nothing. Calling an act fraudulent does not make it so. It must be alleged in what the fraud consists. We have practically nothing before us but the joinder and the bare allegations of fraud. That will not do." What was said in that case as to proof of the fraud referred, of course, to such proof in the Federal court, where the issue of fraud is tried, if properly made in the State court. The *Hough case* is a direct authority in support of the right to join the defendants in this action. In respect to this right of joinder we find the following clear statement of law in 1 Mechem on Agency (2 Ed.), sec. 1460: "In practically every case in which the master could be held liable for the negligence of his servant, the servant himself is personally liable. This must be so from the very nature of the case. The whole theory of the master's liability is that the servant has done a legal wrong for which the law imposes a liability upon the master, however innocent he may be. The person actually and primarily at fault, however, is the servant, and if he would not be liable, the master ordinarily cannot be. The liability of the servant is the direct and primary one; that of the master is a secondary and imputed one. In actual practice the liability of the servant or agent is usually ignored because it is more convenient or effective to pursue the master; but the servant's liability nevertheless exists." The Court expressed a doubt in *Dishon v. R. R.*, 133 Fed. Rep., 471, which was afterwards resolved against its view in *R. R. v. Thompson*, 200 U. S., 206, to which it had referred for a solution of the question in doubt, as the writ of error was then pending.

Coming to the exceptions taken at the trial before the jury, we find several questions of evidence presented. Some of the questions put to witnesses were unanswered, and, therefore, harmless. There is nothing to show what the answer would have been, nor what was expected to be proved, and we cannot see that the appellant was in any way prejudiced by the ruling of the court. *Jenkins v. Long,* 170 N. C., 269. It was competent to show who was in charge of the work, and that J. C. Hollifield was the man. That was one of the important questions in the case. We do not see why it was not also competent to prove that the hands complained to Hollifield that the force was not sufficient to handle the poles, and his reply admitting it, with the order to go on with the work. It was a part of what was done at the time, and the declaration of one who was then acting in the place of his principal. The order given by J. C. Hollifield to the hands was a relevant fact and the court properly admitted evidence to prove what it was. It is one of the allegations of the complaint that plaintiffs were ordered by Hollifield to do the work and that he had the power to give the order. The court did not err in allowing plaintiff to testify how the injury was received or what caused it, and why more hands were needed. He was merely stating facts within his own knowledge. In other words, he was stating what he had seen and the nature of which he understood by former experience. It was not merely an opinion. *Murdock v. R. R.,* 159 N. C., 131; *Britt v. R. R.,* 148 N. C., 37; and especially *Ives v. Lumber Co.,* 147 N. C., 306, which is similar in this respect. All these rulings were correct. There was evidence in the case from which the jury could reasonably draw the inference that J. C. Hollifield was superintendent or foreman of the gang of laborers and as such represented his principal, and that those who acted under his orders had just reason to believe that the refusal or failure to obey him would or might be followed by a discharge from the service in which they were engaged. *Turner v. Lumber Co.,* 119 N. C., 387; *Mason v. R. R.,* 111 N. C., 482 (*s. c.,* 114 N. C., 718); *Shadd v. R. R.,* 116 N. C., 968. Upon the question of the plaintiff's earning capacity and the extent to which it had been impaired by the injury, we do not see why it was not competent to prove his habits, that is, that he was sober and industrious, for such a man would surely be able to do more for himself in the world than a lazy, drunken, and thriftless one. 8 Rul. Case Law, sec. 172; *C. M. and E. Company v. Anderson,* 98 Texas, 156; *Kinston v. R. R.,* 112 Mich., 40. The testimony of Dr. Justice seems to be based upon a personal examination of plaintiff to ascertain his mental and physical condition, and he really spoke only of such condition. In answer to the hypothetical question, he simply stated that he

could form an opinion as to whether the plaintiff's condition will continue as it is or whether it will be worse. In this respect nothing harmful was said by him. This also substantially applies to the testimony of the medical experts. The motion to strike out testimony, even if the latter is incompetent, was within the sound discretion of the court. *S. v. Efler,* 85 N. C., 585; *Johnson v. Allen,* 100 N. C., 136; *Duggar v. McKesson, ibid.,* 1; *S. v. Pratt,* 88 N. C., 639; *Simpson v. Pegram,* 112 N. C., 541.

There was evidence for the jury upon the question of negligence, and the motion for a nonsuit was properly overruled. The jury could infer from the evidence submitted to them that J. C. Hollifield was representing the defendant in superintending the work of loading the cars with telephone poles, and had power and authority over the hands engaged in it. 26 Cyc., 1307. If he ordered them to do work which would expose them to danger, and this order was negligently given, he would be liable jointly with his master, the defendant, for the resultant injury. *Means v. R. R.,* 126 N. C., 424; *Allison v. R. R.,* 129 N. C., 336; 26 Cyc., 1383, and especially *Wright v. Crompton,* 53 Ind., 337; *Howe v. R. R.,* 60 L. R. A. (Wash.), 959; *R. R. v. Thompson,* 200 U. S., 206. There was no expression of opinion by the Court, but simply a statement that if defendant was short of hands this would be no legal excuse for the wrong. It was its duty to have a sufficient force to do the work and make it reasonably safe to perform it. *Pigford v. R. R.,* 160 N. C., 93; *Shaw v. Mfg. Co.,* 146 N. C., 235.

The charge of the court as to negligence and contributory negligence was in accordance with our decisions upon those questions. The court defined the duty of the defendants with respect to the plaintiff while he was performing the task assigned to him, and also the duty of plaintiff to himself, and this was done with full statement as to what care and circumspection was required of each. The judge did not place too great a burden upon the defendants, or either of them, nor was there any departure from the true rule as to proximate cause. We stated the doctrine of proximate cause as applicable to both negligence and contributory negligence in *Treadwell v. R. R.,* 169 N. C., 701. The judge gave the instructions requested by the defendant, as far as he could do so and stay within the law of the case, and they were not only given to this extent, but in a very clear and ample manner. The charge and responses to special prayers embraced all the law which was applicable to the facts, disclosed by the evidence, including that relating to assumption of risk.

We have, after a thorough examination of the case, been unable to discover any error therein.

No error.

BROWN, J., dissenting: I am of opinion that the motion to remove this case to the Federal court should have been granted. It is held in *Rea v. Mirror Co.*, 158 N. C., 25, by a unanimous Court in an opinion by *Mr. Justice Hoke* that "When a petition for the removal of a cause from the State to the Federal court, properly verified and accompanied by a proper and sufficient bond, has been filed in the State court in apt time in an action brought against a nonresident corporation and its resident manager, alleging a joint wrong, and the petition contains allegations of fraudulent joinder, together with full and direct statements of the facts and circumstances sufficient, if true, to demonstrate that there has been such fraudulent joinder of the resident defendant, the jurisdiction of the State court is at an end and the order should be made removing the cause, leaving the remedy for the opposing party in the Federal court upon motion to remand the cause or other proper procedure therein."

The petition for removal, in my opinion, comes up completely to all the requirements of the aforegoing case. It alleges a separable controversy between the plaintiff and the telephone company; that the only negligence alleged is a failure to furnish sufficient men, failure to warn, and failure to furnish a reasonably safe place in which to work and safe surroundings and conditions; that the negligence, if any, which proximately caused the injury was the negligence of the telephone company.

The petition further alleges failure of the complaint to state a joint cause of action; that J. C. Hollifield did not jointly with the telephone company owe the defendant the duty to do the things the failure to do which constituted the alleged negligence; that all such duties were owing to the plaintiff only by the telephone company, and not by its servants or its alleged foreman; that the injury to the plaintiff, if any, was caused by the negligence of the defendant the telephone company, and no failure on the part of the said J. C. Hollifield.

The petition further alleges that J. C. Hollifield is taking no interest in this suit; that he has employed no counsel; that he is the son of the plaintiff; that he, to the knowledge of the plaintiff, is and was totally insolvent; that he was not in good faith made a party defendant, and that the plaintiff does not expect to prosecute the action against him, or seriously attempt to obtain a judgment against him, and that he was wrongfully, unlawfully, improperly, and fraudulently joined as a defendant for the sole purpose of fraudulently preventing or attempting to prevent removal of the cause; that at the institution of the suit the plaintiff, his counsel, and J. C. Hollifield knew that no cause of action existed as to him, and that the allegations attempting to allege a joint liability were knowingly false and fictitious, and made for the sole

purpose of defeating a removal; that there existed at the time, and still exists, an unlawful conspiracy between the plaintiff, his son, J. C. Hollifield, and counsel for the plaintiff to thus fraudulently deprive the telephone company of its right of removal.

The allegations of this petition must be taken to be true so far as the State court is concerned. *Dishon v. R. R.,* 133 Fed., 47, and cases cited. If the English language is taken in its usual acceptation, the allegations of this petition charge a fraudulent joinder of the plaintiff's son, utterly insolvent, for the purpose of preventing the removal to the Federal court. The petition alleges that J. C. Hollifield, the son, did not contribute in any way to the plaintiff's injury, and was in no sense liable therefor. It sets out the acts of the defendant J. C. Hollifield to support these allegations. The case comes within the ruling of the Federal court in the *Dishon case, supra,* which is cited with approval in *Ky. v. Powers,* 201 U. S., p. 1.

The proceedings in the trial court, which are set out in the record, substantiate all of the allegations of the petition for removal. The record shows that J. C. Hollifield was the son of the plaintiff, that he was utterly insolvent, that he filed no answer, employed no counsel, and made no defense. The record further shows that the plaintiff did not intend to take any judgment against him except by default and inquiry.

No issues were tendered affecting J. C. Hollifield and no judgment was moved for against him. The counsel for the plaintiff stated in open court: "We do not now expect to pursue our inquiry on the judgment by default as to J. C. Hollifield."

Many Federal cases can be cited sustaining the right to remove this case, but it is necessary to quote only one, *Wecker v. Enam. Co.,* 204 U. S., 176, which is decisive in this case. In the *Wecker case* two individuals, employees of the corporation, were joined as defendants and allegations made in the complaint, for the purpose of charging them with liability; that they failed to perform certain duties imposed upon them, and as a result of such negligence plaintiff lost his balance and fell into one of the vats and was greatly injured. Plaintiff alleges that his injury was the result of the joint negligence of the corporation and the two individuals. The Supreme Court held that the case was removable upon the face of the petition, saying: "While the plaintiff, in good faith, may proceed in the State courts upon a cause of action which he alleges to be joint, it is equally true that the Federal court should not sanction a device to prevent the removal to the Federal court, where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court, as to permit the State court, in proper cases, to retain their own jurisdiction."

With all deference to the opinion of my brethren, I am of opinion that if it has ever been demonstrated in any case that there was a fraudulent joinder of parties defendant to prevent a removal to the Federal court, it has been demonstrated in this case.

P. H. THRASH AND WIFE v. J. W. OULD ET AL.

(Filed 19 December, 1916.)

1. Instructions—Verdict, Directing—Admitted Facts.

In a suit to cancel a mortgage, the defendants set up as a counterclaim an amount due by a bankrupt corporation in the hands of a receiver for goods sold it by the defendant under plaintiff's letter of credit, for the payment of which the plaintiff thereafter executed the note secured by the mortgage sought to be canceled as additional security and not in extinguishment of the original obligation, after deduction for estimated dividends expected to be paid by the receiver. The estimated dividends were in excess of those actually paid, and there being no evidence that the note and mortgage were procured by fraud, and the amount of such dividends and the amount of the original debt being admitted, an instruction by the court that the jury should find that defendants recover on their counterclaim, in a stated sum, the amount of the debt due, less the receiver's dividends paid thereon, was a proper one.

2. Trials—Evidence—Letter of Credit—Payment—Burden of Proof.

Where in an action to cancel a note and mortgage the defendants set up as a counterclaim an amount due under plaintiff's letter of credit for goods sold and delivered to another, which letters the plaintiffs admit, but plead payment, the burden of proof is on the plaintiffs to show that the alleged payments had been made.

3 Contracts—Married Woman—Separate Property—Statutes—Judgments.

The plaintiff and his wife were controlling owners of a private corporation to whom defendant sold goods, with plaintiff and his wife as guarantors of payment under their letter of credit, given and accepted in good faith. *Held*, it was not necessary that the *feme* plaintiff should specifically have charged her separate property in order to enforce a judgment rendered according to the terms of the guarantee. Ch. 109, Laws 1911.

APPEAL by plaintiffs from *Harding, J.*, at March Term, 1916, of BUNCOMBE.

Fortune & Roberts for plaintiffs.
Merrimon, Adams & Johnston for defendants.

CLARK, C. J. This action was brought to have a note and deed referred to in the pleadings canceled. The defendant Ould Company

set up as a counterclaim against the plaintiffs, the debt evidenced by the note in question and an open account due the defendants by the Peerless Fashion Stores Company for goods sold them by the defendants upon a letter of credit which the plaintiffs had given as security, and asked judgment therefor.

At the close of the evidence it was agreed that the first issue as to the amount of indebtedness by the Stores Company to the Ould Company at the time the former went into bankruptcy was $1,778.95. The response to the second issue was that the defendants had been paid as dividends in bankruptcy on said indebtedness the sum of $419.65. The third issue, as to what amount the plaintiffs were indebted to the Ould Company "by reason of their guarantee set out in a letter of credit," the judge directed the jury to answer $1,359.30, which is the difference between these two amounts.

The appeal questions the correctness of this instruction. The plaintiffs admitted the execution of the letter of credit, but contended that the Stores Company had paid the Ould Company for all goods covered by said letter of credit; that it was only given for goods to the amount of $5,000, and contended that they were not liable for goods sold in excess of $5,000. J. W. Ould testified that the letter of credit covered balance due on goods sold, regardless of the amount of sales and payments, and the defendants contended that the plaintiffs were liable for any balance due by the Stores Company up to an amount not exceeding $5,000 at any and all times, and as it was admitted that the Stores Company was indebted to the defendant company in the sum of $1,778.95 at the time the Stores Company were adjudged bankrupt, the plaintiffs were liable for this balance, less the dividends in bankruptcy. These amounts were ascertained without exception in response to the first and second issues.

The letter of credit signed by the plaintiffs and directed to the Ould Company was as follows:

GENTLEMEN:—You are hereby authorized to sell the Peerless Fashion Stores Company, Asheville, N. C., dry goods and notions to the amount of $5,000, same to be charged to the said Peerless Fashion Stores Company from time to time; with the understanding and agreement, however, that at no time shall the amount of their purchase exceed the amount named, namely, $5,000. In the event the said Peerless Fashion Stores Company should fail to pay any bill or bills when due, we hereby waive any right of legal notice as to this debt and agree and bind ourselves to pay same.

Witness our signatures, this 11 January, 1913.

P. H. THRASH,
OLIVE B. THRASH.

Witness: W. M. JONES.

It was in evidence that on 4 February, 1914, just prior to the adjudication in bankruptcy of the Stores Company, J. W. Ould, president of the defendant company, came to Asheville to secure payment of the indebtedness, and as a result the plaintiffs executed the note and deed in trust which they are now seeking to have canceled. The amount of the note was ascertained by estimating that the Stores Company might pay creditors 30 per cent, which was deducted from the amount due the Ould Company at that time, but without releasing the claim for the balance due above the note. As the bankrupt estate paid less than 30 per cent, the balance due was $1,359.30 and interest, as found in response to the third issue, being somewhat more than the face of the note. There was no evidence of fraud on the part of the defendant in procuring said note and trust deed, and the court properly instructed the jury to answer the fourth issue, on the question of fraud, in the negative. To this there is no exception.

The action was evidently brought upon the allegation of fraud in procuring the note and mortgage, but the jury have negatived this, and counsel for defendant stated on the trial that the note and deed of trust were only security for a certain amount of plaintiffs' indebtedness under the letter of credit and not in any way an extinguishment thereof, and consented that they should be canceled. The burden was on the plaintiff to show payment of the $5,000 guarantee, and this was not done, even if the letter of credit extended only to $5,000 of purchases and not to that amount of balance after payments made.

The plaintiffs contend under exception 3, that Olive B. Thrash (who alone is solvent, her husband being insolvent), being a married woman, it was error to render judgment against her for the amount of the indebtedness found due on the third issue, because she had not charged her property specifically with the debt, and the judgment cannot be enforced against her by execution. It appears that P. H. Thrash was president and his wife, Olive B. Thrash, was secretary and treasurer of the Stores Company, and virtually owner of the whole of its capital stock, and that the defendant Ould Company refused to ship the goods unless the plaintiffs would personally guarantee any indebtedness created, and in consequence the letter of credit above set out was signed by both of them and the sales and shipments to the Stores Company were made in faith thereof.

It was enacted, Laws 1911, ch. 109, as follows: "Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner as if she were unmarried." It was held in *Lipinsky v. Revell*, 167 N. C., 508, *Brown, J.*, construing this statute, that judgment could be rendered against a married woman upon her contracts and enforced by execution, though she had not

specifically charged her property with payment thereof. In *Royal v. Southerland,* 168 N. C., 405, it was held that under this statute a judgment could be rendered against a wife upon her obligation as surety to her husband.

These decisions were both affirmed in *Warren v. Dail,* 170 N. C., 406, and it is no longer an open question, but is settled, that a married woman is liable upon her contracts, by the express wording of the statute, "in the same manner as if she were unmarried," and that under execution issued upon said judgment her property, real and personal, can be sold to the same extent as if she had remained single, though the debt has not been charged thereon by her.

No error.

S. STERNBERG ET AL. v. CROHON & RODEN CO. ET AL.

(Filed 19 December, 1916.)

1. Appeal and Error—Prejudicial Error.

Where intervenors claim proceeds of a paid draft, the introduction on the trial of the draft and letter accompanying it are not objectionable when there is no controversy as to the form of the draft and the letter is not prejudicial to appellant's contention.

2. Evidence—Declarations—Admissions—Corporations—Officers—Principal and Agent.

The officers of a bank in its action to recover the proceeds of a paid draft as a holder in due course are merely agents thereof, and their statements made in reference to the transaction, after its occurrence, are not competent as admissions made by the bank.

3. Evidence—Depositions—Selected Portions.

Selected portions of a deposition are incompetent as evidence of a fact in controversy. *Boney v. Boney,* 161 N. C., 521, cited and approved.

4. Instructions—Requests—Substance—Banks and Banking—Bills and Notes—Due Course.

This controversy affecting the question as to whether an intervening bank acquired a draft as a holder in due course, or for collection under an express or implied agreement that it was to be charged back to the depositor's account if not paid, it is *Held,* that the court gave substantially the requested prayers of the appellant in his general charge, and no error was committed in refusing appellant's requests, though they stated correctly the law as applied to the facts of the case.

APPEAL from *Harding, J.,* at March Term, 1916, of BUNCOMBE.

This is an action brought by the plaintiffs to recover damages on account of breach of contract by the defendant Crohon & Roden, Incorporated, in which the plaintiffs attached proceeds of a certain draft in the possession of the American National Bank of Asheville, North Carolina. The Old National Bank of Grand Rapids, Michigan, intervened and claimed ownership of the funds.

The draft was drawn by Crohon & Roden on the plaintiff and was payable to the intervening bank. There was also a bill of lading attached, covering a shipment of hides.

The plaintiff paid the draft and then attached the proceeds.

The bank introduced the draft and offered evidence tending to prove that it was a purchaser for value, and the plaintiff introduced evidence tending to prove that the bank was not a purchaser for value, but an agent for collection.

The depositions of several officers of the bank were taken, and the plaintiff offered selected portions of the depositions as declarations or admissions, which the court refused to admit, and the plaintiff excepted.

The plaintiff in apt time requested his Honor to submit the following special instructions to the jury:

"Ownership of the funds in controversy in this case by the bank does not necessarily follow an unrestricted indorsement of the draft and bill of lading by Crohon & Roden to the bank. Although there was a blank endorsement of the draft and bill of lading by Crohon & Roden to the bank, yet if you find from the evidence that the bank did not become unconditionally responsible for the amount of the draft, but accepted the draft on the credit of Crohon & Roden and with the intention of holding Crohon & Roden responsible primarily for the amount of the draft, you should answer the first issue 'No.'"

The judge refused to give said special instruction, and the plaintiff excepted.

"It is not conclusive upon the question of ownership of the draft that before collection the amount of the draft was credited to the account of Crohon & Roden, against which he had the privilege of drawing by check. Such privilege is merely a favor if the bank may cancel the credit or charge back the draft to the account of Crohon & Roden when it is not paid by S. Sternberg & Co."

The judge refused to give said special instruction, and the plaintiff excepted.

"Although the amount of the draft may have been placed to the credit of Crohon & Roden, with permission to him to draw out the funds by check, yet if the implied understanding from the course of dealings between the bank and Crohon & Roden was that if the draft was not paid or the funds received by the bank, the amount thereof

was not to be charged back to the account of Crohon & Roden, this was really a bailment for collection, and as between Crohon & Roden and the bank, the title never passed. Whether the bank really owns the paper or not depends upon whether the paper was really taken for collection upon the credit of Crohon & Roden, although there was no indorsement restricting it to that effect, or whether it was taken absolutely."

The judge refused to give said special instruction, and the plaintiff excepted.

"If you should find from the evidence in this case that the bank and Crohon & Roden had a tacit understanding between them from their course of dealings that, although the amount of the draft was credited to Crohon & Roden at the time it was deposited, so that Crohon & Roden could draw against it, yet the tacit agreement was that if the paper so deposited was not paid on presentation, the amount thereof was to be charged up to the account of Crohon & Roden, or taken off his next deposit ticket, this stamps the transaction as being a taking of the draft for collection, and no title passed to the bank, and the bank is not entitled to the funds in this case."

The judge refused to give said special instruction, and the plaintiff excepted.

"If you find from the evidence in this case that it was the custom of the bank, when drafts of Crohon & Roden were not paid, to charge them back to Crohon & Roden, this would be evidence for you to consider upon the question of whether or not there was a mere transfer for collection."

The judge refused to give said special instruction, and the plaintiff excepted.

"If you should find from the evidence that Crohon & Roden are still solvent, and that the bank accepted the draft of Crohon & Roden, expecting to charge back the draft to Crohon & Roden if it was not paid, and expected to hold Crohon & Roden responsible for said draft, and that if Crohon and Roden had become insolvent or in danger of insolvency at any time the bank would have proceeded to collect its debt from Crohon & Roden, and at the time that Crohon & Roden became depositors with the bank they gave to the bank a note signed by the company, protecting the bank from all liabilities on paper handled by the bank for Crohon & Roden, and there was a tacit agreement between the bank and Crohon & Roden that paper was taken on the credit of Crohon & Roden, then and in that event the bank would not be the owner of the funds in controversy."

The judge refused to give said special instructions, and the plaintiff excepted.

"The plaintiff in this action contends that under this evidence you ought to find that some time before depositing the draft referred to in this case, Crohon & Roden asked the bank if it, the bank, would handle drafts for Crohon & Roden, and at that time Crohon & Roden gave to the bank a paper signed by the corporation and by the individual members of the corporation, protecting the bank from any liability which the corporation might owe the bank and from any liability on paper handled by the bank; that it was the custom for Crohon & Roden to deposit drafts with the bank and receive credit at the time of the deposit, and that the bill of lading attached to the draft was of no particular importance to the bank, but the bank relied on the credit of Crohon & Roden and made a difference in the matter of drafts, which difference was that where a solvent party deposited a draft with the bank, the bank placed the amount of the draft immediately to the credit of the solvent party, but if the party was not solvent, the bank would not give credit until the proceeds of the draft were received; that there was a tacit understanding between the bank and Crohon & Roden that if the draft was not paid, it should be charged back against the account of Crohon & Roden, and that the deposit credited to Crohon & Roden was merely an advanced credit given to them, and not the outright purchase of the draft; that no discount was charged until the proceeds had been received from the draft; that the bank recognized the solvency of Crohon & Roden and has not charged the draft back because it wishes to protect Crohon & Roden in this lawsuit, but has a tacit understanding that if Crohon & Roden should become in danger of insolvency at any time, it, the bank, will take the draft out of the deposits of Crohon & Roden, and is relying upon the credit of Crohon & Roden to protect it, and accepted the draft for collection although there was an unrestricted indorsement of the draft. If you are satisfied from the evidence that these contentions are true, then I charge you that the bank is not the owner of the funds in question, and you should answer the issues as to ownership in favor of the plaintiff, S. Sternberg & Co."

The judge refused to give said special instruction, and the plaintiff excepted.

His Honor, among other things, charged the jury:

"But if you find, gentlemen of the jury, from the evidence in this case—if the intervenor has failed to satisfy you by the greater weight of the evidence, or if you find by the greater weight of the evidence in this case, gentlemen of the jury, that at the time that the draft was delivered by the defendant to the Old National Bank that it was delivered to them as an agent only, that is, with the instructions, either expressed or implied, or by the ordinary course of business so understood

by the defendant and the Old National Bank, that the Old National Bank was not buying the draft, but that it was receiving it for collection only, and that it was forwarding it to its agent in Asheville for the purpose of collecting it, that it was holding it and receiving it as such agent, then the court charges you, even though you should find that the proceeds of that draft were placed to the credit of the defendant, that that was an immaterial accommodation on the part of the bank to the defendant in this case to permit them to draw on it, but that they took the draft and held it only for collection, with the understanding that they were to collect it and report to the defendant when the collection was made, then that would be such an agency as would not carry the legal title to the intervenors in this case, and you would answer this first issue 'No.'

"Now, the plaintiffs contend that the evidence in this case ought to satisfy you by its greater weight that that understanding existed at that time, that the draft at the time it was paid into the bank—that the total proceeds of the draft were credited to the defendant, and that the matter of discount, the amount of discount or charges of the bank for discounting or collecting, was held in abeyance until they should hear from their agent here, the American National Bank, as to whether or not the draft had been collected and forwarded to the bank in New York, and that when that was done, that then they would take the amount of exchange, which was equal to the amount placed to their credit running from the time that it was placed in the bank up to the time it was reported as being in New York, and the exchange was charged to them; and the plaintiffs contend that that is a circumstance for you to consider; that if it had been an outright sale of the draft, that the discount would have been considered at that time and deducted at that time, and that the proceeds of the draft, less the discount, would have been credited to their account, and not the full amount. And the plaintiff contends that that is a circumstance for you to consider, and again: but if the defendant placed the draft in the bank and the bank received it, either by an agreement among themselves or by an understanding resulting from the ordinary methods of doing business between the intervenor and the defendant, that it was being received by the bank only as a collecting agency, and that was the method that the defendant had of doing business—collecting money through this bank, its agent for the purpose of collecting this debt, and that when the draft was sent here by the Old National Bank it was paid, then the court charges you that that was an agency, and you will answer that issue 'No.' So it turns upon the question, gentlemen of the jury, whether or not the defendants sold that draft to the bank and the bank gave them credit for the proceeds of it as a sale, or whether the defend-

ants deposited that draft with the bank for collection—not that it was marked 'Collection' on the draft, but that the understanding between the bank and the defendant, at the time it was done, and they received it as such and forwarded it here and the money was paid to its agent, the American National Bank, received for the purpose of collecting, and belonged—the proceeds when collected—to the defendant, or even of belonging—the proceeds—at the time it was placed at the bank, with the understanding that in event it was not paid that the bank should charge it back to the defendant—if that was the understanding, you will answer the first issue 'No.'

"It is not necessary that the defendant should satisfy you of that by the greater weight of the evidence, because the burden is upon the Old National Bank, the intervenors, to satisfy you by the greater weight of the evidence, and if it has satisfied you as I have outlined to you, you will answer the issue 'Yes'; if it has failed to satisfy you by the greater weight of the evidence, you will answer the issue 'No.'"

There was a verdict and judgment for the intervenor, and the plaintiff appealed.

Jones & Williams for plaintiff.
Merrimon, Adams & Adams and A. Hall Johnston for intervenor.

ALLEN, J. The objection to the introduction of the draft and the letter accompanying it are without merit. There was no controversy as to the identity or form of the draft, which the plaintiff admitted he paid, and the letter contained nothing prejudicial to the parties.

The parts of the depositions offered by the plaintiff as declarations or admissions were properly excluded.

The persons whose depositions had been taken were not parties, nor had they been examined as witnesses on the trial. They were officers and agents of the bank, and the declarations were not made in the course of business, but after the transaction in controversy, and the evidence falls within the long line of cases illustrated by *Rumbough v. Improvement Co.,* 112 N. C., 753, in which the declaration of the president and general manager of the company as to a part transaction was excluded upon the ground that he was a mere agent and as such did not have authority to bind the company by his declarations.

The evidence was also incompetent if offered as a part of the deposition, as it is not permissible to introduce selected portions of a deposition without offering the whole. *Boney v. Boney,* 161 N. C., 621, and cases cited; *Barton v. Morphes,* 13 N. C., 520.

The prayers for instructions generally contain correct statements of the law, but by comparison with the charge given, it will be seen that

his Honor substantially gave the plaintiff the benefit of them and that he followed the rule laid down in *Moon v. Simpson,* 170 N. C., 336, and in *Worth Co. v. Feed Co., ante,* 335.

He told the jury to answer the issue in favor of the plaintiff if there was an express or implied agreement that the bank was taking the draft for collection or if this was the understanding resulting from the methods of doing business, which was as favorable as the plaintiff was entitled to.

No error.

LYDA GARRETT AND PAULINE GARRETT, BY HER NEXT FRIEND, v. SOUTHERN RAILWAY COMPANY AND THE PULLMAN COMPANY.

(Filed 19 December, 1916.)

1. Carriers of Passengers—Pullman Company—Duty to Passengers—Assault.

Though the Pullman Company is not, technically speaking, regarded as a common carrier or its coach in a passenger train in the sense of an inn, it nevertheless owes a duty to its passengers to reasonably protect them from assault and robbery by its own employees and by others.

2. Same—Evidence—Demurrer.

Where the evidence is conflicting, but with evidence in plaintiff's behalf tending to show that she was boarding a Pullman car with her railroad and Pullman ticket in the presence of its conductor, who was assisting her, and was assaulted and robbed by an unknown person, which the conductor could readily have prevented, the evidence should be construed in the light most favorable to the plaintiff, and a demurrer thereto should be overruled.

3. Appeal and Error—Evidence Immaterial—Expressions by Court.

Where a Pullman Company is sued for damages arising from an assault and robbery of a passenger, and the testimony is sufficient to sustain a verdict in plaintiff's favor, the admission in evidence of the contract between the Pullman Company and the railroad, with later expression by the judge, in the absence of the jury, is not reversible error, if erroneous.

Two actions in the Superior Court of BUNCOMBE County, one by Lyda Garrett, plaintiff, and one by her daughter, Pauline, as plaintiff, were instituted in the Superior Court of Buncombe County to recover damages for a personal injury, against the Southern Railway Company and the Pullman Company, and were duly consolidated by consent and tried at May Term, 1916, *Harding, J.,* presiding, upon these issues:

1. Was the Southern Railway Company engaged in operating the train which the plaintiff was about to board at Lexington, Ky., on the night of July 6, 1915, as alleged in the complaint? Answer: "Yes."

2. Was the plaintiff Lyda Garrett injured by the negligence of the defendant Southern Railway Company, as alleged in the complaint? Answer: "Yes."

3. Was the plaintiff Lyda Garrett injured by the negligence of the defendant the Pullman Company, as alleged in the complaint? Answer: "Yes."

4. What damage, if any, is the plaintiff Lyda Garrett entitled to recover, as alleged? Answer: "$1,500."

Similar issues were submitted as to Pauline Garrett. In her case the jury assessed the damages at $2,000. The trial judge set aside the findings of the jury as to the defendant the Southern Railway Company, and rendered judgment against the Pullman Company, from which said defendant appealed.

J. T. Horney and Jones & Williams for plaintiffs.

H. T. Wilcoxon, A. Hall Johnston for defendant the Pullman Company.

BROWN, J. The plaintiffs sue to recover damages for negligence upon the part of the defendant in failing to protect them from assault committed by a negro in the railway station at Lexington, Ky., while the defendant was a passenger upon the Southern Railway and in the care and custody of the Pullman Company. At the conclusion of the evidence the defendant moved to nonsuit and excepted to the ruling of the court overruling the motion. The evidence, taken in its most favorable light for the plaintiff, tends to prove that plaintiffs had purchased tickets on the Pullman from Lexington to Asheville, which entitled them to a lower berth. In addition, plaintiffs had the necessary railroad transportation authorizing them to travel on the railway from Lexington to Asheville.

The plaintiff Lyda, accompanied by her sister, who was also a passenger, and her little 6-year-old daughter, Pauline, proceeded to the proper Pullman car and placed themselves in charge of its conductor. The sister, Mrs. McClelland, was helped on the car first by the conductor. The said conductor then took the plaintiff's baggage and put it on the Pullman car platform and as the plaintiff Lyda was handing her 6-year-old daughter, Pauline, to the conductor to be put up on the platform, she was assaulted by a negro.

The testimony tends to prove further that the negro dragged her and her daughter across two railroad tracks and the station platform and threw the plaintiff Lyda down and robbed her; that during this time the Pullman conductor remained motionless and made no effort to prevent the robbery or the assault, although the struggle lasted for several minutes.

The evidence tends to prove that the conductor was in easy reach and could have assisted the plaintiff and could probably have prevented the injuries. The evidence tends further to prove that the child Pauline was dragged along with her mother, very badly frightened and seriously hurt.

Upon a motion to nonsuit, we must assume the facts testified to by the plaintiff and her sister to be true, and they must be construed in the light most favorable to the plaintiff, for the jury seems to have been impressed with the truthfulness of their testimony. It is but just to the Pullman conductor to state that he testified that when the plaintiff Lyda was assaulted he was 40 feet away from her, and that he heard the scream and saw the man grab at her pocketbook; that he halloed at him and ran over as quickly as possible to assist her.

It is contended that the defendant is not liable because it is neither a common carrier nor an innkeeper. It is true that a sleeping car is a place for the reception of travelers, provided generally by the railroads to make traveling over their lines more attractive; but it is not an inn. The question as to whether it is a common carrier has been decided differently in different States. In some few States sleeping car companies are held to be common carriers. In a large majority of States and by the Federal courts they are held not to be common carriers. *Blum v. So. P. P. Co.,* 500 Fed. Cases, No. 1574; *Lemon v. The Pullman Co.,* 52 Fed., 262. The better view seems to be that while these companies provide a vehicle for passengers to ride in, and accommodations for their comfort while riding, the railway company and not the car company undertakes and is responsible for the transportation, and has entire charge of the journey. Nevertheless, it is generally agreed that, however these companies may be classified, it is their duty to guard passengers in their care from harm so far as it can reasonably be done. The company must guard passengers from the attacks of wrong-doers, if such attacks can be foreseen, and it is their duty to protect them from annoyance and insult, not only from their own servants but from all others. *Connell v. Ry.,* 93 Va., 44; Beale on Innkeepers, sec. 373.

In the notes Am. and E. Ann. Cases, volume 26, page 902, it is said: "The person placed in charge of a sleeping car is bound as an employee of the sleeping car company to the exercise of ordinary care for the protection and comfort of all passengers using the car in accordance with the regulations of the company."

In *Calder v. So. Ry. and Pullman Co.,* 89 S. C., 287, it is held that the carrier and the sleeping car company are both liable for the negligent failure of the servants of the latter to protect passengers in their cars.

In *Pullman Co. v. Nortan*, 91 S. W., 841, the Texas Court of appeals declares that a railway company and a sleeping car company both owe to a passenger the duty of exercising care in protecting him from injury.

In *Hill v. Pullman Co.*, 188 Fed., p. 501, it is held that the sleeping car company was answerable in damages to a passenger for an assault in the car under the evidence in that case.

In *Younglove v. Pullman Co.*, 207 Fed., 798, it is held that the defendant as a carrier is required to use due care for the protection and safety of its passengers, not only while the passenger is in the car, but until the passenger alights from the car.

In *Pullman Co. v. Hoyle*, 115 S. W., 316, it is held that a sleeping car company owed a passenger the duty to safely discharge her at her destination, and was liable for any injury resulting from negligence in that respect.

An investigation of the authorities discloses that they all hold that it is the duty of a Pullman company, although not technically a common carrier, to exercise reasonable care in the protection of passengers holding tickets upon the car. It must be conceded that if the testimony offered by the plaintiffs is true, the defendant's conductor entirely failed to protect them from the assault and robbery committed at the very steps of the car while the conductor was helping them into it.

The motion to nonsuit is properly overruled. The defendant assigns error because the court admitted in evidence a contract between the Pullman Company and the Southern Railway Company and then remarked in the absence of the jury: "I am of the opinion that the contract is not competent evidence in this case, as I don't see how it could affect any of the rights of the plaintiff."

We have examined the contract and find that there is nothing in it which would absolve the defendant from liability under the testimony introduced by the plaintiff.

The other assignments of error relating to the evidence are without merit and do not need any discussion. The charge of the court presented the law and the evidence to the jury in a clear and correct manner. The court might well have charged that if the facts are as testified to by the plaintiffs, the defendant is liable for the injury, of course, stating the other side of the controversy.

As to whether the Southern Railway Company is liable is a matter not before us.

No error.

WESTERN CAROLINA REALTY COMPANY, A PARTNERSHIP, AND B. H. SUMNER, v. J. E. RUMBOUGH AND WIFE, MARTHA E. RUMBOUGH, M. C. MOORE, ET ALS.

(Filed 19 December, 1916.)

1. Principal and Agent—Evidence—Husband and Wife.

The mere relationship of husband and wife is not evidence of authority of the former to lease the lands of the latter.

2. Same—Declarations of Agent.

Evidence is sufficient of the agency of the husband to contract with a real estate agency to lease the wife's lands for a term of years upon a commission on the rental receipts, which tends to show that he negotiated with the agency upon that basis, changed the original terms of the proposed lease, stating it was not in conformity with his wife's wishes, and she and her husband afterwards signed the lease with a tenant procured by the agency, in the presence of others, who testified at the trial that she willingly signed the lease, stating at the time it was a fair and acceptable one; and she afterwards received the rental, less plaintiff's commissions, the testimony is not objectionable as a proof of agency by the sole declarations or acts of one representing himself as such agent.

3. Same—Ratification.

Where the husband assumes to act for his wife in contracting with a real estate agency to rent her lands upon a commission based on the rental receipts, and there is direct evidence that she willingly signed a lease with a tenant procured by the realty company in the presence of a member of the company, expressing her satisfaction therewith, and there is further evidence that the tenant entered into possession of the property, lived up to the terms of the lease, paid rent to the realty company, who remitted by check through the husband, payable directly to the wife, less the commissions agreed to by him: *Held*, the act of the wife in signing the lease in the presence of a member of the realty company, and accepting remittances for the rental money, less commissions agreed upon with the husband, is evidence of her ratification of the contract made by him with the realty company in her behalf.

4. Principal and Agent—Scope of Agency.

A principal is bound by the acts of his agent in leasing his lands which were done in the furtherance of the agency and within the scope of the agent's employment. *Latham v. Fields*, 163 N. C., 356, cited and applied.

5. Principal and Agent—Real Estate—Rentals—License Tax—Statutes.

One who is employed by a rental agency upon a share in commissions based upon business which he may bring to such agency, the latter of which has paid the license tax required by ch. 201, sec. 32, Public Laws 1913, acts as the agent of the company thus employing him, and under its license, and is not himself engaged in transactions in selling and renting real estate within the intent and meaning of the statute.

6. Principal and Agent—Parties.

Where one acts solely as the agent of another in consummating a transaction for the lease of lands, looking to his principal alone for his compensation, he is not a proper party to an action to recover upon the contract, and as to him the action is properly dismissed.

7. Issues—Appeal and Error.

In this case the issues submitted by the court to the jury embraced all the controverted questions, and are held to be the proper ones.

CIVIL ACTION tried before *Adams, J.*, and a jury, at BUNCOMBE Superior Court.

The action was brought to recover the amount of commissions for leasing real property in Asheville, N. C., and collecting the rent due for four months under a contract alleged by the plaintiff to have been made with the defendants Rumbough and wife. The other defendants are the lessee, Lowenbein-Rutenberg Company, and M. V. Moore, the purchaser of the property from the Rumboughs.

At the trial, judgment of nonsuit as to all defendants except Rumbough and wife was entered, and as to them the plaintiff Western Carolina Realty Company recovered $46.66. The court submitted no issue as to the rights of the plaintiff Sumner, but dismissed him from the case.

The testimony tended to show that the realty company was a partnership engaged in the real estate business in Asheville, North Carolina; that Sumner had an arrangement with the realty company by which he was to get a part of the commissions of such business as he brought to their attention, or did through their office with the assistance of Wolfe, one of the plaintiffs. The plaintiffs carried on negotiations with the defendant J. E. Rumbough concerning the leasing of certain real estate which belonged to the *feme* defendant; these negotiations covered several months. Finally Sumner and Wolfe went to Rumbough's office and it was agreed that if they procured a tenant for the building for a period of fifteen years, who would pay $2,700 a year, the defendants would pay to the plaintiffs 5 per cent commissions on the rental. Finally Rumbough directed them to make a change in the lease so that the tenant would pay $2,800 a year and the lease would run for ten years, with the privilege of five years additional, and said that then his wife would sign it. This was done, and the lease was turned over to him and he took it home to his wife and kept it a day or two. It was subsequently signed by Rumbough and wife. The plaintiffs were to get 5 per cent commissions for the entire term, on a monthly rental, as it was collected, for their services in negotiating the lease. The lease went into effect some time in April, and the plaintiffs

collected the rent for June, July, August, and September, and made payments on account of repairs and other things, and paid the balance of the rent by giving checks to Mr. Rumbough which were payable to Mrs. Rumbough, which checks were paid after having been indorsed by Mrs. Rumbough through J. E. Rumbough. From the rents thus paid, the plaintiffs deducted 5 per cent commissions. On 20 August, 1915, Rumbough and wife conveyed the leased property to the defendant Moore, and thereafter refused to pay to the plaintiffs any further sum on their commissions, and Moore notified the tenant not to pay any rents to the plaintiffs, and this action was brought to recover commissions on the rent for the months of September, October, November, and December, 1915. The defendants Rumbough and wife denied that they or either of them ever agreed to pay the plaintiffs any sum whatsoever for their services in securing said tenant, but they introduced no evidence.

Sumner talked with Rumbough about the building several months; about leasing it and selling it. Rumbough first fixed the price at $2,700 per annum. The negotiations went on several months. Rumbough said change the lease to $2,800 and the term to ten years and his wife would sign it; Rumbough agreed to pay 5 per cent of the rental for the term; he took the lease and kept it two or three days; it was signed by the lessee and taken to Rumbough's house and he and his wife signed it; after the first lease was drawn up Rumbough said his wife refused to sign it for fifteen years, but if they would make it for ten years she would sign if they would also make the rent $2,800 instead of $2,700. Sumner talked with Mrs. Rumbough when the lease was signed. She said it was a fair lease, and signed it after the changes were made. Plaintiffs collected the rents and paid same to Mrs. Rumbough, less their commissions, for several months; Mrs. Rumbough gave an option to sell the property to Millard & Lassiter; the negotiations were with Mr. Rumbough only; these negotiations went on two or three years. The defendants were not called as witnesses.

As defendant moved for a nonsuit, it will be proper to state a part of the testimony of J. W. Wolfe, who said:

"B. H. Sumner and I went to see Rumbough for the purpose of fixing some basis upon which a lease could be made. Rumbough at that time agreed on $2,700 for a fifteen-year lease and stated he would pay commissions if we had a client who would take it for fifteen years. He had previously said he wanted $2,500. The lease was prepared on a basis of $2,700 and delivered to Rumbough, and he came back and said that his wife—that they could not sign the lease for $2,700 for fifteen years, but that if we would make it for ten years with a renewal clause for five years, and for $2,800, they would sign it. We got those

changes made, the lease signed, and delivered to Rumbough, and it was afterwards signed by Mr. and Mrs. Rumbough. I was not present. Mr. Sumner and Mr. Wearn took it out and brought it back. I think it was a few days from the time it was drawn before it was executed. Mrs. Rumbough was to pay 5 per cent during the term of the lease. The usual rule for collecting commissions on rentals is for the party who makes the lease to collect the rents."

Q. "How were your commissions paid?" A. "Paid out of the proceeds of the property. The lease went into effect some time in April. The rents were to be paid at the office of the Western Carolina Realty Company. Rumbough said I could deduct the commissions from the rents each month and hold it until he called for it. This was about the commencement of the lease. We collected the rents. I think there were two months allowed to the lessees for the time they were making repairs. We collected June, July, August, and September, $233.33 each month. Paid some of the money on repairs. These payments were made at the instance of Mr. Rumbough. We gave him a check for the balance, payable to Mrs. Rumbough."

The court charged the jury, in part, as follows:

"The allegation substantially is this: That the defendants agreed with the plaintiff that if the plaintiff would secure a tenant for the building described in the complaint who was willing to take the same for a period of ten years and pay the sum of $2,800 per annum rental therefor, they, the defendants, would pay to the plaintiffs 5 per cent monthly on the rental for their services in procuring a tenant and collecting the rent for the building. The plaintiffs allege further that they procured a tenant to whom the lease was made upon the terms fixed by the defendants, and that they have failed to pay to the plaintiffs the commissions due on the rental value for certain months, and that they are entitled to recover against these defendants the amount so alleged to be due. These allegations are denied by the defendants. They deny that any such contract was made between the defendants or either of them and the plaintiffs, and deny, therefore, that any liability exists as to them."

The court then read the first issue to the jury and charged further as follows:

"The plaintiffs are required to satisfy you by the greater weight of all the evidence that such a contract was made by the defendants, or at least by one of the defendants, in order to entitle them to an affirmative answer to this issue. If you find from the evidence and its greater weight that the defendants J. E. Rumbough and his wife made the contract as alleged, your answer to the first issue will be merely 'Yes.' Unless you find by the greater weight of the evidence that the contract

was made by these defendants, or at least one of them, you will answer it 'No.' If you find that the contract was made by one and not by the other, your answer to the issue in that event will be 'Yes,' naming the defendant by whom you find the contract to have been made." "The plaintiffs contend that J. E. Rumbough came to the office of the plaintiffs and, after negotiating directly with one member of the firm, Wolfe, and another person who was in the employ of the firm, Sumner, entered into a contract with them to this effect, that if the plaintiffs would procure a tenant or lessee for a certain lot and building in the city of Asheville for a stated period at an agreed price, the defendants would pay to the plaintiffs 5 per cent monthly on the rental value. That after this proposal was made by Mr. J. E. Rumbough on behalf of himself and his wife, the plaintiff procured a lessee, and the property in question was leased for a period of ten years at the annual rental of $2,800; that under the terms of the contract the plaintiffs were to receive monthly 5 per cent on the annual rental value. Plaintiffs contend that the monthly rental value is $233.33, and that the amount due per month is 5 per cent of this amount, or $11.66 for each month; and that for certain months they have not received the amount due, and they are entitled to recover the aggregate of the amount for the months for which there is an arrearage of rent. The plaintiffs further contend that, at the time the contract was made, the defendant represented not only himself for his individual benefit, but his wife also, and that he was the agent of his wife in making the contract, representing not only himself, but her, and that they are entitled to recover, not only against him, but against his wife also. On the other hand, the defendants contend that there was no liability on the part of either of the Rumboughs; the husband didn't make the alleged contract, that he did not represent his wife, that he had no authority to represent her, and for that reason they insist there can be no liability on the part of either one, and that your answer to the issue should be 'No.'

"In passing upon the contentions you may consider evidence tending to show whether or not the contract was in fact made by J. E. Rumbough and the plaintiff. Unless you find that such contract was made by him either in his representative capacity or in his own individual capacity and his representative capacity, you will answer the first issue 'No.' If you find that the contract was made by him, you will then consider evidence tending to show whether it was made for the benefit of his wife as her agent, and also for his individual benefit; and in passing upon the question as to whether or not he acted in the capacity of agent for his wife you may consider evidence tending to show whether or not he had this property in his charge for some time pre-

ceding the date of the alleged contract; any declaration made by the *feme* defendant in regard to the contract, which was in fact made between the defendants and the lessee; the length of time the defendant J. E. Rumbough negotiated in the deal or trade concerning the property, together with the circumstances arising from the evidence, for the purpose of finding out whether or not, if you find such contract was made, the wife either previously appointed her husband for the purpose of effecting such transaction or whether after the transaction was effected she in fact ratified it with full knowledge of what had been done.

"If you find from the evidence that J. E. Rumbough was a duly authorized agent of his wife for leasing the property, doing such things as were necessary to make a valid and satisfactory lease, and, while engaged in the scope of his agency, made a contract with the plaintiff Western Carolina Realty Company, by the terms of which the realty company was to procure a lessee and for an agreed term at a stipulated rental price, and the realty company did in fact find such lessee, to whom the lease was executed and who complied with the agreed terms; and if you further find that the defendant J. E. Rumbough, on behalf of himself and also on behalf of his wife and for the benefit of both, and for the benefit, of course, of each, contracted to pay the realty company 5 per cent monthly on the rental value as consideration of the services rendered, your answer to the first issue will be 'Yes.'"

The court then charged the jury that if, under the same facts and circumstances just stated to them as to the joint liability of the Rumboughs, they should find that the defendant J. E. Rumbough as agent for his wife, and for her benefit only, and not in his own behalf, contracted to pay the realty company 5 per cent monthly on the rental value as consideration for services rendered, they would then and in that event find that the contract was made only by Mrs. Rumbough, and not by J. E. Rumbough, and they would answer the issue "Yes; Martha E. Rumbough"; and unless they answered the first issue "Yes," under the instructions which had been given, they would answer it "No."

The court further charged:

"If you find from the evidence that he was the duly authorized agent of his wife for the purpose of effecting a lease, you will then find that he had general power to do what was usual and necessary to carry on the business entrusted to him; that is, to do those acts and make those contracts usually done and made by other agents in the same line of business, under the same circumstances.

"There is no evidence that the defendant Martha E. Rumbough made any contract personally with the plaintiffs relative to the renting of her property mentioned in the complaint, and before the jury will be

authorized in finding that she made such contract they must find by the greater weight of the evidence, the burden being upon the plaintiffs, that J. E. Rumbough was authorized by her to make the contract alleged by the plaintiff or that she ratified such contract with full knowledge of the same.

"There is no presumption of agency from the relationship of husband and wife. A husband may act as agent for his wife, but in order to bind her he must be previously authorized to act, or, after his acts have been done, she must ratify them after receiving full knowledge thereof; and to establish such agency the evidence must be clear, satisfactory, and sufficiently strong to explain and remove the equivocal character in which she is placed by reason of the relationship of husband and wife."

The court then charged the jury as to the second issue, that is, as to the amount due, if anything.

The jury found by their verdict that the defendants had agreed to pay a commission of 5 per cent monthly on the rent, and allowed plaintiffs the commission for four months due at the commencement of the action.

Judgment was entered upon the verdict, and defendants appealed.

Martin, Rollins & Wright for plaintiffs.
Merrimon, Adams & Adams for defendants.

WALKER, J., after stating the case: We are of the opinion that there was evidence to show that Mr. Rumbough, in his negotiations with the plaintiff realty company for leasing the property of Mrs. Rumbough, was acting as her agent, and this evidence did not consist in declarations and acts of the agent, which would be incompetent. *Francis v. Edwards,* 77 N. C., 271; *Daniel v. R. R.,* 136 N. C., 517; *Jackson v. Tel. Co.,* 139 N. C., 347; *McCormick v. Williams,* 152 N. C., 638. There is proof, apart from what Mr. Rumbough did or said, which tends to show that he was acting for and in behalf of his wife throughout the transaction, and with her knowledge and consent, and with authority so to act derived from her beforehand. She did not make the lease herself—that is, personally—and all the evidence goes to prove that the transaction was conducted by her husband until the lease was carried to her and she signed it, saying at the time that she thought it was a fair lease to both parties, and the lease contained a clause to the effect that the rents were to be paid at the office of plaintiff. The first proposal was that the lease should run for fifteen years at $2,700 per annum, but this was not satisfactory to Mrs. Rumbough, and Mr. Rumbough insisted that it be changed to ten years, with a

renewal clause for five years, at $2,800 rent for each year, payable monthly, and stated that then Mrs. Rumbough would sign the lease. The change was made, and when the lease was taken to her she did sign it willingly, and expressed the opinion of it which we have above stated. The terms of the lease informed her, or was notice to her, that plaintiffs had acted for her in procuring it, as it was brought to her by Mr. Sumner and Mr. Wearn, acting for the plaintiff. She ratified what had been done, if she did not in the beginning authorize her husband to act for her, though the evidence tends strongly to show that she had given full authority to her husband to lease the property for her and that he was acting under that authority. There is evidence also from which the jury could well infer that she received the first installment of rent, from which the commission of 5 per cent had been deducted, and made no complaint on that account. "Except in the cases wherein the common law requires authority under seal, or some statute requires authority in writing, no particular method of authorizing is necessary; and, except in those cases, no particular method of proving the authority need be resorted to. Any competent witness having knowledge of the facts may be called, or any lawful mode of proof be adopted. The evidence offered need not be of the same nature as the act of authorization except in the cases referred to in the preceding sections. Thus the authority may have been conferred by express word of mouth and be proved by evidence of recognition; it may have been conferred informally but proved by evidence of an express admission. The existence of agency is a fact, and, like other facts, may be proved by any evidence traceable to the alleged principal and having a legal tendency to establish it. Informal writings of the alleged principal, his letters, telegrams, book entries, and the like are clearly admissible. But it need not be proved by written instruments (except in the cases already mentioned) or by express or formal oral language. The agency may be shown by conduct, by the relations and situation of the parties, by acts and declarations, by matters of omission as well as of commission, and, generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy." 1 Mechem on Agency, secs. 260 and 261, pp. 185 and 186. "Agency, like any other controvertible fact, may be proved by circumstances. It may be inferred from previous employment in similar acts or transactions, or from acts of such nature and so continuous as to furnish a reasonable basis of inference that they were known to the principal, and that he would not have allowed the agent so to act unless authorized. In such cases the acts or transactions are admissible to prove agency.

But in order to be relevant the alleged principal must in some way directly or indirectly be connected with the circumstances. The agent must have assumed to represent the principal, and to have performed the acts in his name and on his behalf." *Hill v. Helton,* 80 Ala., 528. Mr. Mechem further says that for the purpose of proving agency a wide range may often be properly given to the testimony, provided that which is offered has a real probative tendency toward the main question in issue, or, in other words, legitimately tends to prove the fact of agency so that the jury may reasonably deduce from it that such agency existed. 2 Mechem, sec. 261, p. 187.

We have not stated all the facts or circumstances which tend to show that Mr. Rumbough was acting as agent of his wife with her knowledge and consent, as it is only necessary to decide there was some evidence which justified the submission of that question to the jury. If Mr. Rumbough was the agent of his wife to lease the property, what he did in furtherance of the business and within the scope of his employment is binding upon her. The rule is thus stated in *Latham v. Field,* 163 N. C., 356, 360: "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing." See, also, *Daniel v. R. R., supra;* 2 Mechem on Agency (2 Ed.), sec. 1709.

The defendant contends that B. H. Sumner, who took part in securing the lease, did not have the license to do such business required by Public Laws 1913, ch. 201, sec. 32, and that for this reason the plaintiffs cannot recover. But Sumner was not acting for himself in the transaction, nor was he a partner in the plaintiff firm. He was merely an employee working for the realty company, and received his compensation from the company and not from the Rumboughs by way of commissions due to him by them on the rents for any services he rendered. He was not dealing with them in his own behalf, but simply as the representative of another. The transaction was altogether between the realty company and the Rumboughs, though in conducting it to a conclusion the company was assisted by Sumner as their employee, and at the time it was consummated by the signing of the lease one of the firm was present. Under such facts and circumstances it has been held that the agent is not subject to the tax, but is protected by the license of his principal. *Myderdock v. Com.,* 26 Grattan (Va.), 988. But this statute provides that the principal *or*

the agent shall pay the tax for the privilege of doing the particular business.

We do not think that Sumner, so far as the evidence in this record shows, was subject to the provisions of Public Laws 1913, ch. 201, sec. 32, as he was neither collecting rent nor acting as agent in buying or selling real estate, even if he could be considered as a principal, or as an agent where the principal had no license for the transaction. It was a misjoinder to make him a party as plaintiff, and the court very properly dismissed him from the action. He had no cause of action, either jointly or severally, against the Rumboughs, and could look only to the realty company for his pay. He was not interested in the lease, or the commissions, so as to have any claim against the lessees. The contract was between the plaintiff realty company and Mrs. Rumbough, who owned the property, which was the subject of the lease, and the cause of action for the commissions or for any compensation for securing the lease and collecting the rent belonged solely to the realty company. In the present aspect of the case this is not an action by a person without a license, or one who has not paid the required tax, to recover commissions on a real estate transaction, as Sumner is not now a plaintiff, but it is an action, as at present constituted, by plaintiffs, who have the tax-paid privilege, under the law, to do the thing for which they are seeking to recover commissions, as compensation for the service so rendered.

In the view we take of the case it becomes unnecessary to consider the question whether the fact that Sumner had no license, or had not paid the tax, would so far vitiate the transaction as to preclude a recovery of anything.

We have considered the objections to testimony and find no error in the rulings of the court with respect to them. There was evidence of Rumbough's agency for his wife, and his acts within the scope of his authority are binding upon her.

The court submitted the proper issues. They embraced all controverted questions.

We find no error in the record.

No error.

MARY INGLE v. ASHEVILLE POWER AND LIGHT COMPANY.

(Filed 19 December, 1916.)

1. Carriers of Passengers—Street Railways—Negligence—Rules of Company—Ordinances—Statutes.

It is negligence *per se* for a motorman on a street car to run the car on the streets of a town without giving the signals or warnings required by the company's rules, and to look back over his shoulder in violation of such rules; and in running at an excessive speed in violation of a town ordinance; and for the company to have failed to provide the car with a proper fender, as required by the statute.

2. Evidence—Negligence—Issues—Last Clear Chance.

An issue as to the last clear chance is properly submitted to the jury under evidence tending to show that plaintiff's intestate was struck and killed while attempting to cross the defendant's track carrying a basket of peaches for delivery to his customer; that the motorman was looking back over his shoulder and otherwise should have seen the plaintiff, but approached at an excessive speed, without signals or warnings and under circumstances tending to show he could have avoided the impact in the exercise of reasonable care.

3. Carriers of Goods—Street Railways—Negligence—Trespassers—High Degree of Care.

Pedestrians and drivers of vehicles upon the streets of a town are not trespassers and have equal rights with street cars operated thereon; and a motorman in running such cars owes a higher degree of care in avoiding injuring them when upon the track than is required of a locomotive engineer under like circumstances.

APPEAL by defendant from *Harding, J.*, at May Term, 1916, of BUNCOMBE.

Mark W. Brown and Zeb F. Curtis for plaintiff.
Martin, Rollins & Wright for defendant.

CLARK, C. J. This action is brought by the plaintiff as administratrix of her husband, who was killed by defendant's street car on Montford Avenue in Asheville, 13 September, 1915. Four issues were submitted, *i. e.*, negligence, contributory negligence, last clear chance, and damages. The first three issues were answered "Yes" and the damages for the death of the intestate were assessed at $4,750.

The intestate was a farmer and went to Asheville on the day of his death with a load of peaches, potatoes, and apples for sale, accompanied by one of his five children, a little boy. At a house on Montford Avenue he was given an order for peaches and returned to his wagon on the opposite side of the street to get them. Between his wagon

and the house where he was to deliver the peaches were two parallel street car lines, running north and south, and he had to cross both tracks in returning from his wagon to deliver the peaches. While he was filling his peck measure with peaches the street car on the west track passed going south, and soon afterwards he crossed that track going in a diagonal direction towards the house where he was to deliver the peaches. When upon the east track he was struck by a street car going north down a heavy grade, and there was evidence that it was going at an unlawful rate of speed—25 or 30 miles an hour. There was evidence that no signals were given of the car's approach and that the car was not equipped with fenders. The deceased was going in a stooping position with the peaches and did not see the approaching car, which was being operated as an extra. He could have been seen by the motorman at a distance of 300 feet, but the motorman was looking backward over his shoulder, in violation of the rules of the defendant, and gave no signal by ringing the bell or otherwise until the car was so close to the deceased that he could not escape. The brakes were not applied until after the collision.

The deceased was in the middle of the east track and jumped backward in an effort to escape, but did not have time to save himself. He was knocked into the air across the west track, falling on the brick pavement and rolled then 10 or 11 feet, altogether from 30 to 40 feet. The car ran 84 steps to 100 yards after hitting deceased, but it is in evidence that if it had not been exceeding the lawful speed it might have been stopped within 8 or 10 steps.

The witness Crinkley testified: "A few feet after we passed the other car I saw the man that got struck on the west side of the westerly track, walking toward the east, with some little measure in his hand, this way. He was looking down; looking neither to the right nor to the left; walking, with his head down, across the street. He walked on, and as he approached the track, not looking, the thought struck me that the motorman didn't see him, which, of course, attracted my attention—his coming on the track and the car speeding down the line. He walked to where he stopped, almost in the center of the track, and about 25 feet from there the motorman used his gong. He stepped back—jumped back—about a step or something that way, and disappeared to view under the railing. You can see coming down the street, coming at an angle, and as he came in closer, at the moment the car struck him, I couldn't see him, but in a moment his body was out; using this as an illustration, his body was out in that direction, striking the street. When he came down his body was rolling, and I should say it knocked him 40 feet. The motorman, in the meantime, had kept on until he applied the brakes. He pulled his brakes around, I sup-

pose, to stop as quick as he could. The car ran, I would guess, 200 feet after striking the man."

The defendant insists that the motion to nonsuit should have been allowed, but, taking the evidence of the plaintiff to be true, as we must, on such motion, the defendant's car was being operated at a high and unlawful rate of speed, down grade on a steep track at the time plaintiff's intestate was struck and killed; he was knocked about 40 feet, which is proof that the car was running at a frightful speed, as was testified to by several witnesses, and there was the further fact that the car after striking him ran 84 steps to 100 yards before it could be stopped; the ordinances of Asheville forbade the car to be operated at a greater rate than 20 miles an hour. This of itself was negligence. *Dorsett v. R. R.*, 171 N. C., 109; *Norman v. R. R.*, 167 N. C., 543; *Ledbetter v. English*, 166 N. C., 125.

It was also in evidence that no signals were given of the car's approach and that the motorman was looking backward over his shoulder without keeping a proper lookout, in violation of the rules of the defendant. This was also negligence. *Hopkins v. R. R.*, 170 N. C., 485; *Pickett v. R. R.*, 117 N. C., 616.

There was also evidence that, in violation of law which required the use of "practical fenders in front of all passenger cars," this car was not so equipped; and this failure was negligence. Rev., 2618, 3801; *Smith v. R. R.*, 162 N. C., 31; *Henderson v. Traction Co.*, 132 N. C., 779. This case is almost identical on the facts with *Norman v. R. R.*, 167 N. C., 533.

The defendant insists that the third issue, as to the last clear chance, should not have been submitted. Exc. 2, 3, 5, and 7. We think it was eminently proper that this issue should have been passed upon by the jury. Though the deceased might have been guilty of contributory negligence in not exercising greater care in crossing the street, yet if the defendant had been running the car within the lawful rate of speed and the motorman had been looking forward and not backward over his shoulder, and had given the signals and slackened speed, it might well be that the plaintiff's intestate would not have been killed. The pleadings and the evidence presented this issue, and it was in the province of the jury to determine the truth.

There is even more care required of the motorman of a street car than of the engineer on a locomotive. The citizen has an equal right in the street with the traction car, but he is a trespasser, ordinarily, on the track of a railroad. The motorman is required to run at a lower rate of speed and observe a more careful lookout for persons who may cross, and ordinarily are crossing, a street car track at all hours. The street car company has no right to the exclusive use of

the street, and it must respect the rights of pedestrians and drivers of vehicles of all kinds, who have the same right to use the streets as themselves. *Norman v. R. R.*, 167 N. C., 537, 538; *Moore v. Street R. R.*, 128 N. C., 458. A high degree of care is imposed on the street car company to keep a careful lookout and to equip its cars with such appliances as will prevent injury to others who are using the street.

The deceased had the right to go across the track to deliver his peaches to a customer. There was evidence that the defendant's motorman saw or by the exercise of ordinary care should have seen the deceased approaching and going upon the track 300 feet before the impact; and if so, he should have seen from the stooping position of the deceased that he was carrying a burden and was apparently inattentive and unaware of the approach of the car. If so, he should have slackened the speed of his car and given the signals. The witness Crinkley, the only passenger on the car, testified that he saw all this, and that the motorman was looking the other way and did not give the alarm nor slacken speed.

We cannot see that there was any error which entitles the defendant to a new trial.

No error.

LOUISE ORR, ADMINISTRATRIX, v. JOHN B. RUMBOUGH.

(Filed 19 December, 1916.)

1. Master and Servant—Employer and Employee—Dangerous Work—Duty of Employer.

It is the duty of an employer to furnish the employee, while engaged within the scope of his duties, a reasonably safe place to work, reasonably safe appliances, and to give such inspection to the premises and appliances as are necessary to keep them in this condition, and to warn the employee of dangers known to him or which he should have known by the exercise of ordinary care, and which were unknown to the employee or which he could not discover in the careful performance of his duty.

2. Same—Instructions—Trials—Burden of Proof.

In an action to recover of the employer damages for the negligent killing of an employee, alleged to have proximately resulted from the failure of the former to instruct the latter in doing dangerous work required of him in the course of his employment, the burden is upon the plaintiff to show that the defendant knew of the defect or danger or that it could have discovered it in the exercise of ordinary care, with the presumption that it was familiar with the dangers ordinarily accompanying that character of work.

3. Master and Servant—Negligence—Presumptions—Res Ipsa Loquitur—Exceptions to Rule.

The exception to the general rule which raises a presumption of negligence where a personal injury occurs to an employee under conditions exclusively within the control of the employer, is not applicable when all of the facts are known, and they rebut the presumption, or where the injurious occurrence could not happen without the voluntary act of the injured person, or where both were in the exercise of an equal right and chargeable with the same degree of care.

4. Same—Trials—Evidence—Dangerous Work—Delegated Duty.

Where the plaintiff's intestate, a man experienced in such work, had been employed by the defendant as foreman in his repair shop, and the defendant had the plaintiff to install a welding machine under the instruction and with the assistance of an expert sent from the factory for the purpose, leaving the two in full charge; and the intestate and the expert, by faulty construction, had permitted coal oil to leak upon the floor, become mixed with chemicals used in a retort, which afterwards caused an explosion in the retort resulting in the intestate's death; and there is no evidence that the defendant should reasonably have known the effect the oil would have on the chemicals: *Held*, insufficient to show that the plaintiff had failed in the performance of any duty he owed the intestate, his employee, and a judgment as of nonsuit should be entered. The doctrine that an employer may not escape liability by delegating to another duties he is required to perform are inapplicable to the facts of this case.

APPEAL from *Adams, J.*, at August Term, 1916, of BUNCOMBE.

This is an action to recover damages for the wrongful death of the intestate of the plaintiff, caused, as the plaintiff alleges, by the negligence of the defendant—

(*a*) Installing a highly and intrinsically dangerous welding machine in their place of business, where the plaintiff's intestate's duties required him to work.

(*b*) In exposing the plaintiff's intestate to dangers of said intrinsically dangerous welding machine and the operation of the same.

(*c*) In requiring plaintiff's intestate, B. L. Orr, to work in the room with the welding machine and in and around the same, the said B. L. Orr being ignorant of the dangers of said machine and inexperienced in the operation of the same.

(*d*) In permitting coal oil and other foreign substances to become mixed with the chemicals which were being used for the purpose of generating oxygen gas.

(*e*) In failing to furnish the plaintiff's intestate, B. L. Orr, with a safe place in which to work and reasonably safe tools, appliances, and machinery with which and around which to perform his duties.

The defendant denied that the intestate of the plaintiff was in his employment at the time of his death, denied negligence, and pleaded contributory ngligence.

The immediate cause of death was the explosion of a retort, a part of a welding machine. The defendant was engaged in the automobile business and in repairing and selling automobiles, and became proprietor of a suitable building and furnished it with necessary machinery and appliances for carrying on the business, and employed as foreman B. L. Orr, intestate of the plaintiff, a man 28 years of age, intelligent, of good habits, and a skilled machinist of eight years experience. This foreman had charge of the tools and machinery and the employees engaged to work with and operate the same, and among the implements were a "blower, a blacksmith forge and anvil for hammering out and shaping up tools." The forge was open, not inclosed in any way.

Some time in November, 1914, one Ray, representing the George C. Shemmel welding machine, made at a factory in Ohio, had negotiations with defendant in his office, in said building, and talked with him about the machine, and at first defendant said he wasn't favorably impressed, but said they needed a machine to do the right kind of work. Ray got defendant interested in this machine and told him what it would do, and defendant said to Ray: "If that machine would do what he claimed it would, it was what he wanted." This was the starting point of the negotiations. Defendant called his foreman downstairs by phone, Mr. Orr, and said to him: "Mr. Orr, this man claims to have a machine to do the work that you want done, and if it is what he says it is, we will put one in. I would like to have you know about it." Ray thinks this was said on his second visit in January, but he didn't close the deal for two or three visits after that; that Orr, the man defendant was intending to operate the machine, couldn't get away to go to the factory to get instructions, they were so busy. Finally Ray agreed to bring an expert down from the factory to the plant and instruct Mr. Orr there. This plan was adopted and Ray succeeded in selling one of the machines, and sent the order to the factory and the factory shipped the goods and sent an expert, one McAvoy, to teach Orr. When the machine arrived it was put up in the Enterprise Machine Company and was demonstrated and tested by Ray, McAvoy, and Orr for about a week or ten days, and Ray told defendant, having learned this from the expert, McAvoy, that it would be necessary to have a pre-heating machine to have a successful job. Ray described the pre-heater as "a furnace to heat up the piece you are going to weld."

McAvoy and Orr constructed the pre-heater, making an iron box and connecting it with pipes to convey into it *coal oil,* and, after making this connection, turned on the oil, some of which leaked or spilled out on the floor and became in some way mingled with the chemicals used to produce oxygen gas.

This mixture of the oil and the chemicals was placed in the retort of the welding machine by Orr and McAvoy, and caused the explosion, which occurred about a half-hour thereafter.

The pre-heating machine was completed about 6 o'clock of the evening before the accident, which was at about 11 o'clock in the morning.

The office of the defendant was not on the same floor with the welding machine, but he passed on this floor soon after its completion, and, seeing oil on the cement floor, said it was dangerous, and directed it to be wiped up, which was done.

His Honor, among other things, charged the jury as follows:

"There is no evidence in the case sufficient to be considered by the jury that the defendant John B. Rumbough was negligent in installing a highly and intrinsically dangerous machine in the place of business, as alleged, where the plaintiff's intestate's duties required him to work; nor is there any evidence sufficient to be considered by the jury that John B. Rumbough was negligent in requiring plaintiff's intestate, B. L. Orr, to work in the room with the welding machine, and in and around the same. That is to say, there is not sufficient evidence that there was negligence on the part of the defendant as to the installation of the machine, nor in the mere fact that the deceased was required to work in the room in which the machine was installed."

The allegations relied on on the part of the plaintiff are these: (1) that the intestate was ignorant of the dangers of the machine and inexperienced in operating it; (2) that the defendant negligently allowed coal oil to become mixed with the chemicals which were being used for the purpose of generating oxygen gas; and (3) that the defendant failed to furnish the deceased with a reasonably safe place in which to work and reasonably safe tools, appliances, and machinery with which and around which to perform his duties.

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Martin, Rollins & Wright for plaintiff.
Merrimon, Adams & Johnston for defendant.

ALLEN, J. The verdict establishes the fact that the intestate of the plaintiff was in the employment of the defendant at the time of

his death, and this relationship imposed on the defendant the duty of providing a reasonably safe place to work, reasonably safe appliances, and to give such inspection to the premises and appliances as was necessary to keep them in this condition, and to warn the employee of dangers known to the employer of which he might know by the exercise of ordinary care, and which were unknown to the employee or which he could not discover in the careful performance of his duty. *Womble v. Grocery Co.,* 135 N. C., 479; *Marks v. Cotton Mills,* 135 N. C., 290; *Hicks v. Mfg. Co.,* 138 N. C., 325; *Mincey v. R. R.,* 161 N. C., 471, and many other cases.

The duty to warn or instruct is more insistent when the employee is inexperienced, and is subject to the following qualifications, which must be shown in order to impose liability:

"1. That the master was chargeable with knowledge, actual or constructive, of the existence of the risk.

"2. That the servant himself did not appreciate the risk, and that his nonappreciation thereof was excusable.

"3. That the master knew, or ought to have known, that the plaintiff was thus excusably ignorant of the risk, and was by reason of such ignorance exposed to abnormal hazard, over and above those which he was presumed to contemplate as incidents of the employment." 3 Labatt M. and S., sec. 1141.

"The second fact, which, as stated in par. 1141, *ante,* must be established in order to justify the conclusion that the master was negligent, is that the dangers with regard to which there is alleged to have been a duty of instruction were not known, either actually or constructively, to the servant. The absence of any obligation to instruct a servant who is proved by direct evidence actually to have had as complete knowledge of the danger and of the appropriate means of avoiding it as the master could have imparted to him is too obvious to admit of controversy." 3 Labatt M. and S., 1143.

A breach of either of these duties would be negligence, and, if the proximate cause of the death of the intestate, actionable.

The burden was on the plaintiff to prove the breach of duty, and when this consists of some defect in appliances or ways or place to work or dangers incident to the work, the employee must show that the employer knew of the defect or danger or that he could have discovered it by the exercise of ordinary care (*Hudson v. R. R.,* 104 N. C., 491; *Blevins v. Cotton Mills,* 150 N. C., 499; *Pritchett v. R. R.,* 157 N. C., 100); but the employer is presumed to be familiar with dangers ordinarily accompanying the business in which he is engaged, "on the ground that a person who combines with the ordinary measure of intelligence which the law presumes every citizen to possess, the

special requirements of persons engaged in the given occupation, cannot, supposing him to have made a reasonably careful use of his faculties, fail to understand the extent and nature of the perils normally incident to that occupation." 3 Labatt M. and S., sec. 1029.

In assuming the burden of proof, the plaintiff cannot usually rely on proof of the injury alone, as the general rule is that the injury neither raises a presumption nor is it evidence of negligence (*Patton v. R. R.*, 179 U. S., 658; *Shaw v. Mfg. Co.*, 143 N. C., 134); but there is a well recognized exception to this rule to the effect that "When the thing is shown to be under the management of the defendant or his servant, and the accident is such that as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

This principle was declared in 1865 by *Earl, C. J.*, in *Scott v. London Dock Co.*, 3 H. and C., 134, and has been adopted in many of the States, as will be seen by reference to the notes in 113 A. S. R., 1000, and particularly in this State in *Stewart v. Carpet Co.*, 138 N. C., 67; *Ross v. Cotton Mills*, 140 N. C., 122; *Fitzgerald v. R. R.*, 141 N. C., 540; *Turner v. Power Co.*, 154 N. C., 138; *Ridge v. R. R.*, 167 N. C., 510.

There is much conflict of authority as to whether the principle is applicable to explosions (see note 113 A. S. R., 1000 *et seq.*, and note to *Lykiordopoula v. R. R.*, Anno. Cases, 1912 A, 980); but, however this may be, there are limitations upon the application of the exceptions which are thus stated by Professor Wigmore in 4 Wigmore on Evidence, sec. 2409, and approved in *Stewart v. Carpet Co.*, 138 N. C., 66. "(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been, at the time of the injury, in the control of the party charged; (3) The injurious occurrence must have happened irrespective of any voluntary action at the time by the party injured." He further says that "The doctrine is to some extent founded upon the fact that the chief evidence of the true cause of the injury, whether culpable or innocent, is practically accessible to the party charged and perhaps inaccessible to the party injured."

It is thus seen that the basis of the exception is common experience, and that it is allowed from necessity when the causes of an injury cannot be clearly shown by the injured party and ought to be known to the employer, and that it is not properly applied when all the facts are known and they rebut the presumption of negligence, or when

the injurious occurrence could not happen without the voluntary act of the person injured.

"To render the maxim applicable the thing causing the injury must be shown to have been in the exclusive control of defendant; and the rule has no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care. Nor does it apply where the cause of the accident is known, or where the injury was the result of two or more concurring causes." 29 Cyc., 592.

Let us, then, apply these principles to the evidence.

The defendant purchased a welding machine from a responsible party, and there is no evidence that it was not suitable for the purposes for which it was bought or that there were any defects in it.

He was not acquainted with the proper manner of installing the machine, nor did he know how to operate it, and he therefore made it a part of the contract that the seller would send an expert to install it and to instruct the intestate, who was himself an experienced workman and machinist, how to operate it.

The expert was not in the employment of the defendant, but of the seller of the machine, and the machine was not bought until after consultation with the intestate, who was foreman of the defendant.

The expert came and he and Orr, the intestate, after installing the machine, operated it for about two weeks without difficulty and without complaint. They together had complete and exclusive control of the machine and of the room where it was located. They concluded that it was necessary to construct a heating box in which iron, steel, and other material could be heated before it was welded. The intestate, Orr, and McAvoy, the expert, constructed this heating box and completed it about 6 o'clock of the evening before the accident, which occurred the next morning at about 11 o'clock.

In constructing this box they used pipes for the purpose of conducting oil to the box, and after 6 o'clock it was found that these pipes, constructed by Orr and the expert, leaked, and that oil coming from the pipes was on the cement floor.

The defendant, passing through the room about this time, directed that the oil be removed, as it was dangerous, and this was done.

On the next morning Orr and McAvoy began work about 8:30 o'clock and about a half-hour before the accident they placed in the retort chemicals, manganese, and chloride of potassium, which were in wooden boxes kept on the floor where the oil had escaped. That the combination of the oil and the chemicals created a high explosive, and in a short time the retort exploded, killing the intestate and McAvoy.

There is no evidence that the defendant knew that the combination of the oil and the chemicals would create an explosive, and he directed that the conditions which brought this about should be removed. The pipes which leaked were constructed by the intestate and McAvoy and they had complete control at the time of the accident, of the welding machine, the heating box, and of the floor where they were situated, and it was their duty to see that they were kept in proper condition, and there is neither allegation nor proof that the defendant failed to warn or instruct the intestate, if required to do so under the circumstances.

There cannot be, under these conditions, any negligence upon the part of the defendant unless he is charged arbitrarily with knowledge of the change in the chemicals by contact with the oil, and in failing to warn the intestate. This aspect of the case is fully met by the fact that he requested the seller of the machine to send an expert, who is presumed to have had knowledge not only of the installation and operation of the machine, but of the quality of the chemicals, and that he would not only keep the premises safe, but would warn the intestate of any dangers, and by the fact that the conditions which caused the explosion were created by the intestate and McAvoy, and that they had more perfect knowledge and better opportunity to know than the defendant.

Why impute to the defendant knowledge when the intestate knew or ought to have known more than he? and why require him to warn of dangers of which he did not know, when the intestate had more perfect knowledge, and had by his side an expert to warn and instruct him?

We do not modify the rule which prevails with us, that the employer cannot delegate the duties which devolve upon him as employer; but when all of the circumstances are considered, there is nothing in the record which tends to prove that the defendant failed to exercise the care of a man of ordinary prudence, and the death of the intestate must be referred to accidental causes or to causes created by and under the control of the intestate.

The motion for judgment of nonsuit ought to have been allowed.

Reversed.

HORACE BUCKNER v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 19 December, 1916.)

Insurance—Accident—Total Disability.

A provision in an insurance policy that the insurer will pay a certain sum when the insured has become wholly disabled by bodily injuries and permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations, will be construed as expressed, and the liability of the insurer thereunder will not be extended so as to include a total disability of the insured to perform his trade or vocation when other gainful occupations are still open to him.

ACTION tried at August Term, 1916, of BUNCOMBE, *Adams, J.*, presiding, upon these issues:

1. Has the plaintiff become wholly disabled by bodily injuries, and permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations, as alleged in the complaint? Answer: "Yes."

2. Is the plaintiff entitled to recover of the defendant the sum of $2,000, as alleged in the complaint? Answer: "Yes."

From the judgment rendered, defendant appealed.

Mark W. Brown, Zeb F. Curtis for plaintiff.

Brooks, Sapp & Williams, Merrimon, Adams & Johnston for defendant.

BROWN, J. The plaintiff seeks to recover $2,000 on a policy of insurance issued by defendant to plaintiff, containing the following provisions: "Upon receipt of due proof of the total and permanent blindness or deafness of the insured, or of the loss of both hands at or above the wrist, or of the loss of both feet at or above the ankle, or of the loss of one limb and one eye, or of the loss of one hand at or above the wrist and of one foot at or above the ankle, or *that he has become wholly disabled by bodily injuries*, loss of reason, or disease, and will be permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations, after one full annual payment shall have been made and before a default in the payment of any subsequent premium, provided such total and permanent disability shall occur before the insured attains the age of 60 years, the company by indorsement in writing on this contract will, at the option of the insured, either agree to pay, etc."

At the conclusion of the evidence defendant moved to nonsuit. The motion was overruled and defendant excepted. The plaintiff was the

only witness examined, and testified, in substance, that on 26 December, 1915, he was oiling relief valves of an engine on which he was fireman and was shaken off the engine, which ran over and cut off his left hand 5 inches above the wrist. Plaintiff testified that he had not been able to do any work since the loss of his hand, but had chopped wood with one hand; had not been able to follow any occupation. On being asked, "What kind of work can you do now?" he replied, "What a man could do with one hand."

It is manifest that plaintiff cannot recover for the loss of one hand, for the company contracts to pay only for the loss of both hands or the loss of one hand and one foot. In 1 Cyc., 272, it is said: "But where the policy provides for the payment of a certain sum for the 'loss of one entire hand and one entire foot, or two entire hands or two entire feet,' it shows a distinct purpose to stipulate for the loss of two and not one limb, or part of two limbs, before a liability can accrue."

Recognizing this, plaintiff claims "that he has become wholly disabled by bodily injuries, and will be permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations," and bases his right to recover on that clause of the policy. If the policy contained an agreement to pay in case plaintiff was totally disabled from following his *usual occupation* (as was the contract in many of the adjudicated cases), we should hold that he is entitled to recover upon the facts of this case.

But the evidence fails to disclose a total disability that will "permanently, continuously, and wholly" incapacitate plaintiff "from pursuing any and all gainful occupations." The authorities are practically unanimous that under the terms of this policy plaintiff cannot recover without showing a bodily injury that will incapacitate him not only from following his usual avocation of fireman, but also from pursuing any other gainful occupation. The language is too plain and the meaning too unmistakable to permit an enlargement of the terms of the contract by construction. It is unfortunate for the plaintiff, but "it is so nominated in the bond."

In a similar case in a policy containing practically the same conditions, the Supreme Court of Georgia in *Whitton v. Ins. Co.*, 146 Ga., ..., said: "Under the precise terms of the contract sued upon, the insurer agreed to pay a certain sum in twenty equal installments of $50 each 'in the event of the total and permanent loss of sight of both eyes, or loss of both arms or both legs, or one arm and one leg, or one eye and one limb, of the insured,' or in the further event that the insured should become 'totally and permanently disabled to such extent as to render it impossible for him to engage in any gainful

occupation whatever.' The contract itself expressly declared that 'the total and permanent disability referred to must be such that there is neither then nor at any time thereafter any work, occupation, or profession that the assured can sufficiently do or follow to earn or obtain any wages, compensation, or profit.' The evidence showed the loss by accident of one eye by the plaintiff, and did not show that he was totally disabled within the meaning of that term as defined in the contract itself, since it appears that the plaintiff was not wholly unable to earn or obtain any wages, compensation, or profit. In view of the ruling above, the court did not err in awarding a nonsuit."

Mr. Cooley, after discussing various disability clauses, says: "The provision may limit total disability to the inability to carry on any and all kinds of business. Under such a clause the insured must be unable to perform not only the duties of his usual occupation, but the duties of any other occupation." 4 Cooley's Briefs, 3293, citing *Maccabees v. King,* 79 Ill. App., 145; *Lyon v. Ry. Passenger Assurance,* 46 Iowa, 631; *Maccabees v. Cox,* 25 Tex. Civ. App., 366.

In *B. and O. Assn. v. Post,* 122 Pa., 597, where the plaintiff suffered the same injury as the plaintiff in this case, the Court said: "The phrase 'total inability to labor' contained in the constitution and by-laws of an Employees' Relief Association means a total inability to earn a livelihood at any employment, and not at the particular employment at which the member was engaged at the time of his injury."

1st Cyc., 270, says: "Where the phrase, 'total inability to labor,' is used it is more inclusive, and means a total disability to earn a livelihood at any employment."

In *Rhodes v. Ins. Co.*, 5 Lansing, 77, the Supreme Court of New York says in a case similar to this: "While the policy is to be liberally construed, its provisions cannot be disregarded. To make the defendant liable, total disability to labor must be shown."

Mr. Joyce says: "Total disability and similar expressions in accident and benefit insurance ascertaining the meaning, reference must be had to the entire contract and the exact terms used. The words may necessitate that the assured should be so far disabled as to prevent his following any occupation or labor." Ins., sec. 3031. Mr. Joyce further said: "In an Ohio case, under a policy providing for periodical payments while insured is totally disabled and prevented from the transaction of all kinds of business, it is held that the contract should be enforced as it reads, and that the assured cannot recover because totally disabled for his own trade or business if he retains health, strength, and physical ability sufficient for the pursuance of any other vocation, whether he is conversant with the same or not." Sec. 3031.

Referring to the meaning of the words "wholly disabled," May on Insurance, sec. 522, says that the ability of the insured to engage in some business will prevent recovery unless the insured is disqualified to engage in any occupation.

Mr. Beech says, substantially, that "total disability" that would entitle a member of an insurance order to recover must be not only permanent but total, so as to render him unable to perform or direct any kind of labor or business. Ins., sec. 262.

Bacon says that "total disability" naturally means being totally disabled for all kinds of business, unless by the contract the disability is to be only from the usual occupation of the insured. Benefit Societies, sec. 395a.

These authorities and many others which we could cite establish conclusively that under the terms of the policy issued by the defendant the plaintiff is not entitled to recover, in the absence of evidence showing total disability to pursue any kind of gainful occupation.

The motion to nonsuit is allowed.

Reversed.

C. S. KINSLAND v. JOHN P. ADAMS.

(Filed 19 December, 1916.)

Pleadings—Demurrer—Judgment—Estoppel — False Testimony — Perjury—Evidence.

In an action to set aside a verdict and judgment between the same parties for false testimony of a witness therein to a material fact, the complaint must allege that the witness had been convicted of the perjury and that the plaintiff was free from laches; and when such is not alleged, and it appears from the complaint that a final judgment had been entered creating an estoppel, a demurrer should be sustained.

APPEAL by defendant from *Harding, J.*, at September Term, 1916, of GRAHAM.

Moody & Whitaker for plaintiff.
R. L. Phillips for defendant.

CLARK, C. J. The complaint alleges that in a former action between the same plaintiff and defendant to recover damages for the failure of defendant to deliver certain logs to plaintiff's sawmill the latter had set up a counterclaim for the purchase price of the timber bought, and that on a reference it had been found by the referee that the plaintiff

was due the defendant the sum of $198.10, which report was confirmed by the Superior Court, judgment entered, and no appeal taken. Upon issuing execution to collect the judgment, this action was brought to enjoin the sale thereunder and to have the judgment declared void upon the ground that it was obtained by false testimony, in that the defendant Adams testified before the referee that the plaintiff was still due and owing him for said timber, though at that time the defendant had converted it to his own use. There is no allegation that the defendant Adams has been indicted and convicted of perjury.

The demurrer is because the complaint does not state a cause of action, for that it shows on its face that the controversy had been settled by a judgment of the Superior Court on this subject-matter between this same plaintiff and defendant. Also, that the complaint sets out an allegation for false testimony rather than for fraud, and contains no allegation that the plaintiff did not have ample opportunity before the trial of the former action to obtain evidence of the matter set out in this complaint as the basis of the present action, if it had been true, and fails to allege that the defendant has been convicted or presented for perjury for said alleged false testimony.

The point in this case has been passed in a very clear opinion in *Moore v. Gulley,* 144 N. C., 81, where, after quoting, among other authorities, *Tovey v. Young,* Prec. Ch., 193, as follows, "New matter may in some cases be ground for relief, but it must not be what was tried before; nor when it consists in swearing only will a new trial be granted unless it appears by deed or writing or that a witness, on whose testimony the verdict was given, has been convicted of perjury or the jury attainted," *Walker, J.,* said: "Numerous cases have been decided in this Court involving the question now presented to us, and we believe that in all of them the principle stated in *Tovey v. Young* has been followed and a conviction of the alleged perjury required as a condition of granting equitable relief. *Burgess v. Lovengood,* 55 N. C., 457; *Dyche v. Patton,* 43 N. C., 295; *Stockton v. Briggs,* 58 N. C., 309; *Horne v. Horne,* 75 N. C., 101," and added: "If facts, such as those stated in the complaint, were held by us to have laid a sufficient foundation for a suit to annul what had been solemnly adjudicated in a former action and to entitle the plaintiff to a retrial of the case, the result would be that, as has been well said, all causes would end in chancery, and the trials of actions at law might, to say the least, be seriously embarrassed. We should, even in the exercise of the undoubted jurisdiction invoked, proceed with the greatest caution. The reason of the rule requiring a previous conviction of the witness upon an indictment for the perjury charged against him has been said to be, besides the inconvenience of the repeated trials, the difficulty

of knowing whether upon another trial the same or new witnesses would swear to the whole truth and nothing but the truth; hence, to induce the Court to interfere, the falsehood of the former testimony must be shown, not merely by other witnesses, but by evidence of a higher grade—by writing or by the unimpeachable record of a conviction for the perjury." *Peagram v. King,* 9 N. C., 608.

An action to set aside a verdict and judgment for false testimony concerning a material fact in a former trial between the same parties cannot be sustained unless the plaintiff is free from laches and produces a higher grade of evidence than mere parol, such as conviction of perjury, so that there may be an end to the litigation.

The demurrer should have been sustained.

Reversed.

THE CHAMPION FIBER COMPANY v. W. L. HARDIN.

(Filed 19 December, 1916.)

1. Arbitration and Award—Contracts—Breach.

The plaintiff and defendant contracted that the former should acquire title to certain timber lands to be held in trust for the latter and paid for in sawing the lumber, which thereafter the plaintiff breached by rendering performance by the defendant impossible, and then entered into another contract with the defendant wherein the prices to be paid defendant for cutting the timber and the proportionate amount to be paid for the land varied from the first one, and plaintiff also breached this contract: *Held,* the second contract was not an accord and satisfaction, was not pleaded as such, and did not prevent the defendant from recovering damages under the first contract, which the plaintiff had breached.

2. Same—Performance—Pleas.

An accord and satisfaction must be performed in its entirety by one claiming that it bars a recovery of the original right of action.

3. Reference—Findings—Evidence—Contracts — Breach — Cutting Timber—Appeal and Error—Measure of Damages.

Where the plaintiff has breached his contract by rendering it impossible for the defendant to cut the wood on his lands for a certain profit for certain periods of time, the report of the referee finding defendant's damage in a certain sum, which necessarily exceeds the profit that the defendant could have made from cutting the timber standing thereon, is without supporting evidence, and though approved by the trial judge, will not be upheld on appeal, the rule of damages as to such excess being the interest on capital invested during the suspension periods, expenses of employees and teams, deterioration in value of the property, and such other as directly and necessarily result from the wrongful act.

4. Contracts—Breach—Damages—Flume—Trials—Evidence.

Where the value of a flume is an element of defendant's damages in an action upon contract, evidence of its cost five years before the plaintiff took possession, without evidence of the materials used in its construction, extent of deterioration, etc., is insufficient as to its value at the time of plaintiff's possession.

APPEAL from *Long, J.*, at May Term, 1916, of HAYWOOD.

This is an action growing out of a contract made and entered into by and between W. L. Hardin and The Champion Fiber Company, dated 21 January, 1907, the material provisions of which are as follows:

1. The defendant Hardin agreed to sell, and the Champion Fiber Company agreed to buy of said Hardin, all the pulp and acid wood on certain lands in Haywood County, N. C., known as the Railway Addition to the Love lands, Henry Plott lands, Arthur Davis, Manuel Hopper, and other lands, the terms of the sale being as hereinafter set forth.

2. The title to said 763-acre tract of land above mentioned being, at the time said contract was entered into, outstanding in the Haywood Lumber and Mining Company and one R. L. Mehaffey having acquired an equitable interest in said land, and the said Mehaffey having assigned to the defendant Hardin one-half of his equity therein, and the plaintiff Fiber Company having paid to the said Mehaffey the sum of $500 for an assignment of his interest in said tract, the said plaintiff, Champion Fiber Company, undertook and agreed to pay to the Haywood Lumber and Mining Company the sum of $3,060 and take to itself a good and sufficient deed of conveyance for said 763-acre tract of land; upon trust, however, that when the defendant W. L. Hardin should repay to the Champion Fiber Company the sums so advanced and paid it, at interest at 6 per cent per annum, and otherwise comply with the terms of the contract then made, the said Champion Fiber Company would make, or cause to be made, to the said W. L. Hardin, his heirs and assigns, a good and sufficient deed to vest in him the title to said 763-acre tract of land in fee simple.

3. The said contract was to cover a period of five years from date, and the plaintiff Fiber Company agreed to pay to the defendant Hardin, for the pulp and acid woods so purchased by it, according to the following scale of prices, f. o. b. cars at railway siding at or near the station of Saunook: for the year 1907, $4.25 per cord of 160 cubic feet; for the year 1908, $4.50 per cord; for the year 1909, $4.75 per cord; for the year 1910, $5 per cord; for the year 1911, $5.25 per cord.

4. It was agreed between the parties that the plaintiff Fiber Company might retain $1 per cord from the scale of prices above set forth, to apply as a credit in Hardin's favor, upon the repurchase provision of the said contract, unless all money advanced and paid by the Cham-

pion Fiber Company for said 763-acre tract of land should be otherwise repaid by Hardin within the five years limit of said contract, and when the sum so advanced by the Fiber Company has been repaid to it by Hardin, with interest as aforesaid, whether said sums should be repaid by the delivery of wood or otherwise, and when the defendant Hardin had otherwise complied with the terms of said contract he should be entitled to a deed for the land, as aforesaid.

5. The said acid and pulp wood, when cut and delivered by defendant Hardin as aforesaid, was to conform as nearly as practicable to certain detailed specifications, which specifications are set forth with minuteness in the said contract.

6. The defendant Hardin was to deliver not less than 4,000 cords of wood annually during the continuance of the contract, and in case he shipped 4,000 cords or more in any year he was to be allowed a bonus of 25 cents per cord on all wood shipped for that year, over and above the contract price for the year.

7. The defendant Hardin was to have the right at any time he might desire to submit to the Fiber Company an estimate of his pay-roll and actual expenses in getting out wood, and the Fiber Company should thereupon remit said sum to Hardin, the amount to be remitted, however, not to exceed 50 per cent of all the wood gotten out by Hardin and not paid by the Fiber Company.

8. All wood was to be ranked and measured upon the yards of the Champion Fiber Company, at Canton, North Carolina.

9. In case Hardin should fail from any cause to carry out his contract, the Fiber Company should have the right to enter upon the lands and cut and remove such wood as they should desire, and, after deducting the actual cost of cutting and removing the same, should account to Hardin therefor, according to the terms of the contract.

In pursuance of its said contract the said Champion Fiber Company did on 22 March, 1907, pay to the Haywood Lumber and Mining Company the sum of $3,060, and thereupon the said Haywood Lumber and Mining Company executed and delivered to said Champion Fiber Company a deed for said 763-acre tract of land.

Before the signing of the said contract, to wit, on 19 January, 1907, the plaintiff Fiber Company, by and with the consent and approval of the defendant Hardin, paid to R. L. Mehaffey the sum of $500, and thereupon the defendant Hardin and the said Mehaffey made a deed of assignment to said Champion Fiber Company for their interest in said 763-acre tract of land.

The Champion Fiber Company, in accordance with its agreement, procured a siding to be put in by the Southern Railway Company for the use of Hardin in making his wood shipments.

Soon after the execution of the contract, and prior to 16 February, 1907, the defendant went into possession of said lands and commenced his wood operations thereon.

On 6 November, 1907, the Champion Fiber Company refused to accept further pulp and acid wood, and accordingly directed the defendant Hardin to suspend his operations, and to secure a compliance with this request the Champion Fiber Company procured the Southern Railway Company to refuse to furnish cars to persons desiring to ship wood to said Fiber Company. This suspension commenced 6 November, 1907, and continued, subject to a few small shipments received, until 29 June, 1908, at which time a supplement contract or agreement was entered into by and between the parties hereto, by the terms of which said agreement shipments of wood were to be resumed immediately by the defendant at the rate of 10 cords daily, and the plaintiff company was to advance 50 per cent of the f. o. b. value monthly upon an estimate to be made by the agent of the plaintiff company; inspection to be made on or before the 5th of each month, and advancement to be made not later than the 10th of each month. The Fiber Company was to credit a new bonus of 25 cents per cord on wood shipped to date (6-29-08), and monthly thereafter on all shipments, until a total of 4,000 cords had been received, after which a new year was to commence. The original contract was to be dated forward seven months, and the defendant Hardin was to give written instructions to his attorneys to abandon an action which he, the said Hardin, had commenced against the plaintiff company for relief because of the aforesaid suspension and damages growing out of the same.

Immediately after the execution of the supplemental agreement of 29 June, 1908, the defendant Hardin resumed his wood shipments.

The plaintiff again caused the defendant to suspend his operations by refusing to receive the wood, in September and October, 1908.

On 3 March, 1909, another supplemental contract was entered into between the parties hereto, by the terms of which the defendant was to cut and rank not more than 500 cords per month, for which the Champion Fiber Company was to advance $2 per cord, upon an estimate made by Loomis, agent, between the 1st and 10th of each month. On 6 March, 1909, the plaintiff Fiber Company wrote the defendant to suspend *shipments* of chestnut wood. The defendant testified that when he got the letter he stopped shipping. On 22 March, he suspended until 10 September, at which said time he resumed shipments.

The plaintiff sues to recover $11,190.14 alleged to have been paid the defendant in excess of the amount due the defendant for wood and advancements.

The defendant denies that he owes the plaintiff anything, and he alleges by way of counterclaim that the plaintiff is indebted to him in the sum of $29,050, and that he is entitled to a conveyance of the 763-acre tract of land.

He, among other things, specifically claims damages for each time he was caused to suspend work, $2,250 damages for 1,600 cords of wood cut by the defendant and on the land when the plaintiff took possession; $1,500 for a flume constructed on the land by the defendant, and for 196 cords of wood delivered to the plaintiff and rejected by it.

The plaintiff relies on the supplemental contract of 1908 as an accord and satisfaction.

The action was referred, and on the coming in of the report was heard upon exceptions, and the court, after making specific findings, states the following account, which is made the basis of his judgment:

Advancements made by plaintiff	$ 35,108.60
$500 and interest thereon from 19 January, 1907, to 24 January, 1916	770.40
$3,000 and interest from 22 March, 1907, to 24 January, 1916	4,682.80
Plaintiff's total credits	$ 40,561.80

Credits to which Hardin, the defendant, is entitled:

8 months breach of contract	$ 5,376.00
Bonus on 2,688 cords of wood	672.00
Damages for 1⅕ months suspension, less $100	684.00
Damages for third suspension and breach of contract, 3½ months	3,696.00
5,806 cords of wood and bonus thereon	28,539.75
1,200 cords of wood cut and hauled	2,400.00
Flume	750.00
196 cords of wood	294.00
Making a total of the defendant's credits of	$ 42,411.75
Subtracting the plaintiff's credit of	40,561.80
Leaves a difference in favor of defendant of	$ 1,849.95

The items "8 months breach of contract, $5,376," "Bonus on 2,688 cords of wood, $672," "Damages for 1⅕ months suspension less $100, $684," "Damages for third suspension and breach of contract, 5½ months, $3,696," are all for damages caused by the plaintiff refusing

to receive the wood and causing the defendant to suspend operations, and are based on the finding by the judge that the defendant would have delivered 336 cords of wood per month if he had not been interfered with.

The plaintiff excepts to each of these items, and to the items, "1,200 cords of wood cut, not hauled, $2,400," "Flume, $750," "196 cords of wood, $294," and to the findings supporting them, upon the ground that there is no evidence to sustain them.

His Honor held that the supplemental contract of June, 1908, was not an accord and satisfaction, and the plaintiff excepted.

Judgment was entered in favor of the defendant for $1,849.95, and that the plaintiff convey to him the 763-acre tract of land, and the plaintiff appealed.

Smathers & Ward for plaintiff.

Howell & Bohannon, Alley & Leatherwood, and S. B. Shepherd for defendant.

ALLEN, J. We concur with his Honor in holding that the supplemental contract of June, 1908, is not an accord and satisfaction.

It is not pleaded as such, the terms used do not reasonably lead to that conclusion, and instead of being performed, it has been breached by the plaintiff.

The question is considered and the authorities collected in *King v. R. R.*, 157 N. C., 54, and it is there held that an accord and satisfaction to be effectual "must be performed in its entirety. If performed in part only, the original right of action remains, and the party to be charged is allowed what he has paid in diminution of the amount claimed."

We are further of opinion there is no evidence to support the finding that the defendant could have delivered 336 cords of wood per month during the three periods when his operations were suspended by reason of the wrongful conduct of the plaintiff, and also that the rule adopted for the admeasurement of damages in this particular is erroneous, if, as the plaintiff contends, there is no wood uncut except that on the 763-acre tract which will belong to the defendant.

The defendant alleges in his counterclaim he could have delivered 300 cords per month while his operations were suspended, and he testified that he would have been able to deliver 300 cords per month.

He further testified that, "Eliminating the months during which his operations were suspended, he did not average 100 cords per month," and "that during the nine months in which he claimed wood shipments were suspended he could have gotten out and shipped 2,700 cords at a

cost of $2 per cord, and that he would have had a profit of $2 per cord, and the profit during the entire period would have been $5,400," and for this, if the defendant was referring to the whole period, he is allowed in the account stated by his Honor the four items of $5,376, $672, $684, $3,696, aggregating $10,428, and if only the first period is considered he is credited with 336 cords per month instead of 300 cords, to which he testifies, which would make a difference against the plaintiff in the first item of credit of $576 and in the second of $72.

The rule adopted for ascertaining the damage is not the correct one unless there is other wood in the contract which the defendant was prevented from cutting, for the reason he is awarded damages for wood he would have delivered during the suspension periods, when he afterwards delivered this same wood to the plaintiff and was paid this profit.

In other words, if, as the plaintiff contends, there is no other wood, and we eliminate the wood left on the 763-acre tract of land and uncut, which is not in controversy, the defendant cut 5,806 cords, 1,200 cords, and 196 cords, making a total of 9,202 cords, which would be all the wood on the land, except that not in controversy, and he is allowed a profit on 6,202 cords, 2,688 cords, 403 cords, and 1,848 cords, or 4,939 cords in excess of the wood on the land.

Profits may be recovered under certain conditions, as pointed out in *Wilkinson v. Dunbar,* 149 N. C., 20, and are allowable in this action under the rule followed by the Court if there is other wood uncut, except that on the 763-acre tract, which the defendant has been prevented from cutting; but under the facts as the plaintiff contends they appear in this record, the true rule is interest on the capital invested during the suspension periods, expense of employees and teams, deterioration in value of property, if any, by reason of the suspension, and any other damages the direct and necessary result of the wrongful act of the plaintiff. *Ford v. R. R.*, 53 N. C., 235; *Rocky Mount Mills v. R. R.*, 119 N. C., 709.

The evidence of the defendant as to the profit from the 1,200 cords of wood cut and not hauled is, in one place, that his profit would have been $1 per cord, in another $1.50, in another, $1.75, and finally that "his profit in the wood cut and left on the ground when the plaintiff took charge of the operation was $1.50 per cord," and there was therefore no evidence that the profit was $2 per cord, which was allowed him.

The reason for the difference in the profit on this and the other wood is that the defendant did not haul this wood, and escaped this expense.

The only evidence as to the value of the flume is that of the defendant, who testified that it cost him $1,500 to build it, presumably in 1907, when he began operations, and that the plaintiff took possession of it in 1912.

There is no evidence as to the material used, as to the life of the flume, or the extent of the deterioration, and while there may be some evidence of value, it is too vague and unsatisfactory to justify a finding that it was worth $750 in 1912.

We find no error in the other assignments.

The judgment of the Superior Court is reversed, and the cause is remanded, with directions to strike from the account the items:

8 months breach of contract	$ 5,376.00
Bonus on 2,698 cords of wood	672.00
Damages for 1⅕ months supension, less $100	684.00
Damages for third suspension and breach of contract, 5½ months	3,696.00
1,200 cords of wood cut, not hauled	2,400.00
Flume	750.00

and to assess the damages as to these items in accordance with this opinion.

Reversed and remanded.

ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY
v. B. P. AND B. W. WAY.

(Filed 22 December, 1916.)

1. Water and Water Courses—State Grants—Navigable Waters—Riparian Owner—Wharves—Statutes.

The owner of lands adjoining navigable waters can only acquire a qualified right to, or easement in, the use of such waters and the soil covered thereby, under the provisions of Revisal, sec. 1696, restricted to the erection of wharves on the side of deep water in front of the shore, etc., and incidental to the ownership of the riparian lands, and not independently thereof.

2. Same—Incidental to Ownership—Extinguishment—Reëntry.

Where the riparian owner of shore lands upon navigable waters has entered upon the lands covered by the waters to deep water, and acquired the right to build a wharf, etc., under the provisions of Revisal, sec. 1696, and a strip of land along the shore line has been reclaimed and acquired by another, the original grant of easement by the State is extinguished, and the land so reclaimed becomes vacant and is again subject to entry under the provisions of the statute. See *s. c.*, 169 N. C., p. 1. The rights of riparian owners in land covered by navigable waters discussed by WALKER, J.

R. R. *v.* WAY.

CIVIL ACTION tried before *Whedbee, J.,* and a jury, at March Term, 1916, of CARTERET.

The case was before this Court at Spring Term, 1915, and is reported in 169 N. C., at p. 1. We then granted a new trial. At the last trial the jury returned the following verdict:

1. Are Way Bros. the owners, in the actual occupation, and entitled to the possession of Lot No. 8 in said Block No. 7 in the plan of Morehead City? Answer: "Yes; by color of title more than seven years."

2. Was Lot No. 8 in said Block No. 7 filled up above high-water mark and thus reclaimed by Way Bros. and those under whom they claim prior to the filling in of the other lots, including 6 and 7, by the Government dredge? Answer: "Yes."

3. What amount and at what date did Way Bros. pay the city of Morehead on account of the construction of the bulkhead on the south side of Evans Street? Answer: "$1,000, on the 1st day of 1911."

4. What amount and at what date did the Atlantic and North Carolina Railroad Company pay the city of Morehead on account of the construction of the bulkhead on the south side of Evans Street? Answer: "$3,700, on 2 October, 1911."

5. For what length of time did Way Bros., and those under whom they claim, maintain and use a pier about 6 feet wide across Lots 6 and 7 to deep water in Bogue Sound? Answer: "Twenty years or more."

6. Is the land described in the entry which includes Lots 6 and 7 vacant and subject to entry and grant by the State? Answer: "Yes."

Judgment was entered for the defendant upon the verdict, and the plaintiff appealed.

Moore & Dunn and J. F. Duncan for plaintiff.
Guion & Guion and E. H. Gorham for defendants.

WALKER, J. The questions raised in this case are of great importance, but we think they have been decided by this Court in *Land Co. v. Hotel Co.,* 132 N. C., 517. When the case was here at a former term we gave expression to our views to some extent respecting the rights of the protestant under the grant to Morehead and Arendell, from which source its title was derived, and we virtually held, following what had been theretofore decided in *Land Co. v. Hotel Co., supra,* that the two grantees above named did not acquire the absolute and unrestricted right to title to the bed of the sound which was then covered by tidal waters, but only a qualified right, termed in the *Hotel Co. case* an easement, to use the waters in front of their shore land and the soil covered thereby for the specific purpose designated in the

statute (The Code, sec. 2751), since amended by Revisal, sec. 1696, and further amended by Public Laws 1893, ch. 17). Under Rev. Code, ch. 42, sec. 1 (now Revisal, sec. 1693), lands covered by navigable waters were not the subject of entry, but this was changed by Acts of 1854-5, ch. 21 (Revisal, sec. 1696), and, in this respect, the policy of the State has been changed, and entries of such lands are permitted, but to a limited extent, and not with the capacity of acquiring absolute title thereto in fee as in case of entries upon and grants issued for other or dry lands. It was thought by the Legislature that in the case of lands covered by navigable waters the interests of the State would be better subserved by extending the right of entry thereof to the riparian owners for the restricted purpose of using them for erecting wharves on the side of deep water in front of the shore in the manner provided in the statute (Revisal, sec. 1696), but the State evidently did not intend to part with all of its title, and granted merely a privilege or easement in the land and waters covered thereby, for the single purpose of building wharves in aid of commerce and a better enjoyment of the shores of navigable waters. When considering this feature of the enactment, under which the Morehead and Arendell grant was made, we said in our former opinion in this case: "The right to enter land covered by navigable water, even for the restricted uses and purposes, was, of course, an exception to the established policy of the State, which had existed for many years, and a statute like this, which is special in its nature, should not be carried in meaning beyond a strict construction of its language, and should be confined in its operation to the specified purposes. The right thus to enter land under navigable water was confined to riparian proprietors, the words being: 'Persons owning any lands on any navigable sound, river, creek, or arm of the sea' may so enter land, but for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, and the entry can extend only to 'deep water.' They are also confined to straight lines, and must not obstruct or impair navigation. It is true, the statute provides that they may thus enter the land covered by navigable water 'and obtain title as in other cases'; but this means no more than that a grant should issue for the land, and the expression does not carry with it the meaning that the title shall be the same as in other cases where grants are issued for patentable lands. This could not be so, as the statute expressly restricts the nature of the grant and defines the interest or estate thereby conveyed, and, as said in *Land Co. v. Hotel Co., supra*, the words of the grant must be considered as if the words of the statute, restricting the use of the land to the purpose of erecting wharves, had been written into it. One object of the grant was to afford foundations for wharves, and it conveyed an

easement to use the land for the purpose specified in the statute. It was so held in *Land Co. v. Hotel Co., supra;* and it was further held in that case that the easement was incidental to the ownership of the banks or shores of the body of water, whether river or sound, and was inseparable from the riparian proprietorship." *R. R. v. Way,* 169 N. C., 1.

The ownership of the shore and the right acquired by entry and grant under the statute (Revisal, sec. 1696) are inseparable, so that a conveyance of any part of the shore would carry with it the privilege or easement of using the navigable waters in front of it and the submerged soil for the specific purpose of building wharves along the line of deep water. This was the very ground and reason of the decision in *Land Co. v. Hotel Co., supra.* It was there contended by the plaintiff that under the Morehead and Arendell grant and mesne conveyances it had acquired a separate and independent title to the bed of the sound, and the tidal waters covering it, which lay immediately in front of the shore owned and occupied by the hotel company, and upon which bed of the sound the latter company had built a gangway or wharf and bathhouses and was then occupying and using the same. With respect to this contention in that case, the Court held: "We are of the opinion that the grant to Morehead and Arendell of Square 83 operated to give them an exclusive right or easement therein, as riparian owners and proprietors, to erect wharves, etc.; that when they ceased to be the owners of the land, by conveyance to the Shepherd's Point Land Company, such easement passed as appurtenant thereto, and that it has passed by the several conveyances of the land as appurtenant to Square No. 1; that such easement passed to the defendant company, and the plaintiff has no such title to the soil under the navigable water as entitled it to maintain this action."

The Court was then considering the question as to what rights passed to the grantee under the entry which had been laid and the grant which had issued thereon, under the authority given by the Acts of 1854, ch. 21 (Revisal, sec. 1696), and concluded, after a full and learned review of the authorities by *Justice Connor,* that there was no absolute and independent ownership of the bed of the sound conferred by the statute, but only an easement to use the same solely for the purpose indicated therein. The primary and even the exclusive intention of the statute was to grant submerged lands, and not dry lands, for the sole purpose of building wharves. Of course, the grantee had the implied power to do all such things and make such use of this land as would effectuate this purpose, but he was not to own the land unrestrictedly as in the case of other lands granted by the State which are not so submerged. If the right given by the statute, which is to be perfected

by an entry and grant, is only, in legal effect, an easement, we are unable to see why—when this easement could no longer be enjoyed, as the submerged land had become dry land—it was not altogether extinguished. The statute manifestly contemplated that, in order to the continuance of the easement, the land should remain submerged except so far as it was necessary that its condition should be changed for the enjoyment of the easement. In *Gregory v. Forbes,* 96 N. C., 77, *Chief Justice Smith,* for the Court, said that "A grant of lands covered by navigable waters can only issue 'for wharf purposes'"; and again, in the same case, that "The State can only issue a grant for land under navigable waters for the purpose of erecting a wharf, and then only to the riparian owner." As the place where the easement was located has been made dry land by filling in behind the wall or bulkhead, the object of the State in granting it, under the statute, has ceased to exist. "When the purpose, reason, and necessity for an easement cease, within the intent for which it was granted, the easement is extinguished. Hence, if an easement is not granted for all purposes, but for a particular use only, the right continues while the dominant tenement is used for that purpose, and ceases when the specified user ceases." 9 Ruling Case Law, sec. 71. An easement may be lost by a permanent change in the condition of the estate so as to render its enjoyment impossible, as in this case. Washburn in his work on Easements (3 Ed.), p. 654, says: "It is stated, as a general proposition, that if an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement"; and again, at p. 655: "Where there was a right of way from a piece of upland through a dock to deep water, and a street was laid out between such parcel and the deep water, and by its construction filled up the dock, cutting off communication between the upland and the water, it was held that the right of way was thereby extinguished," citing *Mussey v. Proprietors of Union Wharf,* 41 Me., 34. Where the change in the land or tenement is of such a decisive and conclusive a nature that the easement can no longer be enjoyed, it is extinguished, as where a piece of land subject to an easement is washed away by the encroachment of a river, the easement ceases, *Weis v. Meyer,* 17 S. W., 339; or where there is the grant of a right to grind at a mill, and the mill can no longer be used for the purpose of grinding, the right terminates. *Hahn v. Baker Lodge,* 21 Ore., 30. See, also, upon this subject, 14 Cyc., 1194. "An easement granted or reserved for a purpose definitely declared, ceases when this purpose no longer exists." Jones on Easements, sec. 843. In this case, plaintiff has consented to the erection of a structure which is incompatible with the continuance of the easement it acquired and which has so essentially changed the nature of the soil which was

the subject of the easement as to render nugatory the purpose for which the latter was originally granted. The land has been wholly diverted from that use and subjected to an inconsistent one.

In our former opinion it was said: "If the case should return to this Court, it may become necessary to decide more precisely what is the nature of the estate or interest which passed by the grant from the State; but this will depend largely upon the facts then before us, as it may prove to be immaterial upon those facts whether it is an easement merely or an estate upon condition subsequent—a determinable or base fee. What we have said concerning that interest is sufficient to dispose of this appeal, without any more definite expression of opinion in regard to it. It is sufficient, for the present, to say that the judge was in error when he took the other view of it."

We are constrained by the precedents in this Court to hold that plaintiff acquired only an easement in the bed of the sound in front of its shore lots. The identical construction was plainly given to the statute (Revisal, sec. 1696), in *Land Co. v. Hotel Co., supra,* and as it is a rule of property, if for no other reason, we must follow it. The point was directly raised in that case and decided, and the ruling governs this case. The same meaning was adopted in other cases decided by this Court and cited in the opinion in *Land Co. v. Hotel Co., supra,* and especially *Gregory v. Forbes, supra,* and *Holley v. Smith,* 130 N. C., 85. In the last cited case the present *Chief Justice* said: "The land here in question, as was admitted on the trial, is covered by the navigable waters of Chowan River, and, therefore, it was not subject to entry, except for wharves by the adjacent riparian owner in front of his own property, and even then subject to restriction." The question was not presented in *Bond v. Wool,* 107 N. C., 139, as no grant, under the statute, was ever issued to either of the parties to that section.

In the view taken by us of this case, it is unnecessary to consider the matters discussed in the brief or the other exceptions of the appellant, as our conclusion is that the State has granted only an easement in the bed of the sound, and as this has been changed to dry land by reclamation in the manner already described, the easement was destroyed, and the land, in its new form, belonged to the State, discharged of the easement, and, being vacant, was subject to entry. It results that there is no error in the judgment of the court.

No error.

ALLEN, J., dissents.

F. G. JAMES ET AL. v. OSCAR HOOKER ET AL.

(Filed 22 December, 1916.)

1. Deeds and Conveyances—Interpretation—Estates—Contingent Interests—Vested Interests—Death of Life Tenant.

A conveyance of land to the wife for life, with remainder over after the expiration of her life estate to the children of her present marriage, now or that are hereafter born thereof, and the lawful descendants of said children, etc., "that are living at her death," does not convey a vested interest to the remaindermen at the time of its execution; but a contingent one, to be vested in such as are alive at the designated time and then fill the description.

2. Deeds and Conveyances—Estates—Contingent Interests—"Descendants"—Descent and Distribution.

A life estate to the wife in lands, with remainder, to take effect at her death, to the children of the marriage, "and the lawful descendants of said children," etc.: *Held*, the words "descendants of said children" refer, nothing else appearing, to those upon whom the law would cast the property by descent, including the lineal issue of the deceased life tenant, and not her grandchildren, whose parents were alive at the time of the falling in of her estate.

3. Deeds and Conveyances—Estates—Contingent Interests—Estoppel—Rebutter.

Where a conveyance of lands is upon contingent remainder to the children of the life tenant living at the time of her death, and theretofore some of them have attempted to convey their interests by deeds, as vested, and thereafter fulfill the conditions imposed by being alive at her death, the happening of the contingency passes the estate of the grantors by way of estoppel and rebutter.

SPECIAL PROCEEDINGS to sell land for partition, transferred to civil issue docket and heard on case agreed before *Lyon, J.*, at November Term, 1916, of PITT.

There was judgment making division of the property, and certain claimants whose interests were adversely affected excepted and appealed.

J. B. James for plaintiff.
Winston & Biggs for James and Whedbee.
Albion Dunn, Harry Skinner, F. C. Harding for defendant.
L. G. Cooper for the Dancys.

HOKE, J. The property in controversy, a certain lot in the town of Greenville, N. C., or its proceeds, is subject to disposition according to the provisions of a certain deed, in terms as follows:

"Know all men by these presents, that I, Edward C. Yellowly of Pitt County, North Carolina, for and in consideration of the sum of $1 to me

in hand paid, doth bargain, sell, alien, and convey to Penelope E. Dancy, wife of George A. Dancy, a certain piece or parcel of land in plan of said town as Lot No. 92, whereon she now lives, for and during the period of her natural life, with remainder over after the expiration of her said life estate to the children now or that are hereafter born of the intermarriage of the said George A. Dancy and Penelope, and the lawful descendants of said children, their heirs and assigns, that are living at her death.

"To have and to hold the said premises, with all and singular the privileges, rights, appurtenances, and improvements thereto belonging, to the said Penelope E. Dancy for and during the term of her natural life and to the said children and their descendants in manner as aforesaid, and their heirs and assigns, in fee simple forever."

Penelope, the life tenant, died in 1916, and the facts and circumstances pertinent to the operation and proper construction of the deed are very well epitomized in the brief of counsel as follows:

The children living at the execution of the deed:

(1) Josephine Dancy, wife of D. V. N. Seawell; (2) Melissa Nelson, wife of H. E. Nelson; (3) Lula Cleves, wife of L. E. Cleves; (4) Joseph Dancy; (5) George E. Dancy; (6) Elizabeth Dancey; (7) William C. Dancy; (8) Frank Dancy.

Children and descendants of dead child living at the death of Penelope:

(1) Josephine Seawell, (2) Joseph J. Dancy, (3) Elizabeth K. Goodwin, (4) William C. Dancy, (5) Charles O'Hagan Dancy, son of George Dancy, deceased.

Status of parties from 1869 to death of Penelope in 1916:

Josephine, now living; has one child. In 1897 conveyed her interest to James B. Cherry.

Joseph, now living; has two children. In 1886 conveyed his interest to James B. Cherry.

Elizabeth, now living, and has made no conveyance.

William C., now living; has three children. In 1888 conveyed his interest to Oscar Hooker. In 1912 conveyed his supposed interest, because of the death of his sister Melissa, to R. W. King.

George Dancy, died in 1886. He conveyed his share to Oscar Hooker.

After the death of the life tenant, George Dancy's son and "descendant," Charles O'Hagan Dancy, conveyed his interest as such "descendant" to Harry Whedbee and R. W. King equally.

Melissa is dead. She left no children and made no conveyance.

Lula Cleves died in 1906, leaving no issue. She undertook to convey her supposed interest to Harry Skinner.

Frank Dancey died in 1907, leaving no issue. He undertook to convey his supposed interest to Oscar Hooker.

F. G. James's wife is the heir at law of James B. Cherry, and Harry W. Whedbee is the purchaser of one-half of the interest belonging to Charles O'Hagan Dancy, son of George, who predeceased his mother, Penelope.

Upon these the facts and conditions chiefly relevant to the questions presented, we are of opinion that there was error in the judgment of the court to the effect that the deed, at the time of its execution, conveyed to the remaindermen therein a vested interest and making division of the property on that basis. If the instrument in its granting clause had omitted the words, "that are living at her death," the ruling of his Honor would have been in accord with our decisions, *Harris v. Russell,* 124 N. C., 547; *Pollard v. Pollard,* 83 N. C., 97; *Brinson v. Wharton,* 43 N. C., 80; *Rives v. Frizzle,* 43 N. C., 237; but the addition of these words just after the estate in remainder, "to the children now or that may hereafter be born of the intermarriage of the said George A. Dancy and Penelope and the lawful descendants of said children, their heirs and assigns," and qualifying both the words "children and their descendants," renders the interest a contingent one and requires that the rightful claimants should be living and answer the description at the death of the life tenant. *Vinson v. Wise,* 159 N. C., 653; *Latham v. Lumber Co.,* 139 N. C., 9; *Bowen v. Hackney,* 136 N. C., 187; *Whitesides v. Cooper,* 115 N. C., 570; *Watson v. Smith,* 110 N. C., 6; *Irvin v. Clark,* 98 N. C., 437.

It is contended for some of the appellants, children of the grantees in remainder who are now living, and were at the death of the life tenant, that they properly come within the meaning of the term "descendants" as used in the deed, and should be allowed a proportionate share of the property; but, on the record and facts in evidence, the position cannot be sustained. The primary and linguistic definition of descendants refers to the lineal issue or heirs of a dead and not a living parent or ancestor, and, when the term is used in reference to tenure of property and without anything to change or modify the ordinary meaning, authority is to the effect that it refers to persons upon whom the law has cast the property by descent, and includes only the lineal issue of a deceased ancestor. *Parish v. Mills,* 101 Texas, 276; *Dixon v. Pendleton,* 90 S. C., 8; *Rembert v. Vetoe,* 89 S. C., 198; *Duncan v. Clark,* 90 S. E., Current No. 3, p. 180.

There is not only nothing here to qualify the ordinary meaning of the word, but the evident purpose of the parties and the language of the instrument clearly refers to the property in reference to descent cast, and being to "descendants" as a class, these and other cases seem

to hold that the statute of descents should be resorted to for the purpose of ascertaining the interest to which the descendants are entitled, that is, whether they take *per stirpes* or *per capita.*

This question is not further pursued for reason that in the present instance there is only one living descendant of a deceased parent, to wit, Charles O'Hagan Dancy, and his interest is therefore the same whether he takes in one view or the other. So far as the record discloses, the claimants, under conveyances from the children, remaindermen who were living at the death of the life tenant, and from Charles O'Hagan Dancy, the only living descendant of a deceased child, are entitled to hold according to the tenor of their deeds, for, although by reason of the contingency, the estate they undertook to convey may not have been a transmissible interest at the time the deeds were executed, our decisions hold that on the happening of the contingency the estate of the grantors, by proper conveyances, would pass by way of estoppel or rebutter. *Buchanan v. Harrington,* 141 N. C., 39; *Foster v. Hackett,* 112 N. C., 546; *Watson v. Smith,* 110 N. C., 6.

Applying these principles to the facts in evidence and as agreed upon by the parties, it follows that Oscar E. Hooker is the owner of one-fifth interest in the property as grantee of W. C. Dancy; that Mangie James is the owner of two-fifths interest as the heir at law of James B. Cherry, grantee of Joseph and Josephine Dancy; that Elizabeth Goodwin is owner of one-fifth interest; that Harry Whedbee and Mattie E. King are each entitled to one-tenth interest as grantees of Charles O'Hagan Dancy, the grandchild and only living descendant of a deceased child.

This will be certified, that judgment may be entered according to this opinion.

Reversed.

M. F. TEETER v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 22 December, 1916.)

1. Telegraphs—Easements—Rights of Way—Additional Burden—Compensation—Damages.

The construction of a telegraph company's lines upon a railroad right of way imposes an additional burden upon the fee-simple title to the lands which entitles the owner to compensation.

2. Telegraphs—Easements—Rights of Way—Requisition of Right.

A telegraph company can only acquire an easement in lands for construction and maintenance of its lines by grant, or pursuant to the statutes, Revisal, secs. 1572, 1573, or by adverse and continuous use for

twenty years, the period of the acquisition by such user for five years, allowed to railroad companies by Revisal, sec. 394, not extending to telegraph companies.

3. Limitation of Actions — Trespass — Continuous Trespass — Independent Acts.

The statutory requirement that an action for damages for continuing trespass on lands shall be barred after three years from the date of the original trespass, by the use of the words "continuing trespass," refers to trespass upon real property, caused by structures permanent in their nature where the wrongful act, being continued and complete, causes continuing damages, or where injuries from like sources are caused, or by companies in the exercise of some quasi-public franchise, and was not intended to apply when every successive act amounted to a distinct and separate renewal of wrong.

4. Same—Telegraphs—Easements—Rights of Way.

Where a telegraph company has constructed its line of poles and wires along a railroad right of way on the lands of the owner more than three years next before the commencement of the owner's action for trespass, but within three years has constructed an additional line of its wires thereon and repaired its old line, replacing some of the old poles with new ones, in the same holes: *Held*, the plaintiff's right to damages for the construction of the old line is barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages may be awarded it. Revisal, sec. 395 (3).

5. Telegraphs—Easements—Rights of Way—Permanent Damages—Right to Repair.

Upon payment of a recovery for permanent damages for a right of way in plaintiff's action of trespass against a telegraph company, the defendant, so far as the plaintiff is concerned, acquires the right to maintain its lines on the land for an indefinite period, and to enter on the same whenever reasonably required for the planting, repairing, and preservation of its poles and other property.

6. Telegraphs—Easements—Rights of Way—Measure of Damages—Prospective Values.

In admeasuring the damages for the imposition of an additional burden upon the plaintiff's land by the construction and maintenance upon a railroad right of way by the defendant telegraph company of its line of poles and wires, the inquiry is not confined to the diminution in value of the land as then used, but is extended to all the uses for which it is adapted or applied and which may be reasonably anticipated in the further use or development of the property; and under the circumstances of this case it is *Held*, that the inquiry should not be confined to the diminution of plaintiff's land as farming lands, but that its availability for factory sites was properly considered.

CIVIL ACTION to recover permanent damages for the erection and maintenance of a telegraph line, poles, wires, etc., on plaintiff's land, tried before *Long, J.*, and a jury, at April Term, 1916, of CABARRUS.

Defendant denied liability and pleaded the three years statute of limitations, Revisal, sec. 5, subsec. 3.

The summons seems to have been issued in December, 1914, or January, 1915, and there was evidence tending to show that the poles were originally placed on plaintiff's land and on the right of way of the North Carolina Railroad Company more than four years before that date, and that in 1909, owing to the fact that the Southern Railway, lessee of North Carolina Railroad, had constructed a double track, the defendant moved its poles and lines further out into plaintiff's field, where it was still maintained and operated, and that in 1914, not long before action instituted, defendant had repaired the portion of its line situate on plaintiff's land, putting in several new poles, these being put in the same holes as formerly and causing further damage and injury to said land.

On issues submitted, the jury rendered the following verdict:

1. Is the plaintiff M. F. Teeter the owner and in the possession of the lands over which the defendant constructed its telegraph line within the right of way of the railroad company? Answer: "Yes."

2. Is the plaintiff's cause barred by the statute of limitations, as alleged in the answer? Answer: "No."

3. What permanent damages, if any, is plaintiff entitled to recover of the defendant for the erection and maintaining of said telegraph line on his land as existing and in operation? Answer: "$250."

Judgment on the verdict, and defendant excepted and appealed.

J. W. Keerans, M. H. Caldwell, and L. T. Hartsell for plaintiff.

J. Lee Crowell and H. S. Williams for defendant.

HOKE, J. It is not denied by defendant that the telegraph line superimposed upon a railroad right of way is an additional burden which entitled the owner to compensation, *Hodges v. Tel. Co.*, 133 N. C., 225; *Phillips v. Tel. Co.*, 130 N. C., 513; but objection is made to the validity of plaintiff's recovery on the ground, chiefly, that his Honor should have held as a conclusion of law that, on the facts in evidence, plaintiff's cause of action is barred by the three years statute of limitations, Revisal, sec. 395, subsec. 3, the language being as follows: "Actions shall be brought within three years for trespass on real property. When the trespass is a continuing one, within three years from the original trespass, and not thereafter."

Speaking to this section in *Sample v. Lumber Co.*, 150 N. C., pp. 165-166, action for wrongful entry and cutting timber on another's land, the Court said: "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass

is a continuing one such action shall be commenced within three years from the original tespass, and not thereafter; but this term, 'continuing trespass,' was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong."

Referring to the language of the section and the interpretation of it suggested in that decision, the Court is inclined to the opinion that this is a continuing trespass within the meaning of the law, and for damages incident to the original wrong, and for that alone, no recovery could be sustained. But this is a suit for permanent damages, and on recovery and payment, so far as plaintiff is concerned, confers on the defendant the right to maintain its line on plaintiff's land for an indefinite period and to enter on the same whenever reasonably required for the "planting, repairing, and preservation of its poles and other property." *Caviness v. R. R., ante,* 305. It is a suit to recover for the value of the easement, which can pass to defendant only by grant or by proceedings to condemn the property pursuant to the statute, Revisal, secs. 1572-1573, or by adverse and continuous user for the period of twenty years.

In case of railroads, by section 394 of the Revisal this period has been reduced to five years, but there being no such statute as to telegraph companies, the common-law period of twenty years is required. *Geer v. Water Co.,* 127 N. C., pp. 349-353.

It was objected further for defendant that plaintiff, in giving his opinion as to the amount the value of the land was decreased by the imposition of the easement, was allowed, in describing his property, to base his estimate upon its value both for farming lands and its eligibility for factory sites, the land being used then only for farming; but the objection is without merit.

In *Brown v. Power Co.,* 140 N. C., 333, in reference to such an estimate, it was held, among other things: "In estimating its value, all the capabilities of the property and all the uses to which it may be applied or for which it is adapted may be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner."

In *R. R. v. Armfield,* 167 N. C., pp. 464-466, the Court quotes, with approval, from Pierce on Rys., p. 217, as follows: "The particular use to which the land is applied at the time of the taking is not the test of its value, but its availability for any valuable or beneficial uses to

which it would likely be put by men or ordinary prudence should be taken into account. It has been well said that the compensation 'is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may reasonably be expected in the immediate future.' But merely possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded." And the principle is applied and fully approved in the recent case of *R. R. v. Mfg. Co.*, 169 N. C., 156.

We find no error in the proceedings, and the judgment for plaintiff is affirmed.

No error.

F. M. WILLIAMS v. SUPREME CONCLAVE IMPROVED ORDER OF HEPTASOPHS.

(Filed 22 December, 1916.)

Insurance—Assessments—Classification of Members—Appeal and Error—Judgments of Lower Court.

The plaintiff became a member of defendant insurance order upon a certain premium rate, with a right of assessment of all the members upon a ratable plan to pay losses out of a common fund. This plan was changed by the company, placing plaintiff in a class with those who had insured before a certain date, and those thereafter in a separate class. The judgment of the lower court permitting plaintiff to recover is affirmed.

HOKE, J., dissenting; ALLEN and BROWN, JJ., not sitting.

APPEAL by defendant from *Lane, J.*, at July Term, 1916, of CATAWBA.

Jones & Williams for plaintiff.
Olin Bryan and W. Feimster for defendant.

CLARK, C. J. On 3 January, 1899, the defendant issued to the plaintiff an insurance policy known as a "Second Rate Benefit Certificate," by the terms of which the defendant in return for payments to be made by plaintiff, and the performance of certain stipulations, agreed to pay to the wife and children of the plaintiff at his death the sum of $2,000. At that time the plaintiff was 44 years of age. The policy was obtained in this State and by the solicitation of the defendant's agent. At the time the agent gave to the plaintiff a pamphlet in which, among other things, it was stated: "As evidence of its wise and economical management, strict medical examinations and

the careful selection of its membership, it has been able to maintain, in the twentieth year of its age, an average of nine assessments a year." In the body of the pamphlet was the table of rates for insurance which at plaintiff's age at the time of his taking out this policy was "$2.04 per month for $2,000 of insurance," and underneath the table was the following sentence: "The fund is raised by assessments levied upon each member, according to a regular graded scale, *and the amount paid by the applicant remains his assessment for life.* Assessments may be called as often as they are required."

Under the constitution and by-laws in force at the issuance of the certificate to the plaintiff the *entire membership* of the order were to pay assessments sufficient to pay death losses, the same to be apportioned among *all the members,* according to the age of each member at the date of his entrance, which for plaintiff was $2.04, unless the member should change his rate, for instance, from a $2,000 rate to $3,000, as is shown in the pamphlet. The defendant admits that the plaintiff was accepted at the table of rates in force at that time. The receipts from all the members were to go into a common fund from which death benefits were to be paid, each member paying his proportionate share into the fund, assessments being made at stated intervals and for stated amounts, with the privilege of levying extra assessments if necessary, but when made the assessment should be on all members alike, and all death losses were to be paid from a single fund.

In 1901 the amount of assessments was increased and the right to levy extra assessments abolished. The assessments were again raised in 1909, but the rate continued to be based substantially on the age at entry and were laid upon all members, creating a common fund to which all contributed and from which each was to draw in event of death. The plaintiff submitted and remained a member till 1 December, 1915, at which time he was forced out by the change in the contract by the defendant, which constitutes the ground of this action. The change was made without notice to the plaintiff, and the defendant attempted to apply the provisions to the plaintiff's contract of insurance against his will. The plaintiff ceased to make payments and was suspended, and cannot now, under the by-laws, be reinstated.

These changes which were adopted by resolution provided, in effect, that all persons who joined the order subsequent to 1 January, 1914, were placed in a separate class from those who joined prior to that date, and their contributions were put into a separate fund, and none of their contributions were to be used to pay death losses occurring among those joining prior to 1 January, 1914; but those joining prior to that date were placed in a separate class and were required to pay all death losses occurring in their class. No new members were per-

mitted to enter plaintiff's class and that class were not permitted to share in the contributions from members joining subsequent to 1 January, 1914.

Under this system the assessments upon the plaintiff became, of course, much higher than if the entire membership had continued to share in the burden of all the deaths, with the result that if the plaintiff was the longest liver in that class he would have to pay his own death loss, and in the meantime would as a member of a constantly dwindling class, have been required to pay higher and higher assessments on the death of each of his fellow members.

This result puts the plaintiff in exactly the same position as the plaintiff in *Strauss v. Life Assn.,* 126 N. C., 971; *s. c.,* 128 N. C., 465. The options offered really give the plaintiff no relief. If he had elected to accept any one of them he would have been in the same position as a new member coming into the order who had never held a policy of insurance. The value of his policy was completely destroyed and he would start anew. The plaintiff could not be required to accept the options offered which would destroy every right he had acquired under his policy and by virtue of his payments already made. The defendant having violated its contract with the plaintiff, he can stand upon his rights and recover the damages caused him by the breach of contract, under *Strauss' case, supra.*

If the plaintiff had accepted option 1 he would have to pay assessments at the rate of his attained age, while those joining subsequent to 1 January, 1914, would pay only at the age of their entry.

If he accepted options 2 or 3, the face value of his policy and the amount of his insurance were reduced, while no change was made in the amount of insurance of those who joined subsequent to 1 January, 1914. This was a discrimination against the plaintiff. Option 4 did not apply to him.

This is not a case of increase of assessments, but it is a discrimination between members. The certificate held by the plaintiff is a contract of insurance. Bacon Benefit Societies, secs. 51, 52; *Strauss v. Life Assn.,* 126 N. C., 971; *s. c.,* 128 N. C., 465; *Hill v. Life Assn., ib.,* 463; *Makely v. Legion of Honor,* 133 N. C., 367.

The certificate issued to the plaintiff is "deemed to have been made within this State and subject to our laws." Laws 1893, ch. 299, sec. 8; *Ins. Co. v. Edwards,* 124 N. C., 116; *Horton v. Ins. Co.,* 122 N. C., 498; *Williams v. Life Assn.,* 145 N. C., 128.

Our decisions above quoted settle the point in issue in favor of the plaintiff. In *Bragaw v. Supreme Lodge,* 128 N. C., 357, it is said: "It is not shown that the assured had any notice of or assented to this amendment. A provision that one should become a member subject

to the power of the corporation to change its by-laws cannot be construed into liberty to change at its will the contract of insurance it has made with each insurer. The company and the insured occupy entirely two different relations. In one it is a company and the other party one of its members. In that relation, the by-laws or constitution can be amended at will of the majority, if done in the legal and prescribed mode. The other relation is that of insurer and insured, and this contract relation cannot be altered save by the consent of both parties, and the party alleging that the consent was given must show it."

"A mere general consent that the constitution and by-laws may be amended apply only to such reasonable regulation as may be within the scope of its original design." *Strauss v. Life Assn.*, 126 N. C., 971. We do not think that the alternative offered the plaintiff in this case is reasonable, for the reasons already given. The other exceptions do not require discussion.

No error.

HOKE, J., dissenting.

BROWN and ALLEN, JJ., not sitting.

IN RE MERCER FAIN, AN INFANT.

(Filed 22 December, 1916.)

Habeas Corpus—Custody of Child—Rights of Father.

In proceedings in *habeas corpus* by the father for the care and custody of his motherless infant child, the father is entitled thereto as a matter of right, unless it appears that he is an unfit or unsuitable person to whom to intrust its welfare; and when it is made to appear that he is financially able to take care of the child and will suitably provide for its physical, mental, and moral welfare, it is error for the judge hearing the matter to deny the prayer of his writ and award the custody to the two grandmothers of the child, alternately, though they are of most excellent character and suitable for the charge.

WALKER, J., concurring; CLARK, C. J., dissenting.

PROCEEDING in *habeas corpus*, before *Long, J.*, 13 June, 1916, in the Superior Court of CHEROKEE County. Upon the hearing his Honor rendered judgment, from which the petitioner, W. Mercer Fain, appealed.

Dillard & Hill for the petitioner.

Witherspoon & Witherspoon and M. W. Bell for respondent.

BROWN, J. The petitioner is the father of W. Mercer Fain, Jr., born 10 February, 1915, and now in the custody of the respondent, C. M. Wofford, who was the father of the child's mother, which said mother died on 1 March, 1916.

Upon the hearing before his Honor, Judge Long, the custody of the child was awarded to the two grandmothers, six months to each. The evidence and findings of fact show that the petitioner separated from his wife before her death and that he had a serious disagreement with his father-in-law, the respondent. There is no evidence that the petitioner intended to abandon his child and there is no evidence or finding of fact that he is a man of bad character and unsuitable to have the care of his infant child. On the contrary, it appears to be uncontradicted that he lives with his parents, who are people of good character and well-to-do financially; that he is well able financially to care for the child, and that his mother, Mrs. Fain, has agreed to rear the child for her son. His Honor finds as a fact that Mrs. Fain is a woman of most excellent character, and awards the custody of the child to her for six months of the year. It is true, in matters of this character the welfare of the child is the chief consideration of the court, but the father has certain natural rights which the courts have always respected. The fact that he had a difficulty with his father-in-law and did not live with his wife at the time of her death does not take away from him the ordinary right of a father to the care and custody of his child.

In *Latham v. Ellis,* 116 N. C., 30, a case very similar to this, the Court said: "In North Carolina the father has always been entitled to the custody of his children against the claims of any one except those to whom he may have committed their custody and tuition by deed (sec. 1562 of the Code); or unless he is found to be unfit to keep their charge and custody by reason of his brutal treatment of them or his reckless neglect of their welfare and interests, when their custody will be committed to some proper person on application to the courts."

This question is fully discussed by *Mr. Justice Walker* in *Newsome v. Bunch,* 144 N. C., 15, and by *Mr. Justice Hoke* in the case of *Mary Jane Jones,* 153 N. C., 312, and the right of the father to the custody of his child is recognized and sustained. Upon the findings of fact and the evidence in the case, we think his Honor erred in denying the right of the father to the custody of the child. If it can be shown that the father is unsuitable and incapable of taking care of his child, then those who are interested in it may apply to the courts to change its custodian.

In the record before us there is no finding of fact and no evidence which justifies the court in denying the legal rights of the father.

The cause is remanded with instructions to enter judgment in accordance with this opinion.

Reversed.

WALKER, J., concurring: I do not think it has been held by this Court that the father's right to the custody of his infant child is absolute or unquestionable. He has the preferred or paramount right, but he may lose it by his conduct or other causes resulting in unfitness. In *Newsome v. Bunch*, 144 N. C., 15, we said that this preferred right of the father was based upon his duty to protect his child and provide for its maintenance and education, which obligation, in no legal sense, rests upon its grandparents. This fact should have some weight with the court in deciding between the contestants for the child's custody, apart from the natural claim of the father to the first consideration, as the death of the grandparents, or their inability to care for the child, might leave it without adequate protection and support. "The father, and on his death the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors for maintenance and education. But the courts of justice may, in their sound discretion and when the morals, safety, or interests of the children strongly require it, withdraw the infants from the custody of the father or mother and place it elsewhere." This was said by Chancellor Kent in his Commentaries, vol. 2, p. 205, and we indorsed his statement of the law in *Latham v. Ellis,* 116 N. C., 30, and *In re Turner,* 151 N. C., 474.

In this case there is a finding which reflects no credit upon the father if it is viewed in one permissible aspect; but there is no finding of the main, ultimate, and essential fact that the father is an unfit person to have the custody, nor is there any finding of facts from which we can, or rather from which we must necessarily infer the material fact, as if it had been found in so many words. It might have been better, in the exercise of our discretion, to have required the essential fact to be found definitely before proceeding to pass upon the rights of the parties; but in the absence of a specific finding of such fact, the preferred right of the father has not been impaired, and the case is brought within the principle as stated in the concluding words of *Newsome v. Bunch,* 144 N. C., at p. 18: "While the court, in the exercise of a sound discretion, may order the child into the custody of some person other than the father, when the facts and circumstances justify such a disposition of the child, we do not think that any such case is presented in this record as should induce us to adopt that course and except this case from the general rule. The father has done nothing by which he has incurred a forfeiture of his right to the custody of his

offspring. There is no room for the exercise even of a sound discretion in favor of the grandparents who now have possession of the child. Speaking for himself, and not committing the Court to his view, the writer of this opinion would hesitate to remove the child from its present custody, if the law were more elastic and we were vested with a larger discretion than is given by the law; but we must follow the precedents and the general principles of justice established by them, though the result may be contrary to what we may consider as the real merits of the particular case, and though by the facts, even as found by the court, our sympathies may be enlisted in behalf of the grandparents. The insistence upon his strict right under the circumstances may not be very creditable to the petitioner, yet the law is inexorable in such a case, and cannot be made to yield in deference to a mere sentiment or to a tender regard for the feeling of one of the parties; nor are we permitted to exercise an arbitrary discretion."

CLARK, C. J., dissenting: The court found as a fact that the little child is 20 months of age; that the mother is dead; that the child was born at the residence of the mother's father; that the father separated from his wife and was not present at the birth of the child nor at the death and burial of his wife; that the mother and father did not live happily together and that the father is not able "to bestow that particular care and personal attention on the child which is necessary that it should have at this particular period of its life, and that it is the court's duty to say that the child shall have as nearly as can be the attention of some female who will in some degree take the place of its dead mother."

The court further found that Mrs. C. M. Wofford, the mother of the dead mother of the infant, and Mrs. Fain, the mother of the father, are both women of character, fit and suitable to take care of the child, and the court awarded them the custody of the child until it should attain the age of 5 years, alternately 6 months, each, at a time. His Honor, with all the facts before him more fully than they can be presented to us on the record, has so adjudged, and it would seem that his decision is in accordance with a reasonable view of the welfare of the child, and it is certainly within his power as prescribed by Revisal, 1853, which provides that in a contest over the custody of a child "between parents who are living in a state of separation without being divorced" the court may award the charge of the child "with such provisions and directions as will, in the opinion of the court, best promote the interests and welfare of the child," subject to modification of the order at any time by the court.

The attitude of society, and in consequence of the law, both by statute and in judicial decisions, has been much changed from the common law, when the wife was the chattel of her husband. When, as in this State till 1868, the property of the wife passed to the husband by virtue of the marriage and her person was subject to chastisement at his will (until the decision of the Court in 1874 which abolished it, *S. v. Oliver,* 70 N. C., 60), it was natural that the custody of the child should be deemed also the absolute right of the father, who could will away its custody and guardianship from the mother, after his death, though she had borne the child in agony and endured the care of bringing it up. Revisal, 1853, now puts it in the sound discretion of the court to award the custody to any fit person. It would seem very certain that if the mother were still living no court in this day would take the child, 20 months old, from the custody of its mother to give it to the father, who had shown such indifference at the birth of the child. It would also seem plain that the father is not a fit person to be entrusted with its care at this tender age. Moreover, the judge so finds as a fact, and we are bound by the findings of the facts by the judge. *Britt v. Board of Canvassers, post,* 797.

Whatever may be said of the division of custody between the two grandmothers, this is not unusual in such cases, and certainly ought to satisfy the father, since his mother, with whom he lives, will have the custody of the child half the time. It might be well that the mother of the dead mother of the child ought to have custody of the child all the time. But his Honor thought differently, and we should respect the soundness of his judgment. Certainly the father has no ground to complain. As the order is subject to modification at any time upon cause shown, it would seem that this judgment should stand unless and until it is modified by some other Superior Court judge upon evidence adduced which should satisfy him of the propriety of a change. Upon this record I am satisfied that his Honor acted for the best interests of the child of 20 months of age in awarding its custody to its two grandmothers.

In *Newsome v. Bunch,* 144 N. C., 16, *Walker, J.,* after stating that at common law the father had the absolute right to the custody of his children, said that now "The welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons. *In re Lewis,* 88 N. C., 31; Hurd on Habeas Corpus, 528-529; Tyler on Infancy, 276-277; Schouler on Domestic Relations, sec. 428; 2 Kent's Com., 205."

In re Turner, 151 N. C., 474, this Court held, *Walker, J.,* that in the exercise of a sound legal discretion the court may order the child in the custody of some third and fit person against the claims of both the father and mother. This last case is a full consideration of the modern and humane rule that the welfare of the child and not the absolute rule of the father is the guide. This is cited with approval, *Howell v. Solomon,* 167 N. C., 591. The duty of the support of the child is upon the father, but it does not necessarily follow, as at common law, that he is entitled to its custody. The judge here finds as a fact, and there is evidence and other findings of fact to sustain him, that he is not a fit person to be entrusted with the care of this baby, and in his sound discretion has awarded its custody to its two grandmothers. The only objection that can be found with this reasonable and natural order is the alternation of the custody between them, and if this should be found by a subsequent judge, upon evidence adduced before him, not to operate in practice for the best interests of the child, the order can be changed.

T. A. MAY v. NATIONAL FIRE INSURANCE COMPANY.

(Filed 22 December, 1916.)

1. Courts—Terms—Expiration—Limitation—Judgments—Procedure.

A judgment by default signed on Sunday by the presiding judge on the street, after leaving the bench without adjourning court, but permitting the term to expire by limitation, is irregular and voidable if not absolutely void; and the action of a judge holding a subsequent term, in setting it aside upon finding meritorious defense, will not be disturbed on appeal.

2. Courts—Terms—Expiration—Limitations—Motions—Recess—Procedure.

After leaving the bench for a term of the Superior Court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless they are such as are cognizable at chambers. The judicial procedure for recesses of court and adjournment pointed out by BROWN, J.

MOTION to set aside a judgment, heard at July Term, 1916, of SWAIN, before *Harding, J.* The court set aside the judgment, and plaintiff appealed.

Frye & Frye for plaintiff.

Osborne, Cocke & Robinson, John M. Robinson for defendant.

BROWN, J. The defendant bases its motion to set aside the judgment upon two grounds, viz., excusable neglect and that the circumstances under which the judgment was rendered make it irregular and void.

We will consider only the second ground.

The facts are that the Superior Court of Swain County, to which the summons in this case was returnable, convened on 6 March, 1916, Long, Judge, presiding. The complaint was filed on 7 March and the answer 18 March.

The judge finds "that the defendant has a good and meritorious defense to plaintiff's claim; that on 12 March, 1916, the judge presiding left the bench; that he did not adjourn the court, but left it to expire by limitation of law; that it is admitted by the attorneys for the plaintiff and found as a fact that the judge after so leaving the courtroom signed the judgment herein while standing in front of his boarding-house."

Prior to thus signing the judgment, his Honor had made a general order, as follows: ". . . and defendants are allowed thirty days thereafter to file answer or demur, except in those cases wherein judgments by default are taken in *open court.*"

A reference to the calendar will show that *12 March, 1916, was Sunday.*

We are of opinion that the judgment was irregular, not being rendered to the due course of judicial proceedings, and voidable, if not absolutely void.

A judgment of the Superior Court, other than strictly "chambers business," can only be rendered in term, when the court is in session and the judge presiding.

It cannot legally be rendered on the street. When the judge leaves the bench and the term is left to expire by limitation, the term ends then and there when the judge has finally left the bench. The judge then cannot hear motions or other matters outside of the courtroom except by consent, unless they are such matters as are cognizable at chambers. *Delafield v. Construction Co.,* 115 N. C., 22; *Hardee v. Timberlake,* 159 N. C., 552.

The orderly course of judicial procedure requires that when the court takes a recess until a certain hour, the crier should so announce, and when the presiding judge orders an adjournment *sine die* the crier should so announce, and the time of the adjournment should be entered on the minutes.

Affirmed.

JAMES J. BRITT v. BOARD OF CANVASSERS OF BUNCOMBE COUNTY ET AL.

(Filed 22 December, 1916.)

1. Courts—Title to Office—Congressmen—Constitutional Law.

The State courts are without jurisdiction to try the title to office of Congressman, the Constitution of the United States referring this power exclusively to Congress (Art. I, sec. 5).

2. Same—Mandamus—Injunction.

The State Board of Elections ascertains and declares the result of an election for Congressman and certifies the result to the Secretary of State, who issues a certificate of election, on which the Governor issues a commission, the certificate of election and commission establishing a prima facie right to the office; and a process sued out in the State courts by a contestant against the board of canvassers, purporting on its face to be a writ of mandamus to compel the board to make proper returns of the election, without making other parties, will be considered by the court as a mandamus, and not a mandatory injunction involving the determination of the title to the office.

3. Mandamus—Mandatory Injunction—Definitions.

The purpose of a mandatory injunction is to restore the plaintiff to his previous condition changed by the wrongful act of the defendant, and that of a mandamus to compel the defendant to do an act which he has refused to do in violation of the plaintiff's rights.

4. Mandamus—Courts—Jurisdiction.

Semble, it is only the resident judge or the one holding the courts of a district who may issue a mandamus in regard to a contested election held therein, and not a nonresident judge, or one holding the courts of a different district. *Moore v. Moore*, 131 N. C., 376, cited and applied.

5. Mandamus—Findings—Appeal and Error.

Where the judge finds the facts in proceedings for mandamus, and the appellant has not demanded a trial by jury, the facts so found are conclusive on appeal, as where he has found that the board of canvassers ascertained and declared the result of the voting in an election on one of several controverted dates.

6. Mandamus—Equity—Appeal and Error—Findings of Fact.

An application for mandamus is a legal and not an equitable remedy, and the Supreme Court on appeal may not pass upon the facts or find additional ones.

7. Office—Title—Quo Warranto—Mandamus—Elections—Courts—Enquiry.

An action of *quo warranto*, and not the writ of mandamus, is the proper remedy to try title to office, and in the latter case the courts cannot inquire into questions of fraud, illegal voting, illegality of the election, and the like.

8. Mandamus—Elections — Board of Canvassers — Adjournment — Scope of Writ.

As to whether a board of canvassers can be compelled by mandamus to reconvene after its final adjournment, *quere;* and *semble,* it can be done theretofore only for the purpose of requiring it to complete its labors, but not to reconsider its action.

9. Elections—Courts—Board of Canvassers—Judicial Duties—Congressmen —Constitutional Law.

The county board of canvassers are vested with statutory authority to judicially pass upon all facts relative to the election and to judicially determine and declare the results, etc., Revisal, sec. 4350; and with the exercise of this discretion the courts will not interfere, except by *quo warranto,* which is prohibited by the Federal Constitution relating to the election of Congressmen. Art I, sec. 5.

10. Ballots—Unmarked Ballots—Intent of Voter—Sufficiency.

The purpose of the ballot is to designate the choice of the voter, and it is sufficient for its validity for it to be voted unmarked when the name of but one candidate appears thereon.

11. Elections—Board of Canvassers—Supplemental Returns—Invalidity— Reconvening Board.

Additional or supplemental returns made up by the county board of canvassers after the registrar and pollholders had fully performed their duties and adjourned, and without calling them together for reconsideration as a body, should not be given effect by the courts.

APPEAL by plaintiff from order of *Adams, J.,* at chambers, 27 November, 1916, from BUNCOMBE.

This action was commenced in Buncombe County to procure a writ of mandamus to compel the defendant board to certify as the result of the election for Congress on 7 November, 1916, that the plaintiff received 4,037 votes in said county and his opponent 4,325 votes, the plaintiff alleging that this result was ascertained and determined by defendant board on 9 November, 1916.

The defendant denied that it ascertained and determined the vote for Congress on 9 November, 1916, and alleged, on the contrary, it postponed action on that day because of the absence of returns from three precincts and did not determine the result until 17 November, 1916, when at an adjourned meeting the board duly canvassed all the returns and judicially determined the result to be that the plaintiff received 4,043 votes for Congress and his opponent 4,353 votes, and that the result had been duly certified to the proper officers.

An alternative writ was issued by Judge Shaw, returnable before Judge Adams, who at the hearing found the following facts:

From the evidence I find the facts following:

1. The board of county canvassers met 9 November for the purpose of canvassing and determining the vote cast in Buncombe County at an election held 7th November. The plaintiff insists that the votes for a representative in Congress were canvassed by the board at this meeting; the board contends that the returns from three precincts had not been received and were not then before the board and that an adjournment was taken until Saturday, 11th inst., without a judicial determination of the returns. The evidence is diametrically conflicting, and I do not find as a fact that the returns were accepted and judicially determined and the congressional vote canvassed at this meeting.

2. On Saturday the board continued the tabulation of certain returns, but declined to complete the tabulation of the congressional returns, assigning as a reason therefor that the returns from Sandy Mush Precinct had not been received, and again adjourned until 10 a. m. Thursday, 16th inst.

3. The board reconvened on the 16th inst., and by request of plaintiff adjourned until the afternoon, when the writ issued by Judge Shaw was served upon the board by the sheriff of Buncombe County, whereupon still another adjournment was taken, until 10 a. m. Friday, 17th inst.

4. In the record evidence are certain papers purporting to be the returns made by the registrars and judges of election of the votes cast in 28 precincts of Buncombe County for a representative in Congress. As to five of these papers there is a controversy between the parties.

From Lower Hominy Township there is a paper, dated 7th November, signed W. E. Fletcher, registrar, E. E. Conner, judge of election, showing Weaver's vote to be 147 and Britt's 90, Olin's 4.

From West Asheville Precinct a similar paper, dated 7th November, signed by the registrar and two judges of election, showing Weaver's vote to be 287 and Britt's 246.

From Asheville Precinct, No. 2, a similar paper, dated 7th November, signed by the registrar and two judges of election, showing Weaver's vote to be 133 and Britt's 128.

From Hazel Precinct a similar paper, dated 7th November, signed by the registrar and two judges, showing Weaver's vote to be 73 and Britt's 45.

I find also other papers in this file purporting to be "amended and supplemental returns" from these precincts. Both the papers from Lower Hominy purport to be signed by Fletcher, registrar, and Conner, judge of election. The paper from West Asheville, dated 7th November, is signed by Brown, registrar, Hall and Moses, judges of election; the supplemental paper, by Brown, registrar, and Hall, judge. The

paper from Asheville Precinct, No. 2, dated 7th November, is signed by Garren, registrar, and West and Ford, judges; the supplemental report by Garren and West. The paper from Hazel, dated 7th November, by Spivey, registrar, and Eve and Miller, judges; the supplemental report, by Spivey and Miller. These supplemental papers set forth, in addition to the votes stated in the papers of 7th November, the number of "unmarked votes" said to have been cast for Britt and Weaver. The total "unmarked votes" in these four precincts for Weaver being 20 and for Britt 4.

Among the papers I find another purporting to be an "amended and supplemental return" from Asheville Precinct, No. 6, signed Lyda, registrar, and Leonard, judge of election, showing the vote to be as follows: Weaver 304 marked votes, Britt 162 marked votes; Weaver 7 unmarked votes, Britt 2 unmarked votes.

If a paper from this precinct was returned 7th November, it does not appear in this file.

These "amended and supplemental returns" show 27 "unmarked votes" for Weaver and 6 "unmarked votes" for Britt. The "amended return" from Hazel Precinct, purporting to be signed by the registrar and C. D. Miller, judge of election, show 4 unmarked votes for Weaver and 1 for Britt, but in the margin I find this entry: "I can remember only one unmarked ballot, and that was for Britt. C. D. M."

Two of these amended returns bear date 15th November; the others are not dated. On the face of all these papers are the printed words, "Original returns of registrar and judges of election of votes for representative in Congress"; and the papers were filed by the board in the clerk's office as provided by law.

5. The county board in determining the result of the election estimated the "unmarked votes," and judicially declared the result. If these "unmarked votes" are legally included in the count, Weaver is entitled upon the face of the returns from the district to the certification of election; if illegally included, the plaintiff upon the face of the returns is entitled to such certificate.

6. I have not been able to find when all the "amended returns" were filed with the board, nor at whose instance. From the stenographer's report of the meeting held 16th November, I find that plaintiff propounded several interrogatories, among them being this: "At whose instance were these alleged amended and supplemental reports made?" But I find no answer. In this meeting a member of the board moved that these "amended and supplemental returns be received, accepted, and considered with the original returns in judicially determining and declaring the number of legal ballots cast for candidates for Congress," but this motion was not formally voted on before the writ was served.

I further find on the 17th inst. the board were advised by counsel, learned in the law, that they had the legal right to consider the amended returns, and they did accept them as the returns of the registrars and judges of election.

7. I further find that the county board on Friday, 17th November, concluded its canvass of the votes cast in Buncombe County for a representative in the Sixty-fifth Congress and did then and there judicially determine the returns, declare the result, tabulate and sign an abstract, and certify said returns in the manner provided by statute, and included the "unmarked votes" set out in the "amended and supplemental returns."

Judgment was rendered in favor of the defendant.

The plaintiff appealed, and after argument the court of its own motion issued the writ of *certiorari* directing Judge Adams from the evidence taken before him to make an additional finding of fact as to what was done by defendant on 9 November, 1916, with reference to the congressional vote and whether on that day said board ascertained and judicially determined and declared the result of the vote for Congressman.

A copy of the order directed to Judge Adams was mailed to the plaintiff and his counsel and to the defendant and its counsel, and each party was notified that the court would hear motions or arguments on the return to the writ on Tuesday, 19 December, 1916, at 10 o'clock.

Judge Adams made the following return:

JAMES J. BRITT
v.
BOARD OF CANVASSERS. } *Further Finding of Fact.*

To the Honorable the Supreme Court of North Carolina:

In obedience to the writ of *certiorari* issued in this cause 14th December, directing the undersigned to make the additional finding of fact as to what was done by defendants on 9 November, 1916, with reference to the congressional vote, and whether on that day said board ascertained and judicially determined and declared the result of the vote for Congressman, I beg to submit the following, after due investigation of the record and affidavits, as such additional findings:

On 9 November, 1916, at 11 o'clock, after organization, the board proceeded to examine the returns from the various precincts in Buncombe County, or such returns as had been delivered to the board. Returns from Asheville (No. 1), West Asheville, and Sandy Mush (No. 1) precincts were not before the board on 9th November. While

there may have been a tentative tabulation by certain persons, among those who attended the session of the board, based upon what they deemed to be the vote from those precincts, I find that no formal returns or other papers purporting to be returns from these precincts were received, accepted, or acted upon by the board on that date. On the other hand, the board stated that returns from these precincts were not before them on 9th November, and for that reason they would not canvass the congressional vote on that date, and in consequence continued the canvassing of the congressional vote until 11th November, and again until later dates, as shown in the former finding of facts. I further find that the board did not canvass and estimate and did not ascertain and judicially determine and declare the result of the vote for Congressman on 9th November, and that such judicial determination was not made until Friday, 17th November.

This 15 December, 1916. W. J. ADAMS, *Judge.*

By direction of Supreme Court, above copy of return to instanter *certiorari* is inclosed. CLERK, ETC.

On Tuesday, 19 December, 1916, the plaintiff appeared, and was heard in his own behalf as to the effect of the return of Judge Adams to the writ of *certiorari.*

James J. Britt in propria persona.

F. A. Sondley, Thomas Settle, T. J. Harkins, and F. W. Thomas for plaintiff.

Theodore F. Davidson, J. D. Murphey, Louis M. Bourne, Winston & Biggs, J. W. Hayes, and A. Hall Johnston for defendant.

ALLEN, J. It is well at the outset to have a clear conception of the question for decision, and of the limitations on the power of this Court.

In the first place, we are not trying the title to the office of Congressman.

This is manifest from the fact that Mr. Weaver, the other contestant for the office, is not a party to this action, and if he was, the Court would be without jurisdiction, because it is provided in the Constitution of the United States, Art. I, sec. 5, that "Each house (Senate and House of Representatives) shall be the judge of the elections, returns, and qualifications of its own members," thereby withdrawing from the courts and vesting in Congress the power to pass on the title to the office of Congressman.

Nor is the question before us as to who is entitled to the certificate of election and commission, which but establish the right to the office *prima facie,* and we can make no order in reference to the certificate

and commission, because the State Board of Canvassers ascertain and declare the result of an election for Congressman and certify the result to the Secretary of State, who issues a certificate of election, on which the Governor issues a commission; and none of these officers are parties.

The only parties are Mr. Britt, the plaintiff, and the board of canvassers of Buncombe County, the defendant, and the only object of the action is to compel by writ of mandamus the members of the defendant board to reassemble and to certify as the result of the election in Buncombe County that the plaintiff received 4,037 votes for Congress and his opponent 4,325 votes.

That the action is for the remedy by mandamus and not by injunction appears from the prayer of the complaint, which asks that a peremptory mandamus issue from the writ issued by Judge Shaw, which is entitled "alternative mandamus" and is in the form of the writ of mandamus, and by the relief sought, which is not to restore the plaintiff to his *previous* condition, changed by the wrongful act of the defendant, which is the office of the mandatory injunction, but to compel the defendant to do an act which it has refused to do, which is the function of the writ of mandamus. 3 Pom. Eq. Jur., sec. 1359.

The action was commenced in Buncombe County and the alternative writ of mandamus was issued by Judge Shaw, resident judge of the Twelfth and holding the courts of the Eighteenth Judicial District, returnable before Judge Adams, holding the courts of the Nineteenth District, of which Buncombe County is a part.

We are of opinion Judge Shaw was without authority to issue the writ, for the reason stated by *Clark, C. J.*, in *Moore v. Moore,* 131 N. C., 371, that "Under our rotating system the judge holding by rotation the courts of a district has, during the six months he is assigned thereto, the sole jurisdiction therein, just as the resident judge had when there was no rotation, except in the cases otherwise specifically provided by statute; and these exceptions in civil cases are restricted to restraining orders and injunctions to the hearing and appointment of receivers. *Habeas corpus* proceedings are an exception, also, but this is a prerogative writ."

We will not, however, rest our decision on this ground, but as no motion was made to quash the writ before Judge Adams, and as the action itself was properly constituted, will deal with it as if an original application for the writ had been made before Judge Adams.

The gravamen of the complaint is that the defendant, the board of canvassers, met on 9 November, 1916, and then and there canvassed the returns and then and there found and declared that the plaintiff had received in Buncombe County 4,037 votes, and that Zebulon Weaver

received 4,325 votes, and that the said board had refused to announce, certify, and proclaim said canvass and result.

The defendant denies that the result was ascertained or declared on 9th November, and alleges that there was an adjournment on that day because of the fact that the returns from three precincts were not present and that it took no final action until an adjourned meeting on 17th November, at which time it completed the canvass of all the returns from the county and ascertained the result to be that the plaintiff received 4,043 votes and his opponent Weaver 4,353 votes, and that they duly certified the same to the proper officers.

Judge Adams has found the fact, thus in controversy, with the defendant, and his finding is conclusive upon us, as the statute regulating applications for mandamus (Rev., sec. 824), after providing for the return of the summons, says: "At which time the court, except for good cause shown, shall proceed to hear and determine the action, both as to law and fact: *Provided,* that when an issue of fact is raised by the pleading, it shall be the duty of the court, upon the motion of either party, to continue the action until said issue of fact can be decided by a jury at the next regular term of the court."

The statute vests the judge before whom the summons is returnable with the power to determine the fact, unless there is a demand for a jury trial; and as the plaintiff has made no such demand, we must accept the fact as established, for the purposes of this appeal, that the defendant board did not ascertain and declare the result of the vote on 9 November, 1916, and that it did so on 17 November, 1916, and when we do so the plaintiff's action must fail because the fact upon which it rests has been found against him.

We not only have no power to reverse the findings of fact, but we have no authority to find additional facts, if inclined to do so, as the application for mandamus is "legal and not equitable" (26 Cyc., 141), and the power of this Court to review evidence and find facts is restricted under the present Constitution to appeals from "judgments final as well as interlocutory, which are exclusively equitable in their nature, and which a court of equity as a distinct and separate tribunal could alone formerly render." *Young v. Rollins,* 90 N. C., 134.

If, however, we dealt with the question as the record stood before the return to the *certiorari* and without the specific finding against the plaintiff as to what occurred on 9th November, can we cause the board to reassemble and make return and certify the result as the plaintiff claims it to be?

In the first place, if we eliminate the fact found against the plaintiff as to what occurred on 9th November, mandamus is not the appropriate remedy for settling any conflicting claims in the pleadings.

"Mandamus cannot be employed for the purpose of settling conflicting claims to an office. It is no part of its functions to determine contested elections. . . . A defense is sufficient which sets up that after the canvass another than the relator was declared elected, received the certificate of election, and qualified by taking the oath of office, notwithstanding a claim by the relator that he was properly elected, for when it becomes necessary to go beyond the returns and to consider questions touching the legality of the election, or of fraud, illegal voting, or the like, then mandamus is not the proper remedy, and it is necessary to resort to *quo warranto* or to such statutory proceeding as may be provided." 9 R. C. L., 1153 *et seq.*

This is a well considered statement, supported by numerous authorities, that the courts cannot on application for mandamus inquire into questions of fraud, illegal voting, illegality of the election, and the like, and that resort must be had by the aggrieved party to the action of *quo warranto* to try the title to the office, or, in this case, to the House of Representatives.

"Mandamus is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relator has a present clear legal right to the thing claimed, and that it is the duty of the defendant to render it to him. If it appears from the complaint that two persons are claiming the same duty *adversely to each other,* against a *third* party, the writ does not lie (Tom. L. D., title "Mandamus," 3 Bun., 1452), and that for the plain reason that the *title* must be decided between them before the defendant can know to whom the duty or thing is due." *Brown v. Turner,* 70 N. C., 103.

This last statement by *Judge Bynum* and concurred in by *Pearson, C. J.,* in a contest over office, is very pertinent, and if sound as a legal proposition would alone justify a refusal to grant the prayer of the plaintiff, because it is there stated that the writ of mandamus will not lie if two persons are claiming the same duty adversely to each other against a third party, and on the facts as they appear to us, Mr. Britt and Mr. Weaver are claiming the same duty adversely to each other from the defendant board of canvassers, a third party, and there is reason and justice in the rule because otherwise relief may be had by mandamus, which would seriously affect the rights of another, when he has had no opportunity to be heard, and this action fitly illustrates it, as the plaintiff is asking that the board of canvassers take action, which may determine whether he or Mr. Weaver shall have the certificate of election, when Mr. Weaver is not a party to the action and cannot be heard.

There is also much conflict of opinion as to the power to compel a board which has adjourned, to reassemble, but the weight of authority seems to be that this can be done for the mere purpose of requiring it to complete its labors, but that it cannot be done to compel it to reconsider its action (*S. ex rel. Hudson v. Pigott,* 24 A. and E. Anno. Cases, and extensive note), and on the facts found by the judge, the defendant board has performed its duties and certified the result.

If, however, mandamus is the proper remedy, and if the defendant board is not *functus officio,* and can be reassembled, what can the board be required to do?

The authorities are practically unanimous to the effect that the court has the power to compel officers to perform a ministerial duty, but that where the officer is vested with discretionary power, the court cannot control or interfere with his action.

The authorities are collected and the question fully discussed in the opinion by *Justice Hoke* in *Board of Education v. Comrs.,* 150 N. C., 122, where he says: "It is recognized doctrine that the writ of mandamus is the appropriate remedy to enforce the performance of duty on the part of county officials, when the duty in question is peremptory and explicit, but that such a writ will not be granted to compel the performance of an act involving the exercise of judgment and discretion on the part of the officer to whom its performance is committed. In some of the books the principle is stated in this way: that the writ is only allowable when the duty is mandatory and the act sought to be coerced is ministerial in its nature; and while expressions are sometimes found that the performance of a duty to some extent discretionary will be controlled by this writ when it clearly appears that an officer has acted capriciously, an examination of these authorities will, we think, disclose that in cases involving the exercise of official discretion the order of the court in actions for mandamus has always been restricted to compelling an officer to act in a given case, and will never undertake to direct him as to how he shall act."

Mr. Justice Walker in *Edgerton v. Kirby,* 156 N. C., 347, says: "If a public officer fails to perform his legal duty to the public, mandamus will lie to compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that *they* are to judge for themselves, and, therefore, no court can require them to decide in a particular way or review their judgment by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the persons to whom the discretion is confided by law would not then be their own, but that of the court under whose mandate or compulsion they gave it. *Attorney-General v. Justices of Guilford,* 27 N. C., 315;

Barnes v. Comrs., 135 N. C., 27. . . . As to the power of a court of general jurisdiction to issue a mandamus for the purpose of controlling the discretion of a public officer, the case of *U. S. v. Seaman*, 17 How. (U. S.), 225, and *Gaines v. Thompson*, 7 Wallace, 347, may well be consulted, for they state the doctrine with clearness and accuracy. They deny the power where there is a discretion left to the officer as to how he will perform the duty, and so we have held. . . . This author (Tapping Mandamus) says that in no case does the writ lie 'to compel a tribunal, judicial or administrative, to render any particular judgment or decision, or to set aside one already rendered, but only to enforce the performance of a ministerial or mandatory duty. The writ is appropriate to compel subordinate courts or bodies (or even individuals, in a restricted class of cases) to proceed and determine matters pending before them and properly within their cognizance or jurisdiction, but it cannot compel them to do that which the law leaves them to decide according to their best judgment and discretion. Tapping, 35, 36. The plaintiff must try other ordinary remedies before he resorts to this unusual writ of compulsion."

The case of *Johnston v. Board of Elections, ante*, 162, is an instance of the exercise of the jurisdiction by the courts to compel the performance of a purely ministerial duty by mandamus. In that case the plaintiff Johnston and the defendant Pate were opposing candidates for the nomination as a member of the House of Representatives at a primary election. The election was held, the result tabulated, declared, published, and filed with the proper officers; there was no allegation of fraud or irregularity in the election, and it was held in an action to which Pate was a party that the board of elections could be compelled to perform the ministerial duty, involving the exercise of no judgment or discretion, of placing his name on the party ticket.

We turn, then, to the election law for the purpose of seeing what powers are vested in the county board of canvassers and what duties are imposed upon it, and we find by Revisal, sec. 4350, it is required to open and canvass and judicially determine the returns, stating the number of legal ballots cast in each precinct for each officer, the name of each person voted for, and the number of votes given to each person for each different office, and to sign the same, and that it is vested with power and authority to judicially pass upon all facts relative to the election and to judicially determine and declare the result of the same, and to send for papers and persons and examine the same.

This section clearly vests the board with discretionary power and imposes the duty of exercising its judgment, and, if so, we cannot, upon an application for a mandamus, interfere with the exercise of its judgment and discretion, nor can we review its judgment except in an

action to try the title to the office by *quo warranto,* which, as we have seen, is not applicable to the office of Congressman.

If the matter was properly before us and we had jurisdiction to decide it, we would hold as to the congressional ticket, which has only one name on it, that all unmarked ballots ought to be counted for the respective candidates, because the purpose of the election is to ascertain the will of the voter, and the marking of the ballot can only serve a useful purpose in ascertaining this will when there are more names than one upon a ballot.

The statute was evidently copied from a statute requiring the names of all the candidates to be on one ballot, and the requirement as to marking was for the purpose of identifying and indicating the choice of the voter, and while such provisions are usually held to be mandatory, "the doctrine of all the cases is that the intention of the voter, as gathered from the ballot itself or other surrounding circumstances of a public character, is to control." 15 Cyc., 362.

The voter is interested in the question as well as the candidate, and when his will is expressed, it ought not to be set aside on light grounds, and no one can doubt what his purpose and intention was when he voted a congressional ticket with only one name on it.

We would also hold that what are referred to as additional or supplemental returns ought not to have been considered, if, as the plaintiff contends, they were made up after the registrar and pollholders had fully performed their duties, and without calling the registrar and pollholders together in a body.

If they had the right to act at all, they could only do so in a regular meeting called for that purpose, and when all were present or had an opportunity to attend.

We have carefully considered the contentions of the parties and are of opinion that the judgment must be affirmed.

We have not discussed the charges and counter-charges of illegal and wrongful conduct, because their consideration properly belongs to another tribunal.

The courts are slow to interfere with the action of officers appointed by law to conduct elections and to declare the result, and will not do so except in extreme cases and when the duty is clear, because if the jurisdiction is once recognized they may by injunction restrain the holding of an election and prevent an expression of the popular will, or after the election is held may delay the declaration of the result or defeat it.

Affirmed.

EDITH S. VANDERBILT v. S. F. CHAPMAN ET AL.

(Filed 29 December, 1916.)

1. Limitation of Actions—Adverse Possession—Successive Occupants—Continuity.

To ripen title to lands by adverse possession, with or without color, the claimant must show continuity of sufficient possession for the requisite statutory period, and, in case of successive occupants, some recognized connected possession between them, which may be shown by deed, will, or other writing or by parol.

2. Same—Evidence—Deeds and Conveyances—Color of Title.

Where title to lands is claimed through the adverse possession of successive occupants, the ownership asserted is one dependent on adverse possession, which does not require privity of title in the successive occupants, but the actual occupancy by them of the land under or for another or in subordination to his claim under an agreement or arrangement recognized as valid between themselves; and when this continuity and identity is established between a subsequent and next preceding and prior occupant adverse to the true paper title, the claimant or subsequent holder under color may avail himself of the adverse occupation of his predecessors and refer the same to the conveyance under which he claims as color.

3. Same—Executors and Administrators—Powers of Sale.

Where there is evidence that the one claiming title to lands by adverse possession under color directs his son, who managed his affairs, to hold possession under his deed, and by will appoints his son as his executor, who is interested therein as a devisee, and who thereafter enters and continues to remain in possession as such executor until he conveys the lands under a power conferred in the will, and that his grantees entered and remained in possession for a period sufficient under the statute to ripen the title, by counting the possession of his predecessors, it is *Held*, that the possession of the executor of the original grantee as such should be considered, and it is reversible error for the trial judge to instruct the jury, in effect, that the evidence of his possession as executor, not being in privity of title, was insufficient, and should not be counted.

CIVIL ACTION to recover possession of land and remove a cloud from plaintiff's title, tried before *Adams, J.*, and a jury, at August Term, 1916, of BUNCOMBE.

Plaintiff showed a proper paper title to a tract of 465 acres of land in said county, the title taking its rise in a State grant to David Allison in 1796, and it was admitted of record that plaintiff had a proper paper title by mesne conveyance to this 465-acre tract included within the boundaries of the Allison grant.

Defendant claimed title by adverse occupation for seven years under color of title to 169 acres of land within the boundaries of plaintiff's

tract and being that part of said tract described and contained in a deed therefor from W. E. Lance, who had a prior grant covering the property, to Richard Ledbetter, bearing date 18 May, 1893, and duly registered in Buncombe County, 18 September, same year.

On issues submitted the jury rendered the following verdict:

1. Is the plaintiff the owner in fee and entitled to the possession of the land described in the complaint and in controversy in this action, or any part thereof? Answer: "Yes."

2. Have the defendants wrongfully entered into possession of said land under the claim of title? Answer: "Yes."

3. Does the defendants' claim of title constitute a cloud upon the title of the plaintiff? Answer: "Yes."

4. What damages, if any, is the plaintiff entitled to recover? Answer: "No damages."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

James H. Merrimon, J. G. Merrimon, and Harkins & Van Winkle for plaintiff.

Duff Merrick, A. Hall Johnston, and Theo. F. Davidson for defendant.

HOKE, J. On the trial it was admitted of record that the plaintiff had a proper paper title taking its rise in a grant to David Allison for 250 acres of land bearing date 28 November, 1796.

In support of defendant's claim, they offered in evidence a deed from W. E. Lance and wife to Richard Ledbetter, covering the land in controversy and bearing date 18 May, 1893.

2. The will of said Richard Ledbetter, probated and registered 22 January, 1903, the portions of which, material to the questions presented and involved in this appeal, are as follows:

"I do hereby nominate and appoint my son, Z. T. Ledbetter, my son-in-law, M. L. Sumner, my executors of this my last will and testament, earnestly requesting them to act as such; and for the purpose of enabling them to carry out the provisions of this, my said will and testament, they are hereby vested with such parts of my estate, real and personal, as it may be necessary should be vested in them for such purpose."

And further: "It is my will and desire that my executors, as early as it may be practicable after my death, collect in all moneys due me, and that they sell off all my real and personal estate not herein devised or bequeathed, and from said moneys and proceeds pay off and discharge the legacies herein required to be paid therefrom, and any sum then remaining, after paying all costs and charges of administration and all debts due and owing by me, they shall divide. . . ." etc.

And: "In disposing of my said property, real and personal, my executors may sell at public or private sale for cash or on time, or in such way and manner as in their judgment will be best for my estate, and I do hereby invest them with authority and empower them to make all deeds and conveyances necessary to be made to complete such disposal."

3. Deed from Z. T. Ledbetter, executor of the last will and testament of Richard, to defendants, covering the land in controversy, bearing date 10 February, 1914, and registered same day.

It was shown that Z. T. Ledbetter alone qualified as executor of his father, and there was evidence on part of defendants tending to show adverse, continuous occupation of the property, asserting ownership under said deed from its date by Richard Ledbetter till his death in 1903; by Z. T. Ledbetter, his executor, claiming also under the will of his father till his own conveyance to defendants and by them till the bringing of the suit.

There was evidence on the part of plaintiffs tending to show breaks in the continuity of defendants' possession, sufficient, if established, to destroy their claim, and also that Z. T. Ledbetter, at the time he occupied after the death of his father till the sale and conveyance by himself, claimed the same as his father's executor, under the terms and provisions of the will.

Speaking to the occupation of himself and father and as to how he claimed while in possession as executor, Ledbetter, as witness for defendant, testified, among other things, as follows: That in 1893 his father, who owned the Clapp tract of land lying just north of this in controversy, had cleared and cultivated an acre or an acre and a half over the line. On that date his father bought and took a conveyance of the land in controversy from W. E. Lance who had taken a grant for it a short time before, and in making a survey for the Lance deed they ascertained that they had gone over the line and cleared an acre or an acre and a half of land on this land; that witness and father had continuously occupied and worked this clearing, through their tenants, year by year, from the date of the deed until witness, as executor, sold and conveyed to defendants. "The possession, that is, the field about which I spoke, is on both sides of this line. My father had possession on both sides of it. I was attending to a great deal of my father's business after the deed of 1893, and his instructions were to hold possession on the part of that clearing inside the W. E. Lance deed. After the date of the deed in 1893 my father's tenants held possession on until his death, and then I as executor held possession until I sold to Mr. Chapman. My father has been dead thirteen years the 19th day of January. He died 19 January, 1903. We held possession from that time until I made Mr. Chapman and Mr. Reynolds a deed. We

held possession by tenants in cultivation and had some little peach trees set out on the land. I don't think there was a year but what there was some growing crop on part of the cultivation. I instructed the tenants after I took possession to put something on each year. I was up there once a year," etc.

Upon this, the testimony chiefly relevant to the question presented, his Honor, among other things, in effect charged the jury that the will in itself was not color of title, as it did not purport to convey title to the executors, but only contained a power of sale, and that if Z. T. Ledbetter entered and held the land as executor and not as heir, such occupation by him and his tenants could not be added or tacked to the occupation by his father or referred to his claim under the Lance deed as color. "But if he took possession, as the heir at law of Richard Ledbetter, his possession as heir at law would be deemed a continuation of the color of title acquired by his ancestor, and his possession, so held, would be deemed possession under color," etc., and to this and other portions of the charge, substantially embodying the same positions, defendants duly excepted and assigned the same for error.

In order to establish title by adverse occupation there must be continuity of possession for the requisite statutory period, and, in case of successive occupants, there must be some recognized connection between them. This connection may be effected by deed or will or other writing, or it may be shown by parol. It is said that there must be a privity between the successive occupants, but this does not at all mean that there must be a privity of title. The ownership asserted is one dependent on adverse physical possession, in this instance under color. The privity referred to is only that of possession and may be said to exist whenever one holds the property under or for another or in subordination to his claim and under an agreement or arrangement recognized as valid between themselves. When the continuity and identity of possession is established between a subsequent and next preceding and prior occupant, shutting out all opportunity of interruption in favor of the true title, in such case the claimant or subsequent holder may, in connection with his own, avail himself of the adverse occupation of his predecessors and refer the same to the original entry and the color of title under which it was made.

These positions are supported by authoritative cases in other States, and our own decisions are in approval of the same general principle. *Illinois Steel Co. v. Paczocha,* 139 Wis., 23; *Clithers v. Fenner,* 122 Wis., 356; *Montague v. Marunda,* 71 Neb., 805; *Rowland v. Williams,* 23 Ore., 516; *Vance v. Wood,* 22 Ore., 77; *Iron and Coal Co. v. Bayles,* 95 Tenn., 612; *McNeely v. Langhan,* 22 Ohio St., 32; *Weber v. Anderson,* 73 Ill., 439; *Shevin v. Brackett,* 36 Minn., 152; *Smith v. Chapin,*

31 Conn., 530; *Ricker v. Butler,* 45 Minn., 545; Braswell on Limitations and Adverse Possession, sec. 240; Burdick on Real Property, pp. 642-643; *Barrett v. Brewer,* 153 N. C., pp. 547-551; *Bond v. Beverly,* 152 N. C., 57; *Atwell v. Shook,* 133 N. C., 387; *Everett v. Newton,* 118 N. C., 919; *London v. Bear,* 84 N. C., 266.

In *Illinois Steel Co. v. Paczocha, supra,* it was held, among other things: "The privity between successive occupants of land which will permit the tacking of their possessions is not dependent upon any claim, or attempted transfer, of any other interest or title in the land, but is privity merely of physical possession not derived from or in subordination to the true owner; and the only essential of the transfer is that the predecessor passes it to the successor by mutual consent, as distinguished from a case where a possessor abandons possession generally and another, finding the premises unoccupied, enters without contact or relation with the former.

"2. Where the possessions of successive occupants other than the true owner join by delivery from predecessor to successor, there is no opportunity for the true owner to become seized, and after twenty years submission to such inability he becomes barred. . . .

"7. There is privity of possession between one who lived upon land with his family and the members of the family who continued to occupy it as a home after his death."

In *Montague v. Marunda:* "Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription, but this privity may exist by grant, devise, purchase, or descent, and the adverse possession of an ancestor may be taken advantage of by his heirs if their possession has been continuous with his, exclusive and under the same claim of right as made by him. In such case the ouster and disseizin made by the ancestor is continued by the heirs and relates back to the original entry."

In *McNeely v. Langan,* 22 Ohio: "The possession necessary to bar an action, for the recovery of real property, need not be continuous for the period of limitation in any one occupier. It is sufficient that the possession during such period was in the defendant and those under whom he claims; and, as to third persons against whom the possession was held adversely, it is immaterial if successive transfers of the possession were in fact made, whether such transfers were by will, by deed, or by agreement, either written or verbal."

And in *Rowland v. Williams,* 23 Oregon: "Continuity is an indispensable element of adverse possession, but several possessions may be tacked together where they can be referred to the original entry. No

paper evidence of a transfer of possession is necessary when the holding is under the claim of the first entryman."

In *Bond v. Beverly:* "The subsequent holder under a deed void for uncertainty of description was allowed to tack his possession to that of his grantor and refer the same to the deed under which the latter held as color."

In *Barrett v. Brewer* the doctrine of tacking was disallowed, but that was on the ground that there had been no entry by the ancestor under the color, and, speaking to the question, *Associate Justice Brown* quotes with approval from *Sherin v. Brackett* as follows: "Therefore, it is held, in treating of color of title, that the privity spoken of exists between two successive holders when the latter takes under the earlier as by descent (as, for instance, a widow under her husband or a child under its parent) or by will or grant, as by voluntary transfer of possession."

In *Atwell v. Shook, supra,* the occupation of the widow was held to inure to the benefit of the heirs at law on a question of adverse possession. And in *London v. Bear* the possession of the executor was held to be in subordination to the heir's title.

Considering the record in the light of these authorities, we are of opinion that there was error to defendant's prejudice in holding that they could not avail themselves of Z. T. Ledbetter's occupation of the property as being under color if he entered and held the same as his father's executor. While we are disposed to concur in his Honor's view that the will in question did not convey the estate to the executor, but only a power of sale, *Ferebee v. Proctor,* 19 N. C., 439, and while there are cases to the effect that there is no privity between the heirs of a deceased owner and his personal representatives in reference to real estate, these authorities will be found to refer more generally to a privity of estate or title, and have no application to the facts of this record, tending, as they do, to show that Richard Ledbetter, having bought and taken a deed for this property and entered thereon during his lifetime, directing his son, who then, to some extent, managed business of this kind for him, "to hold possession under the Lance deed"; that he died, leaving a will which empowered his son to sell the property and vesting in him such estate as was necessary to carry out the powers under the will; that the son entered, claiming ownership under the will, and, in the assertion of his father's title, exercising possession continuously from his death in 1903 to his sale to defendant in 1914, and that said executor was also one of the testator's heirs at law. True, there is much testimony on the part of plaintiff tending to show that there was no continuity of possession on the part of the adverse claimants, and that neither the occupation of the father and

son nor of both together was of a character and extent sufficient to mature title; but there is very little conflict of evidence as to *how* the executor claimed while he was in possession, to wit, that he was there under the will, asserting ownership for the benefit of his father's estate; and if these facts are accepted by the jury and were continued and of a kind sufficient to mature his title, there would be such a privity of claim and possession between himself and his father as would justify referring his occupation to the original entry and give him the benefit of his father's deed as color of title. In *Ricker v. Butler*, 45 Minn., 545, and *Rowland v. Williams*, 23 Ore., *supra*, the possession of the personal representative, asserting ownership for the estate, was held to inure to the benefit of the heir within the principle referred to, and our own case of *London v. Bear* is in recognition of the same principle.

For the error indicated defendant is entitled to a new trial of the issue, and it is so ordered.

New trial.

W. E. WORLEY ET AL. v. J. R. BOYD ET AL., BOARD OF COMMISSIONERS OF HAYWOOD COUNTY; VIRGE McCLURE ET AL., ROAD COMMISSIONERS OF BEAVERDAM TOWNSHIP.

(Filed 29 December, 1916.)

1. Roads and Highways—Statutes—Interpretation—County Commissioners—Damages—Petition.

Where legislative authority is given the county commissioners to construct, etc., the public roads of the county, levy taxes for the purpose, and to appoint juries of view to assess damages to the landowners, with right of appeal, and to pay such damages from the general county fund; and by a later statute enacted for the greater improvement of the roads of a township, a "township road commission" is created therefor, giving them full control and management of the roads, providing for a bond issue for the purpose of macadamizing, etc., which had been duly put into effect, and with further provision "that the land may be condemned and used by said road commission, as provided by the general law" of the county: *Held*, the statutes should be construed together, and as a whole constitute the road law of the county, and thereunder it becomes the duty of the county commissioners to act upon the petition of the owners of the lands taken, and appoint the viewers for the assessment of their damages, with right of appeal, the damages to be paid out of the county general road fund.

2. County Commissioners—Roads and Highways—Mandamus.

A mandamus will lie against the board of county commissioners to compel them to perform their official duty to act upon the petition of owners of land to have their damages, arising from the construction, etc., of the public roads, assessed according to the method prescribed.

PETITION for mandamus, heard on facts stated and admitted in the pleadings, before *Harding, J.,* at July Term, 1916, of HAYWOOD.

The plaintiffs, landowners of Beaverdam Township, had duly filed their petitions before the board of commissioners of Haywood County and before the road commissioners of Beaverdam Township, praying that they appoint a jury of view to assess damages done to their lands lying in said township and caused by the laying out certain highways over the same, pursuant to a special road law of the township. Chapter 325, Public-Local Laws 1915, and the general road law of the county. Laws 1905, ch. 771. And also for payment of said damages when properly assessed, etc. Both boards having refused to act in the matter and claiming that the duty properly lay with the other body, the present proceedings were instituted to compel action in the premises and the payment of the amount awarded, etc.

There was judgment directing the board of county commissioners to proceed and have damages assessed, and reserving the question as to who should pay the same, and all parties appealed, assigning error.

J. T. Horney and John M. Queen for plaintiff.
Morgan & Ward for county commissioners.
Smathers & Clark for road commissioners.

HOKE, J., after stating the case: In chapter 771, Public Laws 1905, provision is made for laying out, constructing, and keeping in repair the public roads of Haywood County, except the township of Waynesville, which is chiefly regulated and, to a large extent, constituted a special road district by chapter 375, Laws 1903. This statute of 1905 is a combination system for constructing and maintaining the public roads by taxation and labor, and the tax collected is made and styled a special road fund, in the care and control of the board of county commissioners. Section 15 of the act confers power on the proper county authorities and their agents to "locate, relocate, widen, or otherwise change any part of any public road," and ample and minute provision is made for the assessment of damages by a jury of view, designated by the county commissioners, on petition of any person where lands may have been taken for the purpose indicated, and direction is given for payment of such damages (if any above benefits) out of the general road fund of the county. And section 16 contains provision for appeal without bond from the award of the jury to the county commissioners, and from this last body to the Superior Court of Haywood County. In 1915 the citizens of Beaverdam Township in Haywood County, desiring to enter upon a more aggressive and efficient system of road improvement, an act was passed, chapter 325, Public-Local Laws 1915,

authorizing, on approval of the township voters, a bond issue of said township of $50,000 for the purpose of "macadamizing, grading, and otherwise constructing and improving the public roads of the township," and vesting the management and control of the roads of the township in a "township road commission" composed of five members, with power in the board of county commissioners to fill vacancies, etc., and with some other rights of supervision not involved in this appeal. While this statute confers upon the local board large powers in the management and control of the public road system of the township, in the way of grading, construction, improvement, and maintenance, in reference to condemning land for the purpose of roads, the statute, section 16, contains provision only in general terms, as follows: "That land may be condemned and used by said road commissioners as provided by the general law of Haywood County."

The bond issue having been approved by the voters, the bonds sold and the proceeds turned over to the township board, they have entered on the discharge of their duties, have constructed several new roads in the township, taking over the lands of adjoining owners when the public interest required it, and, on petition filed by plaintiff and some of the other landowners for an award of damages, both official boards have refused to entertain or act on the petition, each claiming that the duty is incumbent on the other.

A perusal of this legislation will disclose, further, that, in addition to the obligation to pay the interest on their bond issue, the taxpayers of Beaverdam Township are still required to pay and have paid their proportionate share of the tax constituting the "road fund" provided for in the general road law. It is the recognized principle that these statutes, being on the same subject and more especially when making direct reference to each other, are to be construed together, and, as a whole, shall constitute the road law of Haywood County, *Dickson v. Perkins, ante,* 359; *Keith v. Lockhart,* 171 N. C., 451; and considering this legislation in that aspect, we do not hesitate to hold that when land is taken over for the purpose of public roads, the petitions for the award of damages shall be preferred to the county commissioners; that they shall appoint the jury of view, with right of appeal, as stated, and that the sum awarded shall be paid out of the general road fund, as directed by sec. 15, ch. 771, Laws 1905. Not only is this the permissible and primary meaning of the language of the section more directly bearing on the question, but the position is strengthened and confirmed by reference to other portions of the law and by the facts and attendant conditions relevant to its interpretation—circumstances to be properly considered whenever the language of a statute is

sufficiently ambiguous to permit of construction. *Simmons v. Groom,* 167 N. C., 271.

Thus it will appear that while the authority conferred on the township board is very large, extending, no doubt, to the taking over of land for the purpose, in the first instance, the full right of condemnation is not among the enumerated powers of the local board, nor is the payment of the damages assessed among the enumerated purposes for which they are permitted to spend the moneys committed to their control. Furthermore, as the taxpayers of Beaverdam are required to pay their full proportion of taxation for the general road fund, in addition to their liabilities on the bond issue, it is but right and just that the payment of damages for condemnation of land for a new road or a change of an old one, and which will constitute, for all purposes of convenience and travel, a part of the county road system, shall be paid for out of the general road fund as the statute contemplates.

We are of opinion, therefore, that to obtain compensation for lands taken over for the purpose of these highways, the petition shall be filed before the board of county commissioners, who shall appoint the jury of view, and the damage, when finally assessed, shall be paid by said commissioners out of the general road fund of the county. The board of commissioners of the county having declined to act on petition, properly preferred pursuant to the statute, petitioners have resorted to appropriate proceedings by mandamus to compel the performance of official duty. *Board of Education v. Comrs.,* and authorities cited, 150 N. C., pp. 116-121; *S. v. Sermons,* 169 N. C., 288.

This will be certified, that the judgment directing the appointment of a jury to assess the damages be affirmed, and that judgment be entered, further, that when said damages have been finally assessed pursuant to law the same shall be paid out of the general county road fund, and the costs of appeal shall be paid in like manner.

Modified and affirmed.

T. H. LINDSEY v. SUPREME LODGE OF KNIGHTS OF HONOR
AND
W. A. JAMES v. SUPREME LODGE OF KNIGHTS OF HONOR.

(Filed 29 December, 1916.)

1. Appeal and Error—Statutes—Conditions Precedent.

The statutory requirements as to making up cases on appeal to the Supreme Court and docketing them (Revisal, sec. 591) are conditions precedent which must be complied with, or the appeal will be dismissed.

2. Appeal and Error—Case—Service—Extension of Time—Courts—Written Agreement.

The trial judge has no power to extend the statutory time for service of case or counter-case on appeal, and this can only be done by agreement between counsel, and will be enforced only when put in writing.

3. Appeal and Error—Rules of Court—Transcript.

A transcript of the record proper should be filed by appellant in the Supreme Court to entitle him to move for a *certiorari* under Rule 17; and the filing of the original papers, which should remain in the office of the Superior Court, is insufficient.

4. Appeal and Error—Rules of Court—Motions to Dismiss—Transcript Duplicate.

Where the appellant has filed a certificate of the clerk below that the case had been tried there, giving the names of the parties, and unsuccessfully applied for a *certiorari* in the Supreme Court, it is not necessary to appellee's motion to dismiss, under Rule 17, that he should duplicate the certificate.

5. Same—Motion to Reinstate.

An appellant who has been guilty of gross laches in not complying with the statute and rules of Court regulating appeals is not entitled to have it reinstated after appellee's motion to dismiss or affirm has been granted.

6. Same—Indorsement of Service—"Due Time"—Written Agreement.

Where the appellant has indorsed on his case on appeal for the appellee to sign, "Accepted in due time," which the latter has stricken out before signing, and the case was served after the statutory time without written agreement as to extension of time: *Held*, a motion to reinstate will be denied.

ALLEN, J., dissents; HOKE, J., concurs in dissenting opinion.

APPEAL by defendants from *Adams, J.*, at August Term, 1916, of BUNCOMBE.

Jones & Williams for plaintiffs.
Bourne, Parker & Morrison, Winston & Biggs for defendants.

CLARK, C. J. This is a motion to reinstate the appeal in these cases, which were dismissed on 5 December, 1916.

The records of this Court show the following entries: "Appeal docketed 27 November, 1916; 5 December, motion of plaintiff to dismiss the appeal allowed and motion of defendant for *certiorari* denied. On 9 December defendant filed transcript on appeal and moved to reinstate and for *certiorari*. The plaintiff, appellee, moved to dismiss defendant's motions. Motion set for Friday, 15 December, and plaintiff moved to affirm or dismiss for failure to serve case on appeal on time, for that appellant did not file transcript within time required, and also, under Rule 17, to docket and dismiss. December 22, motions argued and petition for *certiorari* and motion to reinstate denied."

This Court has repeatedly called attention to the fact that this Court sits to hear appeals upon the merits; that the statutory requirements as to making up appeals and docketing the same are plain, Revisal, 591, and that if not complied with the "condition precedent," which authorizes an appellant to docket an appeal, not having been observed, the attempted appeal will be dismissed, because it has no legal right to be considered. *Vivian v. Mitchell,* 144 N. C., 472, and numerous cases there cited; *Cozart v. Assur. Co.,* 142 N. C., 523; *Barber v. Justice,* 138 N. C., 21.

The Court has also called attention to the fact that the judge below cannot extend the time for service of case and counter-case or for service of notice of appeal, *Barber v. Justice,* 138 N. C., 22; that while counsel may do it by consent, if there is a dispute between them the court will not attempt to pass upon the veracity of counsel, but if the alleged agreement is denied it will be disregarded, for it was the duty of counsel seeking an indulgence of this kind in derogation of the statute and the rights of the other party to put the agreement in writing. *Graham v. Edwards,* 114 N. C., 228; *Sondley v. Asheville,* 112 N. C., 694, and numerous cases citing the same, in Anno. Ed.

This case was docketed by the appellee on 27 November, 1916. He did not, however, docket the "transcript on appeal," but attempted to file the original papers from the court below. This was not the "transcript" on appeal required by the statute and by the rules of this Court, and, besides, was contrary to the rules of Court, which strictly prohibit the original papers in any cause from being taken out of the office of the Superior Court. While the "transcript" of the record proper was not filed, there was filed, however, a certificate by the clerk below that such a case had been tried in the court below, giving the names of plaintiffs and defendants, and thereupon the motion of the appellee to dismiss was valid under Rule 17. It was not necessary for him to duplicate the certificate which had been filed by the appellant, under Rule 17. It was also properly allowed because the appellant did not file a "transcript of the record proper," which was essential to give him a standing in court to move for a *certiorari* for the rest of the record. He could not be relieved from filing the transcript of the record proper "because it could not be found," for he had it.

On motion to reinstate, the above facts appearing, there was gross laches and he was not entitled to reinstatement. It further appears from the affidavit of the appellee that the appellant served the case on appeal after the time agreed upon; that the appellant had indorsed on his statement of the case, "Accepted in due time," and that the appellee's counsel struck out the words "in due time," and that he neither then nor at any other time agreed to waive the failure of the

appellant to serve the case on appeal in time. The appellee's counsel avers that the original of appellant's case will show that these words were struck out. The appellant does not controvert this fact; but if he did, by the uniform and necessary practice of this Court when no agreement in writing is filed, we cannot hear an allegation of an agreement between counsel to waive time if that allegation is denied by the opposite counsel. Again and again the Court has stated that it will not permit itself to be placed in the unpleasant position of passing upon the veracity or the correctness of the recollections of counsel; that the statutory requirements as to time are plain and unmistakable, and when not observed the Court will dismiss the appeal unless the waiver is in writing or is admitted. Here it is not shown in writing and is denied under oath. If we could pass over the other instances of laches, such as not having the transcript of the record proper filed in time; the violation of the rules of Court in attempting to file the original papers here and improperly taking the original records from the office of the court below (a practice which would lead to endless abuse); if we could overlook these matters, still it would not avail the appellant to reinstate the appeal, for under the statute the appeal would be necessarily dismissed for failure to serve the case on appeal in time.

If counsel think that the judge below has erred, he has a right to appeal, but only upon complying with the "conditions precedent" required by the statute, *Cozart v. Assur. Co.*, 142 N. C., 522, of giving notice of appeal and making up his case on appeal in the time and manner prescribed, service of same in the proper manner, docketing the same in the prescribed time, and the due assignment of errors and the printing of the case on appeal and of the brief in proper time, Pell's Revisal, 591, and notes. These requirements are plain and explicit and are for the purpose of avoiding the great waste of time in controversies between counsel over the routine of getting an appeal into this Court. Much time has been consumed uselessly in this very matter, when if counsel for the appellant had complied with the plain letter of the statute, which all other appellants must observe, it would have been avoided. We cannot make an exception to these requirements without opening a sluice-way for evils and the employment of the time of the Court in considering similar allegations in any and every case in which appellant's counsel might think that he should be entitled to disregard the rules applicable to all others. Such controversies are a needless consumption of time. They do not happen in the Supreme Court of the United States, and should not be tolerated here.

There is one plain way for an appellant to bring his cause to this Court, and that is to observe the statutory requirements. If he has

an agreement with counsel on the other side, it should be put in writing, for if denied, as in this case, we cannot consider such controversy between counsel.

The appellant did not docket his case on appeal in time, and on the certificate filed by himself that there was such case and such appeal the appellee was entitled to have it dismissed under Rule 17, without filing an additional certificate of his own. The appellant did not file a "transcript of the record" on appeal, but, in violation of the rules, attempted to file the original papers in the cause below. This Court cannot recognize such practice as valid. Not having filed the transcript of the record proper in apt time, the appellant was not entitled to *certiorari*. The appellant did not file his brief in time. He did not serve his case on appeal in time, and his allegation that the appellee waived such failure is flatly denied by the affidavit of the appellee's counsel, and therefore in purview of the law it was not made.

The motion to reinstate and for *certiorari* is

Denied.

ALLEN, J., dissenting: The appellant failed to have a transcript of the record prepared for this Court and the appeal was docketed upon the production of the original papers from the office of the clerk of the Superior Court.

This was irregular and unauthorized, and I think the remedy of the appellee was to move to strike the case from our docket, or to present the certificate of the clerk of the Superior Court, and move to dismiss under Rule 17; but he did neither.

He moved to dismiss the appeal before a transcript was filed, and when no appeal was pending in this Court.

The appellant then filed a transcript and moved for a *certiorari* to bring up the case on appeal, and on the hearing it has been made to appear that if the transcript had been docketed in due time in the first instance the appeal could not have been heard at this term because of unavoidable delays in settling the case on appeal.

The statement of the case by appellant was not served in due time, but I think this was waived by acceptance of service by the appellee, by serving exceptions to case on appeal, and by his appearance before the judge twice after notice and engaging in settling the case without making any point as to the time of service of appellants' case, and without objection as to the power of the judge to settle the case. *Roberts v. Partridge,* 118 N. C., 355; *Love v. Huffines,* 151 N. C., 378.

It is true, appellees' counsel in accepting service struck out the words "in due time" indorsed on the statement of the case, but he made no

objection as to time then or thereafter until the motion for *certiorari* was made by appellant.

I think the *certiorari* ought to issue, to the end that the appeal may be heard on its merits.

HOKE, J., concurs.

STATE EX REL. MARLER-DALTON-GILMER COMPANY ET AL. v. LETHIA A. GOLDEN, ADMINISTRATRIX OF S. D. ANDERSON, AND TITLE GUARANTY AND SURETY COMPANY.

(Filed 19 December, 1916.)

1. Judgments—Estoppel—Administrators—Accounts.

Proceedings upon exceptions of creditors filed to the final account of an administratrix, some of which were sustained by the judge and others reversed, with action by the clerk in conformity with the rulings, do not render the judgment accordingly entered by the clerk final in the sense it will operate as an estoppel between the parties.

2. Executors and Administrators—Accounts—Taxes on Lands.

A payment of taxes on the lands of the deceased by his administratrix is not a proper credit to be allowed him in his account.

3. References—Pleas in Bar.

Where the defendant enters a plea in bar to an action involving an accounting, which is bad upon its face, it is not error for the trial court to deny the plea and refer the matter.

4. Executors and Administrators—Judgments—Evidence.

Judgments against the administratrix in this case are held evidence of the indebtedness and very conclusive under the decision of *Brown v. Harding*, 170 N. C., 253.

5. Estoppel—Pleas in Bar—Trials—Questions of Law—Jury.

Where a plea in bar, bad upon its face, is interposed by an administratrix in an action against her requiring an accounting in which the only question contested is a matter of law upon an undisputed fact, a trial by jury thereof is properly denied.

6. Executors and Administrators—Evidence—Receipts—Burden of Proof—Disbursements.

Where in an action against an administratrix the amount of her receipts are shown, the burden is on her to show proper disbursements.

7. Reference—Evidence—Findings—Appeal and Error.

Where the referee finds the facts upon supporting evidence, and the findings are approved by the trial judge, they will not be disturbed on appeal.

CIVIL ACTION tried before *Harding, J.*, at August Term, 1916, of CHEROKEE.

The action was brought by certain judgment creditors of S. D. Anderson against the defendants, upon the official bond of the *feme* defendant as administratrix with the will annexed of S. D. Anderson, her first husband.

The defendants pleaded that there had been an adjudication of the matter in controversy in a former proceeding before the clerk of the Superior Court which was carried by appeal to the judge, who entered a judgment therein. It appears that the administratrix filed her final account, and some of the plaintiffs as creditors of her intestate filed exceptions thereto, but all of this resulted finally in the judge sustaining certain exceptions to the final account of the administratrix and overruling others, and remanding the proceedings to the clerk to reform the final account according to his rulings. This the clerk did, and upon a final adjustment of the matter upon the basis indicated in the judge's rulings, the clerk found that the administratrix had received as assets applicable to debts of her intestate the sum of $2,084.46 instead of $2,279.65, as formerly reported, and that she had disbursed $1,965.22 instead of $2,627.21 as formerly reported by her, leaving in her hands for distribution to and among the creditors entitled thereto the sum of $119.24 and the clerk then adjudged that the final account be amended and reformed accordingly. The principal exceptions filed by the creditors were to the payment of taxes on her land with which the administratrix had credited herself in the account. The court referred the case to Mr. T. J. Hill, who has performed his duty well and filed a very carefully prepared and accurate report. He passed upon each item of the account after taking evidence and reports that the class of creditors to which the plaintiffs belong are entitled to recover 79.6 per cent of their claims, the following being the statement:

"Marler-Dalton-Gilmer Co., in the sum of.....	$ 140.18
Treacy-Morris & Co., in the sum of.....	153.19
J. K. Orr Shoe Co., in the sum of.....	73.45
Bristol Overall and Pants Co., in the sum of.....	41.04
Madison Flouring Mills Co., in the sum of.....	28.27
Total	$ 436.13"

The judge confirmed the report and rendered judgment in favor of each creditor for the amount found by the referee as his share, and for costs, and the defendant administratrix appealed.

E. B. Norvell for plaintiffs.
J. D. Mallonee and M. W. Bell for defendants.

WALKER, J., after stating the case: The principal questions in this appeal are settled by *Bean v. Bean,* 135 N. C., 92, where it is held that a proceeding similar to the one taken in this case is not an estoppel, but simply one for the purpose of having the final account filed with the clerk and audited. It also decides that the taxes paid on the land are not proper credits to the administrator. As to the estoppel, see *Royster v. Wright,* 118 N. C., 152; *Allen v. Royster,* 107 N. C., 278; *Collins v. Smith,* 109 N. C., 468. It is said in *Bean v. Bean, supra:* "The account, as filed and stated in response to the citation, had no more force or effect against him than the account would have had if he had filed it voluntarily. The statute expressly provides that 'it shall be deemed prima facie evidence of correctness,' even when it is audited by the clerk, by the examination of vouchers or witnesses, or of both. The auditing is an *ex parte* proceeding and has none of the features or characteristics of that kind of judicial proceeding the judgment in which works an estoppel upon the parties. This really disposes of the other question, as, if the plea was bad on the defendant's own showing, there was no use in deferring the taking of the account until it was passed upon, and the court was right in holding that the said proceeding did not constitute an estoppel, nor could it form the basis of a good plea in bar. *Jones v. Sugg,* 136 N. C., 143. The judgments were evidence of the indebtedness and very conclusive proof. *Brown v. Harding,* 170 N. C., 253 (*s. c.,* 171 N. C., 686). Having held that there was no estoppel and that the plea in bar was not good, there was nothing for a jury to try, and there was no application, and certainly no proper application, for a jury trial upon any other question. *Driller Co. v. Worth,* 117 N. C., 515; *Keerl v. Hayes,* 166 N. C., 553; *Alley v. Rogers,* 170 N. C., 538. The defendant was not entitled to a judgment of nonsuit against the plaintiffs. There was evidence as to the amount of receipts by the administratrix and the burden was upon her to show what she did with them, as she made the disbursements. This refers, of course, to the assets she received, which were properly chargeable to her in her final account. There is no serious dispute as to what she did with the assets, as it is stated in the account, but she had merely paid some of the creditors more than their just share.

The finding of the referee that the administratrix is indebted to the plaintiffs in the several amounts above set forth in the statement of the case was well supported by the facts, and, besides, when a referee makes a finding of fact from evidence and it is approved by the judge,

upon exception to the report, we do not review the finding here. *McCullers v. Cheatham,* 163 N. C., 63; *Spruce Co. v. Hayes,* 169 N. C., 254; *Sturtevant v. Cotton Mills,* 171 N. C., 119; *Alley v. Rogers, supra.* A careful review of the case leads us to the conclusion that there was no error committed by the court, and we, therefore, affirm the judgment.

Affirmed.

W. B. HAWES v. BLADEN LUMBER COMPANY.

(Filed 11 October, 1916.)

CIVIL ACTION tried at January Term, 1916, of DUPLIN, before *Allen, J.,* upon these issues:

1. Did defendant wrongfully and unlawfully cut and remove timber from the lands of plaintiff, as alleged in the complaint? Answer: "Yes."

2. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: "$330."

From the judgment rendered, defendant appealed.

Stevens & Beasley for plaintiff.

E. K. Bryan, H. D. Williams for defendant.

BROWN, J. This appeal involves the same questions that are discussed and decided in the case of *L. H. Bradshaw v. Hilton Lumber Co.,* at this term, *ante,* 219, except the point at which the diameter is to be taken is fixed in the deed. In addition to the matters of law presented in that case, the defendant requested the court to charge the jury that there is no evidence in this case which would justify the jury in finding that the defendant wrongfully and unlawfully cut any timber or trees of the plaintiff, and that the jury should answer the first issue "No."

Upon an examination of the evidence, we find that there is evidence sufficient to go to the jury and that his Honor properly refused to give such instructions. We think it is needless to discuss the evidence or point it out in this opinion.

No error.

E. HARRELL v. HILTON LUMBER COMPANY.

(Filed 11 October, 1916.)

Limitation of Actions—Record—Date of Summons—Judicial Notice.

Where the statute of limitations is relied on and the summons has not been introduced in evidence, the Supreme Court, taking judicial notice of facts and entries of record, will ascertain the date of the summons as it there appears.

CIVIL ACTION tried at January Term, 1916, of DUPLIN, before *Allen, J.*, upon these issues:

1. Did the defendant wrongfully and unlawfully cut and remove timber from the lands of the plaintiff, as alleged in the complaint? Answer: "Yes."

2. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: "$90."

From the judgment rendered, the defendant appealed.

Stevens & Beasley for plaintiff.

E. K. Bryan and H. D. Williams for defendant.

BROWN, J. This case involves the same controversies as the case of *L. H. Bradshaw v. Hilton Lumber Co.*, at this term, *ante*, 219, except the point at which the diameter is to be taken is fixed in the deed, and is governed by what is said in the opinion in that case. The only other assignment of error relates to the statute of limitations, pleaded by the defendant. It was admitted upon the argument that the summons was not read in evidence and that if the Court can take notice of the summons and look at it as a part of the record, then the statute of limitations does not bar a recovery. The summons was a part of the record which the Court will take notice of in order to ascertain when the action was commenced, as the courts will take judicial notice of facts and entries of record in the suit being tried. The point is decided against the defendant in *Harrington v. Wadesboro*, 153 N. C., 437.

No error.

HORACE ELLIOTT v. P. H. BRADY ET AL.

(Filed 11 October, 1916.)

Parties—Deeds and Conveyances—Mortgages—Actions—Accounting.

A purchaser of land from a mortgagor upon consideration that the former pay off the mortgage, the amount of which the latter agreed to ascertain, but failed or refused to do, may maintain his action against the mortgagee as a necessary party, for an accounting, in order that he may relieve the land from the lien of the mortgage, and remove the cloud upon his title. Revisal, sec. 411.

CLARK, C. J., concurring; BROWN, J., concurring.

APPEAL by plaintiff from *Shaw, J.*, at October Term, 1916, of RUTHERFORD.

R. S. Eaves for plaintiff.
C. B. McBrayer for defendant.

ALLEN, J. In August, 1916, the plaintiff purchased a tract of land from defendant O'Neal on which there was a mortgage by her to the other defendants, Brady and wife. The conveyance from her to the plaintiff specified as a consideration the sum of $400, and, in addition, as the complaint alleges, the plaintiff agreed to pay off "such amount as was actually due and collectible on a certain mortgage executed by said O'Neal to the other defendant."

The complaint alleges that under this agreement the plaintiff was bound to pay the amount "legally collectible on said mortgage," and that the grantor O'Neal contracted to ascertain such amount by legal action, but has refused to bring such action or to be joined as a party plaintiff in this action, and for that reason has been made a defendant. Revisal, 411. The defendants Brady and wife, the holders of the mortgage, demurred *ore tenus* that the complaint did not state a cause of action. The court dismissed the action as to them, and the plaintiff appealed.

The sole question presented is whether the complaint states a cause of action as against the holders of the mortgage indebtedness, and upon the motion to dismiss, the facts alleged must be accepted as true.

If so, the plaintiffs agreed to pay what was actually due and collectible on the mortgage held by the defendants Brady and wife; the defendant O'Neal, the grantor of the plaintiffs, agreed to have this amount ascertained and has refused to do so, and there is a controversy as to the amount due.

This, in our opinion, states a cause of action, as the plaintiffs have the right to know how much they owe, so they may relieve their land

of the mortgage, and Brady and wife are necessary parties, as they are the holders of the mortgage.

We refrain from expressing an opinion as to what is actually due and collectible until the facts are developed.

Reversed.

CLARK, C. J., concurring: The sole question presented is whether the plaintiff whose land is charged with payment of the mortgage debt can maintain this action to compel the mortgagees to credit the debt with the usury paid thereon. Revisal, 1951.

The plaintiff having bought the land subject to the mortgage, which he has assumed to pay off, the land is in the position of a surety to the mortgage debt, and therefore the plaintiff is entitled to be protected against the payment of any more than the amount legally due thereon, and can maintain this action against the mortgagees to determine the balance legally due and is entitled to join his grantor to compel her to execute her agreement to ascertain the amount due, and besides she is a necessary party in an action to ascertain such balance.

The land in the hands of the grantee of the mortgagor cannot be subjected by foreclosure sale to the payment of any larger amount than it could have been sold for if it had remained in the ownership and possession of the mortgagor. *Bank v. Loven, ante,* 664.

This is not an action to restrain foreclosure of a mortgage, but it is to compel a statement of the account between the mortgagor and mortgagee as to the balance legally due upon the mortgage debt. In *Erwin v. Morris,* 137 N. C., 48, it was virtually held that a purchaser of land from the mortgagor could bring an action to purge the mortgage debt of usury, or could do so by way of defense; otherwise, the injunction would not have been continued in order to ascertain the terms of the contract between the mortgagor and the grantee as to payment of purchase money.

The authorities seem quite uniform that the grantee of a mortgagor can avail himself of the defense of usury as against the holder of a mortgage on the land unless barred by the contract of purchase. *Bank v. Drew,* 117 Am. St., 231; *Ford v. B. and L. Assn.,* 109 Am. St., 192; *Klapworth v. Dressler,* 78 Am. Dec., 87. If this were not so, then the plaintiff as grantee could not avail himself of the contract that the grantor would ascertain the balance legally due by an action for that purpose, and would be forced to resort to an injunction which under some decisions of this Court might deprive him of the benefit of his contract with the grantor that he should pay only the balance legally collectible, which means, of course, the balance which the mortgagee could have collected out of the land in an action against the mortgagor to determine that amount.

The court should have proceeded to have the account stated for the ascertainment of the balance "legally due and collectible" as between the mortgagor and mortgagee, and the plaintiff is entitled to be exonerated upon payment by him of said amount. He would have no cause of complaint as against the mortgagees beyond the amount of his mortgage if the counter-claim by reason of the usury should under Revisal, 1951, amount to enough to cancel the debt.

The plaintiff is entitled to any relief which the facts stated and proven entitle him to receive, and he is not barred of this because in his prayer for release he asks for more or a different relief from what he is entitled to have. Pell's Revisal, subsec. 3, and numerous cases therein cited. *Gillam v. Ins. Co.*, 121 N. C., 369, and cases cited in Anno Ed.; *McCullock v. R. R.*, 146 N. C., 317; *Bradburn v. Roberts*, 148 N. C., 214, and numerous other cases down to *Bryan v. Canady*, 169 N. C., 583.

BROWN, J., concurring: I concur in the opinion of the Court by *Mr. Justice Allen* upon the ground that the demurrer should be overruled because the complaint states some cause of action. The plaintiff has a right, in my opinion, to maintain the action for the purpose of ascertaining what is "legally collectible on said mortgage," as that is the contract under which he purchased the land. What is "legally collectible on the mortgage" cannot be determined upon demurrer. It can only be adjudicated when the facts are found by the trial court. The plaintiff, having purchased the land from the mortgagor, subject to the mortgage, has no right to set up the plea of usury against the mortgage debt on his own account. The only person who can do that is the mortgagor himself.

As said by *Mr. Justice Hoke* in *Riley v. Sears*, 154 N. C., 519, speaking for a unanimous Court, "It is undoubtedly a sound proposition that if one buys property and agrees to take up a note affected with usury, as a part of the purchase price, he cannot maintain the defense of usury against the note, and for the very sufficient reason that as to him the obligation is not for the loan of money." The same principle is laid down in *Doster v. English*, 152 N. C., 339; *Yarborough v. Hughes*, 139 N. C., 204; and *Stuckey v. Construction Co.*, 61 W. Va., 74.

It must be borne in mind that the plaintiff in this case is seeking the aid of the Court to ascertain the amount legally due on the mortgage, and he is not "the party against whom the action is brought." Therefore, it is possible that he may be brought within the maxim of equity that requires one who seeks equity to do equity. These matters can only be determined when the evidence has been taken and the facts are found.

LUTHER B. TUTHILL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 13 September, 1916.)

Carriers of Goods—Trials—Instructions—Evidence—Nonsuit—Appeal and Error.

In this action to recover of a railroad company damages to a shipment of shoes while in the carrier's possession, and caused by a storm-tide, the sufficiency of the evidence to establish the defendant's liability for failure to recover the shoes does not arise on defendant's appeal, it not having made a motion to nonsuit or requested special instructions thereon.

ACTION tried at May Term, 1916, of BEAUFORT, before *Allen, J.*, upon these issues:

1. Was the property of the plaintiff injured by the negligence of the defendant? Answer: "Yes."

2. If so, what damages is plaintiff entitled to recover? Answer: "$150."

From the judgment rendered, defendant appealed.

Ward & Grimes for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

PER CURIAM. This action is brought to recover damages to a shipment of shoes injured while in the defendant's possession by a storm-tide at Washington, N. C., 2 September, 1913. Upon arrival at said point the shoes were loaded in a box car and moved down to the river, where they were subsequently injured by the storm-tide.

Upon the trial the defendant made no motion to nonsuit and submitted no requests for special instructions to the jury. Therefore, the sufficiency of the evidence to establish the liability of the defendant for failure to remove the shoes in time to avoid injury is not before us.

There are no exceptions to the evidence and the three assignments of error are directed to certain propositions of law contained in the charge, which we think are substantially correct.

Upon the record the judgment is

Affirmed.

ADELINE BRABBLE AND CAROLINE SNOWDEN ET AL.
v. J. L. BRUMSEY.

(Filed 20 September, 1916.)

Appeal and Error—Technical Error—Reversible Error.

Where the controversy over lands depends on the location of a boundary, and it is not disputed that the parties held title under the descriptions contained in their deeds: *Held*, an expression of opinion of the witness as to certain marks having been made with an axe, when this is inconsequential, and a charge of the court as to the character of the possession necessary to take the title out of the State, if technical, are not reversible error.

ACTION tried before *Bond, J.*, and a jury at January Term, 1916, of CURRITUCK. Appeal by the plaintiffs from a judgment in an action to try the title to land and to recover damages for trespass thereon.

Two actions were instituted, one in favor of the plaintiff Brabble and the other in favor of the plaintiff Snowden, and were consolidated. The deed under which the plaintiffs claim called for 65 acres of land, and leaving out the land in controversy, they have $66\frac{9}{10}$ acres. The land in controversy is 3 acres, of which $1\frac{3}{10}$ acres is claimed by the plaintiff Brabble and $1\frac{7}{10}$ acres by the plaintiff Snowden.

Issues were submitted to the jury and they were answered in favor of the defendant, and from the judgments rendered thereon the plaintiffs appealed.

Ehringhaus & Small and Aydlett & Simpson for plaintiffs.
A. M. Simmons and Ward & Thompson for defendant.

PER CURIAM. There are several exceptions in the record which we have examined, none of which will justify ordering a new trial.

Those principally relied on are, first, the statement of the witness that it was his impression that certain marks were made with an axe, and, second, to the charge of the court that the possession must be continuous under color to take the title out of the State.

There is nothing to show that the opinion expressed by the witness as to the mark was material or in any way influenced the verdict, and his Honor did not, in fact, charge as claimed as to the continuity of possession.

If, however, he had done so, and conceding that this would have been technically erroneous, it would not be reversible error for the reason that it was not disputed that the plaintiffs had been in possession of the land within their deeds and outside of the dispute continuously, and the real question for the jury to determine was the location of the boundaries, and this has been settled by the verdict under instructions which are without error.

No error.

L. E. NORFLEET ET ALS. v. TARBORO COTTON FACTORY.

(Filed 20 September, 1916.)

1. Liens—Corporations—Factories—Coal Furnished—Statutes.

Revisal, sec. 1131, confers no lien on the products of a cotton factory corporation in favor of one furnishing coal used in their manufacture, but only the right to enforce their claims by judgment and execution, as against the holders of mortgages upon the corporate property.

2. Liens—Enforcement—Corporations.

As to whether one furnishing coal to a corporation used in the manufacture of its cotton products can claim his lien on the facts of this case, under the provisions of Revisal, sec. 2016, *quere*. But his failure to enforce his asserted lien under the provisions of Revisal, sec. 2027, deprives him of whatever right thereto he may have had.

APPEAL from *Whedbee, J.*, at July Special Term, 1916, of EDGECOMBE.

This action was brought for the purpose of appointing a receiver for the defendant corporation and for dissolving same; on 23 January, 1914, the defendant corporation was placed in the hands of C. A. Johnson, temporary receiver, who thereafter operated same until the March term of the Edgecombe Superior Court, when C. A. Johnson and H. P. Foxhall were appointed permanent receivers, who thereafter operated same until ....., 1914.

The property of the corporation, except stock manufactured and in process and accounts receivable, was sold for $29,000 by order of the court, and sale confirmed at June Term, 1914, and the following order made in said cause at said term:

And it is further ordered that said receivers pay out of the purchase price the allowances to said receivers, commissioners and their attorneys, the cost of this action, to be taxed by the clerk, also the 1915 taxes, and immediately pay over the residue of said purchase money to the clerk of the Superior Court of Edgecombe County.

This cause is retained for further orders.

W. M. BOND,
Judge Presiding.

At said June term the following order was made in said cause:

"The time for filing claims against Tarboro Cotton Factory is hereby extended until 15 August, 1914, on which date said commissioners and receivers are directed to make full report of all claims with their recommendations or finding as to each."

The petitioners in due time filed their claim with the receivers for $492.37, the account set out in the petition, but not the claim on account of the lien, and on 2 September, 1914, they reported the same to the court as a valid claim, as follows, with respect to all claims filed:

"Upon the hearing and investigation of the notes and accounts presented and filed with the said receivers, as appears by their statement thereof, they report that they are allowed against the said Tarboro Cotton Factory and should be paid as far as possible out of the remaining proceeds of the sale of said cotton factory according to the priorities of lien that the court shall adjudge any of them entitled to, except the claim of Percy Bryly, which your receivers report is not valid and should not be allowed or paid."

On 4 June, 1915, the receivers filed their final report, showing a balance in hand of $1,422.68.

An order was thereafter made in the action requiring the amount in the hands of the receivers to be paid into the office of the clerk of the Superior Court to abide the orders of the court.

The claim of the plaintiff is for coal furnished the defendant corporation in November and December, 1913, and used in the manufacture of cloth and yarn, and it claims a lien upon the proceeds of the sale of cloth and yarn.

The notice of the lien was filed in November, 1914, and his petition to enforce the same in October, 1915.

His Honor dismissed the petition, and the petitioner excepted and appealed.

W. C. Howard for appellant.
G. M. T. Fountain & Son for appellee.

PER CURIAM. The petitioner claims a lien under section 1131 and section 2016 of the Revisal.

The first of these sections confers no lien. *Coal Co. v. Electric Co.*, 118 N. C., 232. It only gives those holding claims against a corporation for labor performed or torts committed the right to enforce their claims by judgment and execution as against those holding mortgages upon the property of the corporation.

It is doubtful if the petitioner brings itself within section 2016 of the Revisal; but, conceding that it has done so, it has failed to commence any proceeding for the enforcement of its lien within the time prescribed by statute, Revisal, sec. 2027.

It is also true, as contended by the other claimants, that there is no finding of fact and nothing in the record to show that any part of the funds in the hands of the clerk and upon which the petitioner claims

a lien is any part of the proceeds of the manufactured product of the factory, and it does appear that when the petitioner presented his demand that his claim of lien be recognized, that it was denied by the receivers, and that it filed no exception. and, so far as the record discloses, it made no objection thereto.

In our opinion, after a careful investigation of the record, the ruling of his Honor dismissing the petition must be sustained.

Affirmed.

BROWN v. HARDING.

(Filed 4 October, 1916.)

Appeal and Error—Costs—Brief—Rule of Court.

Costs of brief exceeding twenty pages will not be taxed against the unsuccessful party, under the rule of the Supreme Court.

BROWN, J., not sitting.

PER CURIAM. The rule limiting the number of pages in a brief for which costs may be taxed to twenty pages has not been repealed, and, therefore, the clerk will tax the costs in this case according to that rule. The motion to retax is denied, and the clerk will tax costs to the successful party for briefs at twenty pages.

BROWN, J., not sitting.

PENNIE HOLLOMAN v. CALVIN HOLLOMAN.

(Filed 4 October, 1916.)

1. **Appeal and Error—Case—Service—Objections and Exceptions.**

Technical and immaterial objections made to the service of cases on appeal upon opposing parties are not favored by the Supreme Court; and an appellant may not decide for himself upon the sufficiency of appellee's counter-statement because not served with his own statement attached; the proper procedure being to except to the sufficiency, have it passed upon by the trial judge while settling the case, and, upon an adverse holding, by exception thereto for the Supreme Court.

2. **Same—Recordari—Motion to Affirm.**

Where a counter-case on appeal has been served without appellant's statement attached, and the latter, for that reason, has not requested the

judge to settle the case, but applies for a writ of *certiorari* in the Supreme Court to bring up from the Superior Court his statement, which appellee had filed with his own statement in the clerk's office, and it appears that each statement had been served on the adverse party in time: *Held*, the motion for *certiorari* will be denied; and if no error in the record proper, filed in the appellee's motion, is found, the judgment below will be affirmed.

APPEAL by defendant from *Stacy, J.*, at April Term, 1916, of HERTFORD.

Winborne & Winborne for plaintiff.
R. C. Bridger for defendant.

CLARK, C. J. This is a petition for a *certiorari* by the defendant, who appealed as a pauper. He alleges that by consent the appellant was allowed sixty days to serve the case on appeal and the appellee sixty days thereafter to serve his counter-case or exceptions; that on 26 June, within the time agreed, the appellant served his case on appeal and that on 10 July, 1916, the appellee served what purported to be her exceptions or counter-case, which the appellant deemed insufficient under Revisal, 591, for the reason that the appellee did not return with his counter-case the copy of the appellant's statement of his case, "with her approval of the specific amendments indorsed or attached," he did not send the papers to the judge to settle the case on appeal, and he asks that this Court send a *certiorari* to the clerk's office to send up the appellant's statement of the case on appeal as the "statement of the case."

The appellee files an affidavit in reply, stating that the appellee duly served its counter-case on the defendant's counsel on 10 July, well within the time allowed, and that, further, about the middle of July, 1916, appellee's counsel wrote to the judge by whom the case was tried, inquiring what had been done about settling the case on appeal, to which the judge replied that no papers had been sent to him and that he had heard nothing from it, and that at request of the judge they sent him copies of the evidence, the exceptions taken on the trial, and the court's charge, as taken down by the court stenographer, and that on 9 August, 1916, within the sixty days allowed appellee, Judge Stacy returned all these to plaintiff's counsel with the statement: "I have not been requested to settle this case, and am returning the papers you sent me."

The failure of the appellee to return a copy of the case on appeal served on her by the appellant was not such a default as entitled the appellant to decide in his own favor that it was fatal. If the appellant had wished to take advantage of such supposed defect he should have

sent the papers to the judge, raising this exception, in order that the judge might pass upon such exception, and that his ruling, together with the case on appeal as settled by the judge, should come up to this Court. In that event the whole matter would have been disposed of at once. If this Court should have held that the defect was fatal, the appeal would have been dismissed at appellee's cost. If the Court should have held otherwise, then the cause would have been argued and decided upon the case as settled by the judge.

In deciding for himself that the appellee had committed a fatal error the appellant himself was in default. If he had for any reason needed the return of his copy of the case on appeal, which he had served on the appellee, he could doubtless have had it upon request made known to the appellee's counsel. If this had not been done, and the appellant had kept no copy of his own case, matters might have been different. But in fact the appellant avers that he had filed a copy of the case in the clerk's office, and it is that case which he now wishes this Court to procure by *certiorari,* that it may be treated as the case on appeal. The appellee's counter-case was served on appellant 10 July and also filed in clerk's office 27 July, both within the time, and there was no reason the case should not have been sent to the judge to settle.

The Court does not favor such unnecessary and technical objections. The appellant was put to no inconvenience by the failure of the appellee to return his copy of the case on appeal and made no objection that it had not been returned, and had another copy himself. The appellee could file either specific objections or a counter-case, *S. v. Gooch,* 94 N. C., 982, and cases cited in Anno. Ed.

Under these circumstances the motion for a *certiorari* is denied, and there being no case on appeal filed in this Court by the default of the appellant, and the only record before us being the record proper, on inspection of which we find no error, the motion of the appellee to affirm is allowed.

Motion by appellant for *certiorari,* Denied.

On motion by appellee, Affirmed.

CANDACE POE v. J. R. BRIGHT.

(Filed 4 October, 1916.)

Mortgages — Payment — Foreclosure — Principal and Agent — Purchase by Mortgagee—Judgments.

There being evidence in this case that the mortgagee of lands sold the same by foreclosure after the mortgage debt had been paid, and that the purchaser acted for, and has reconveyed the lands to him, and the jury having so found, under a proper charge, these as facts by their verdict, a decree of the court that the mortgage be satisfied of record and that the attempted foreclosure was void, etc., is a correct one.

ACTION, tried before *Lyon, J.*, at March Term, 1916, of LEE, upon these issues:

1. Was the mortgage dated 20 March, 1889, satisfied by the plaintiff before the alleged sale of the land by Bright to Johnson? Answer: "Yes."

2. Was the mortgage duly foreclosed as provided therein? Answer: "No."

3. What amount, if anything, is the defendant indebted to the plaintiff? Answer: "$88."

The court rendered judgment in favor of the plaintiff, decreeing that the mortgage set out in the complaint be satisfied of record; that the sale and attempted foreclosure was void; and that the plaintiff recover of the defendant the sum of $88, with interest. From this judgment the defendant appealed.

R. H. Hayes, Hoyle & Hoyle for plaintiff.
Williams & Williams, A. A. F. Seawell for defendant.

PER CURIAM. This action is brought to recover possession of a certain piece of land conveyed by mortgage from the plaintiff to the defendant. There was a foreclosure of the mortgage and the property was purchased by one Johnson, the only bidder, for $200. The plaintiff alleges that at the time of the sale the mortgage had been fully satisfied; that Johnson purchased for Bright, the mortgagee, who furnished a part of the money; that Johnson a few months after the sale reconveyed the property to Bright, the defendant. The jury have established these facts in their answer to the issues. We have examined the three assignments of error relating to the admission of evidence, and find them to be without merit.

The motion to nonsuit was properly denied, as there is abundant evidence tending to prove that the mortgage was satisfied, and paid at

the time of the sale, and that Johnson purchased the land for the defendant. The exceptions to the charge are without merit. His Honor presented the case to the jury in a clear, comprehensive, and forceful charge, which we find to be free from error.

No error.

JOEL E. DEBRUHL v. NEW BERN BANKING AND TRUST COMPANY.

(Filed 4 October, 1916.)

Contracts—Services Rendered Deceased—Promised Consideration—Executors and Administrators.

Evidence that the plaintiffs cared for the deceased and his aged and blind wife for a number of years; that both were helpless, requiring constant nursing and attention, given and received in expectation of compensation, is sufficient to sustain the verdict in plaintiff's favor in this case, as to the reasonable value of such services.

ALLEN, J., did not sit.

ACTION tried before *Whedbee, J.*, and a jury, at May Term, 1916, of CRAVEN.

On issues submitted, the jury rendered the following verdict:

1. Did David E. Debruhl, the testator of defendant, contract and agree with the plaintiff that if plaintiff would render the services declared on the complaint that he would will to the plaintiff his entire estate, as alleged? Answer: "No."

5. If "No" to first issue, is the defendant indebted to plaintiff for services rendered by plaintiff and wife to testator of defendant during the three years next preceding the death of said David E. Debruhl, and if so, in what sum? Answer: "Yes, $1,500 and interest."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

A. D. Ward and William F. Ward for plaintiff.
Moore & Dunn and T. D. Warren for defendant.

PER CURIAM. The Court is unable to see any reason why this verdict and judgment should be disturbed. There was allegation, with evidence on the part of plaintiff tending to show, that for ten years before testator died plaintiff had performed faithful and onerous duties in caring for and looking after the testator and his aged wife, and for the last three years the said testator had lived in the home of plaintiff,

and his wife with him till she died, about six months before her husband; that when they came to plaintiff's house to live the wife was blind and he had consumption, and both were old, feeble, and practically helpless, requiring almost constant attention, and that the services were well worth $2,500.

There was also evidence on the part of plaintiff that their services were given and received in expectation of being paid for, and some of the testimony tended to show that they were given and received under a contract that the testator was to will plaintiff his property.

The jury found there was no contract to will the property, but that the services rendered by plaintiff to the testator for the last three years of his life were reasonably worth the sum of $1,500 and under the charge of his Honor that these services were given and received in expectation of being paid for. *Winkler v. Killian,* 141 N. C., 575.

There is no ground for complaint on the part of defendant as to the manner in which the case was presented to the jury, and the facts in evidence are in full support of the verdict rendered.

No error.

ALLEN, J., did not sit.

IN RE WILL OF KENNETH H. FLEMING.

(Filed 4 October, 1916.)

Wills—Trials—Change of Issues—Prejudice—Instructions—Mental Capacity.

Where in an action to caveat a will the trial judge has stated that he will submit three issues, as to the execution of the will, mental capacity of testator, and undue influence, and it is admitted that the will was executed, and there was no evidence of undue influence: *Held,* it was not prejudicial to the caveators that the court only submitted the usual issue relating to the execution and validity of the will. The charge as to the degree of mental capacity required is approved.

ISSUE of *devisavit vel non,* tried at March Term, 1916, of PITT, before *Whedbee, J.*

Upon the submission of the usual issue, the jury found that the paper-writing propounded for probate was the last will and testament of K. H. Fleming, deceased.

Harry Skinner, W. F. Evans, Albion Dunn for caveators, appellants.

Harding & Pierce, S. J. Everett and F. G. James & Son for propounders, appellees.

PER CURIAM. We have examined the ten assignments of error relating to the admission of testimony over the objection of the caveators, and find them to be without merit. The court stated, in the presence of the jury, at the beginning of the introduction of evidence, that he would submit three issues tendered by the caveators and that he would answer the first issue "Yes" and the third issue "No." Instead of submitting the three issues, he submitted only one, which is the usual issue submitted in a controversy relating to the execution and validity of a will.

We do not think that the caveators were prejudiced at all by the action of his Honor. The first issue tendered by them related to the execution of the will; the second, to the mental capacity of the testator; and the third, to undue influence. The execution of the will was admitted, and we agree with his Honor that there is no sufficient evidence of any undue influence. The question of the mental capacity of the testator was submitted to the jury in a charge free from error. We think the standard of mental capacity laid down by his Honor, that "A person has testamentary capacity within the meaning of the law if he has a clear understanding of the nature of the business in which he is engaged, of the kind and value of the property devised, of the persons who are the natural objects of his bounty, and of the manner in which he desires his property to be distributed," has been approved by this Court in many decisions. *Wood v. Sawyer,* 61 N. C., 277.

No error.

A. E. MYERS & CO. v. NORFOLK SOUTHERN RAILROAD COMPANY ET AL.

(Filed 4 October, 1916.)

CIVIL ACTION tried before *Whedbee, J.,* at May Term, 1916, of CRAVEN.

This is an action to recover damages for failure to deliver a car-load of potatoes.

The facts are fully stated in the report of the case on former appeal, 171 N. C., 190.

There was a judgment in favor of the plaintiff, and the defendant appealed.

T. D. Warren for plaintiff.
Moore & Dunn and W. B. Rodman for defendant.

PER CURIAM. We have carefully examined the record, and find no error. The evidence is almost identical with that offered upon the former hearing, and the case has been tried in accordance with the opinion of this Court.

No error.

A. S. COPELAND ET AL. v. F. M. HOWARD.

(Filed 11 October, 1916.)

Contracts, Written—Parol Evidence.

Parol evidence that at the time of the execution of a promissory note the parties agreed that the due date would be at a different time from that therein stated is inadmissible, as varying the terms of the writing.

APPEAL from *Bond, J.*, at April Term, 1916, of LENOIR.

This is an action upon a note executed by the defendant and payable on 1 January, 1915.

The defendant offered to prove that at the time of the execution of the note an agreement was entered into between him and the plaintiff that the note should not be paid until two years from its date. This evidence was excluded, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Loftin, Dawson & Manning and C. M. Allen for plaintiffs.
T. C. Wooten and Joe Dawson for defendant.

PER CURIAM. The evidence was properly excluded, because in direct contradiction of the terms of the writing. *Walker v. Venters,* 148 N. C., 388; *Basnight v. Jobbing Co.,* 148 N. C., 350.

No error.

NETTIE TAYLOR, ADMINISTRATRIX, v. COLE MANUFACTURING COMPANY.

(Filed 11 October, 1916.)

APPEAL from *Allen, J.*, at February Term, 1916, of SAMPSON, in an action to recover damages for wrongful death.

There was a verdict and judgment in favor of the plaintiff, and the defendant excepted and appealed.

Butler & Herring for plaintiff.
Grady & Graham for defendant.

PER CURIAM. We have carefully examined the exceptions contained in the record, and find no sufficient reason for disturbing the verdict and judgment.

No error.

VINSON, JONES & FINCH, INC. v. J. H. PUGH AND J. FRANK WOOTEN.

(Filed 11 October, 1916.)

Pleadings—Demurrer—Fraud—Good Faith.

In this case the complaint alleged that one of the defendants, with the advice and suggestion of the other, unlawfully, with intent to hinder, delay, and defeat plaintiff's recovery, burnt certain deeds and papers, and it appearing that findings as to good faith were necessary for a proper determination, it is *Held* that the demurrer was properly overruled.

CIVIL ACTION heard upon demurrer at March Term, 1916, of SAMPSON. A demurrer was interposed by defendant Wooten. The court, *Bond, J.*, presiding, overruled the demurrer, and said defendant appealed.

No counsel for plaintiff.
T. C. Wooten and G. V. Cowper for defendant Wooten.

PER CURIAM. The allegations of the complaint are so very voluminous, and the liability of defendant Wooten depends so much upon his good faith in the discharge of the duty he assumed, that it is difficult to determine it without findings of facts. The complaint alleges and the demurrer admits that Wooten received a part of the purchase money and afterwards refused to deliver the deed, and "the defendant J. Frank Wooten unlawfully, and with the purpose and intent to hinder, delay, and defeat the plaintiff in its lawful recovery in this action, took said deed, draft, and statement, and with the advice and suggestion of his codefendant, James H. Pugh, burned the same to prevent the plaintiff and the court from examining and using the same in the trial of this action."

We think his Honor properly overruled the demurrer, and required the defendant to answer.

Affirmed.

ROBERT S. HUTCHINSON, RECEIVER, v. BOARD OF COMMISSIONERS OF IREDELL COUNTY.

(Filed 19 December, 1916.)

Mechanics' Liens—Public Buildings — Liens—Trust Funds — Distribution—Statutes.

One furnishing material to a contractor for a public building can acquire no lien thereon under the statute, and notice given to the commissioners gives him no right of distribution in the funds in their hands due to the contractor; hence, the commissioners are without authority to deduct the amount due such material man from that due the contractor before payment, and a receiver of the contractor may recover the full amount thereof.

APPEAL from *Ferguson, J.*, at Fall Term, 1916, of IREDELL.

This is an action by the receiver of the Soloman Construction Company to recover $1,498.86.

On 11 April, 1913, the Soloman Construction Company, a corporation, entered into a contract with the county of Iredell for the erection and completion of a county home at and for the price of $25,800, and thereafter did extra and additional work of the value of $68, and sold the county some lumber of the value of $10.53, making a total of $25,878.53.

The defendant paid the Soloman Construction Company, on its contract, including small items to complete the buildings and replace defective concrete, a total sum of $24,379.98, leaving a balance due of $1,490.86, for which the plaintiff in this action obtained judgment.

On 11 February, 1914, plaintiff was appointed receiver for the Soloman Construction Company. At the time of the appointment of a receiver the contract was practically completed, but final settlement had not been made.

The Soloman Construction Company sublet the contract for the painting to Lon G. Cruse Company, for $670. On 30 January, 1914, eleven days before the receivership, the Lon G. Cruse Company filed a notice and claim of lien with the chairman of the board of county commissioners. On 13 February, 1914, plaintiff notified the chairman of the board of county commissioners of his appointment as receiver for the Soloman Construction Company.

On 25 May, 1914, the chairman of the board of commissioners directed that an order issue for $664.75, to Duckworth & Smith, attorneys, in payment of the Cruse claim of $670, $5.25 having been deducted for work done by the county, and on 2 June, 1914, a voucher, authorized by the board of commissioners, was issued for $664.75 in full of the Cruse claim.

On 4 June, 1914, the defendant tendered plaintiff a check for $758.75, in full settlement of all amounts due the Soloman Construction Company, the sum tendered representing the amount it admitted to be due under the contract, less the Cruse claim. Plaintiff declined to accept this check as tendered.

Plaintiff brought this action in the Superior Court of Iredell County to recover the balance due under the contract, and by agreement it was referred to W. B. Gaither, Esq., of Newton, N. C., to take and state the account between the parties and report his findings of fact and conclusions of law to the court.

The referee finds that the item of $664.75, paid to Duckworth & Smith, attorneys for Lon G. Cruse Company, should not be deducted from the balance due plaintiff as receiver for the Soloman Construction Company under its contract with the county.

Upon the coming in of the referee's report, his Honor, Judge Ferguson, affirmed the referee's findings of fact and conclusions of law as to this item.

Judgment was rendered in favor of the plaintiff, and the defendant appealed.

A. B. Justice, H. P. Grier, and H. C. Jones for plaintiff.
Caldwell & Caldwell for defendant.

PER CURIAM. The decision in *Foundry Co. v. Aluminum Co., ante,* 702, is controlling on the appeal in this action.

It was there held that the right of one furnishing materials to share in the fund due by the owner to the contractor is statutory and is dependent upon acquiring a lien on the property, and if no lien on the property is or can be acquired, that no duty or obligation is imposed on the owner by giving notice, and the authorities are all to the effect that no lien can be acquired against public buildings. *Snow v. Comrs.,* 112 N. C., 341; *Hardware Co. v. Schools,* 150 N. C., 680.

It follows that as the Cruse Company acquired no lien upon the property by giving notice to the owner, it thereby imposed no obligation upon the owner with reference to the amount due the contractor, and that the defendant made payment to the Cruse Company of its own motion and when under no duty to do so, and that the amount paid cannot be allowed as a credit against the plaintiff receiver.

Affirmed.

J. M. LEE v. J. A. AND J. W. ROWE.

(Filed 18 October, 1916.)

Instructions—Lands—Commissioners to Allot—Mistake in Description.

Where commissioners have duly allotted to the several claimants their interest in certain lands, a charge of the court, upon the evidence, is correct that if the jury found the commissioners in allotting the shares actually went upon the land and put up stakes as marking lines of each share, the actual allotment as made by them would control a mistake, if any, made in the written description. *Clark v. Aldridge,* 162 N. C., 326, cited and applied.

ACTION tried before *Daniels, J.,* September Term, 1915, of PENDER, upon these issues:

1. What is the true dividing line between plaintiff's and defendant's land? Answer: "From H to the river."

2. Did the defendant wrongfully and unlawfully trespass upon same or any part thereof? Answer: "Yes."

From the judgment rendered, defendant appealed.

Bland & Bland, E. K. Bryan for plaintiff.

H. L. Stevens and C. E. McCullen for defendant.

PER CURIAM. It was admitted that the plaintiff was the owner of lot No. 3 in the division of the lands of Thomas Lee, deceased, and that the defendant was the owner of lot No. 4 in the division of the lands of Thomas Lee, deceased, and the question in this case was, Where is the true boundary line between the said lots?

It was admitted that there was not sufficient evidence of adverse possession by the plaintiff and those under whom he claims to ripen title to any part of the said lands outside of the boundaries of the deed.

It is conceded, and also stated in the judgment, that if the jury should find that the line running from H to the river on the map prepared by the referee was the true dividing line, then the plaintiff is the owner of the lands in controversy. We have examined the assignment of error relating to the admission of testimony and find them to be without merit.

His Honor charged the jury that if they found the commissioners in allotting the shares actually went upon the land and put up stakes as marking the lines of each share, that then the actual allotment as made by the commissioners would control the written description, if the commissioners made a mistake in writing out their description as they had actually allotted it on the ground. The charge is sustained by the following authorities: *Clarke v. Aldridge,* 162 N. C., 326; *Allison v. Kenion,* 163 N. C., 582; *Higdon v. Rice,* 119 N. C., 623.

No error.

W. L. WYATT v. CITY OF RALEIGH.

(Filed 18 October, 1916.)

Appeal and Error—Issues—Objections and Exceptions—Harmless Error.

Where the action to recover damages for the negligent killing of a mule has been submitted upon the three issues of negligence, contributory negligence, and amount of damage, a charge upon the second issue, answered "Yes," if erroneous, is not reversible error as to plaintiff, when the jury have answered the first "No," to which no exception was taken by him.

ACTION tried at June Term, 1916, of WAKE, before *Connor, J.*, upon these issues:

1. Was the plaintiff's mule killed as a result of the negligence of defendant, as alleged in the complaint? Answer: "No."

2. If so, did plaintiff contribute by his own negligence to the cause of the death of the said mule? Answer: "Yes."

3. What sum, if any, is plaintiff entitled to recover of the defendant as damages? Answer: .....

From the judgment rendered, plaintiff appealed.

Willis Smith for plaintiff.
John W. Hinsdale, Jr., for defendant.

PER CURIAM. The only assignment of error relating to the evidence is to that of George M. Harden, who testified as to the condition of the streets of Raleigh on the morning that the accident occurred, and it is without merit. The other assignments of error, six in number, all relate to the first issue, referring to the alleged negligence of the defendant.

The said assignments are without merit. The charge is a clear and correct presentation of the well settled principles of law applicable to this case. But if the charge was in some respects erroneous, as contended by the plaintiff, it would not matter, for the jury found the second issue against the plaintiff, and there are no assignments of error as to the charge upon that issue.

No error.

H. W. AND J. C. WEBB v. J. C. ROSEMOND.

(Filed 25 October, 1916.)

1. Appeal and Error—Trials—Distinct Theories.

A party is not permitted to try his case in the Superior Court on one theory and have it determined in this Court, on appeal, upon an entirely different one.

2. Appeal and Error—Objections and Exceptions—Instructions—Special Requests.

Exception that a charge by the judge was not sufficiently full or explicit, or that it did not cover a phase of the controversy, should be taken to the refusal of the court to give requests for special instructions aptly tendered.

3. Contracts—Statute of Frauds—Orders to Pay Moneys—Wages—Parol Evidence—Waiver.

An order to pay laborer's wages for sawing logs is not required by the statute of frauds to be in writing; but where the statute is applicable, the admission of parol evidence, without objection, will be deemed a waiver of rights thereunder.

4. Evidence—Burden of Proof—Trials—Instructions.

In this action to hold the drawer of an order primarily responsible to the plaintiff, a third person who had cashed them, the burden of proof was properly placed on the plaintiff, under the instructions given.

ACTION tried before *Devin, J.*, and a jury, at March Term, 1916, of ORANGE, on appeal from the court of a justice of the peace.

The plaintiffs alleged liability of the defendant on certain cedar log orders, to the amount of $199, under the circumstances and conditions set out in the evidence. The defendant denied any liability. There was a verdict in favor of defendant, judgment, and appeal by plaintiff.

J. W. Graham and A. H. Graham for plaintiff.
Frank Nash for defendant.

PER CURIAM. There was evidence tending to show that the defendant had agreed to pay to parties, who cashed the same, the amount of orders given to divers persons for cedar logs, which had been delivered to defendant, who sawed them for Massey-Walker Lumber Company of Roanoke, Va. As the logs were delivered to defendant, he would give a written order to the party, who delivered them, in the following form:

HILLSBORO, N. C.

Pay to John Doe five $^{50}/_{100}$ dollars for cedar logs.

(Signed) J. C. ROSEMOND.

In the margin of the order were these words: "Present or mail to Massey-Walker Lumber Company, Roanoke, Va."

Plaintiffs introduced evidence tending to show that defendant had requested plaintiffs to cash some of the orders, promising if they would do so that he would see them paid, and that they did cash orders amounting to $199, which had not been paid by defendant nor the Massey-Walker Lumber Company. Defendant's testimony tended to show that parties who cashed the orders, including plaintiffs, well knew that he was acting only as agent of the Massey-Walker Lumber Company and was assuming no personal liability upon the orders either to the parties to whom they were made or to those who cashed the same for said parties, nor had he promised the latter that he would pay the same to them. Plaintiffs' testimony also tended to show that Rosemond was not acting as agent merely for the Massey-Walker Lumber Company, but was acting for himself in carrying on the business of buying and sawing cedar and other kinds of logs, and for this reason he had made the promise to pay the same to plaintiffs who had cashed the same, at his special request and relying upon said promise.

The court charged the jury as follows:

"1. If you find from this evidence, and by the greater weight thereof, that defendant Rosemond entered into an agreement with these plaintiffs, H. W. and J. C. Webb, whereby plaintiffs were to cash these orders issued to persons from whom he purchased logs and lumber or posts with the agreement that he would see them paid, and that this agreement was the original obligation of Rosemond, credit being given to him therefor, and if, in pursuance of such agreement, orders for the payment of money to different persons in the sum of $199 were cashed by plaintiffs, those orders being drawn and signed by J. C. Rosemond—if you find these to be the facts, it will be your duty to answer the issue $199 and write the figures $199 under the same.

"2. If you find the plaintiffs were cashing these orders for the Massey-Walker Lumber Company, and that the agreement between the plaintiffs and defendant in effect was that Rosemond was agent of the Massey-Walker Lumber Company, and was to certify the amount in these orders for lumber for which Massey was to pay, and for which Massey was paying, and the plaintiffs undertook, in effect, to cash the orders for them and to act as fiscal agent for Massey, the defendant would not be liable; and if you so find, it would be your duty to answer the issue 'No' or 'Nothing.'"

There was evidence in the case to support the view of the case as stated in the two instructions set forth above. The court stated fully the contentions of the parties with respect to the issue between them as indicated in the said instructions. There was no request, at any time during the trial, to state any other contention nor was there any objection, during the trial and before verdict, to make any other or further statement of the contention, nor was there any prayer for instructions of any kind, and no objections to the course of the trial, save one, until after it was concluded and the jury had rendered the verdict, nor until defendants filed exceptions to and assigned errors in the charge.

The case was tried throughout before the jury on the theory that the plaintiffs had cashed the orders upon the defendant's express and original promise to pay the same if the Massey-Walker Lumber Company failed to do so. There are several reasons, as we think, for affirming the judgment.

First. A party is not permitted to try his case in the Superior Court upon one theory and ask us to hear it here upon another and different theory. It has been an invariable rule with us to hear a cause here according to the theory upon which it was tried in the Superior Court. *Allen v. R. R.*, 119 N. C., 710; *Warren v. Susman*, 168 N. C., 457, and *Coble v. Barringer*, 171 N. C., 445, 447, where the cases are collected. It was said in *Allen v. R. R., supra:* "While we are not bound by an erroneous admission of a proposition of law, we must have respect to the manner in which parties present and try their cases." The reason for this rule is an adequate one, as any other course would be unjust to the judge who presided at the trial and to the appellant, and, besides, where a party has selected the ground upon which he will wage battle before the jury, and has had a fair chance of winning on his chosen field, he should not be allowed to have another chance, after losing, by shifting his ground in this Court to some other position, which he had not taken when he had a fair opportunity of doing so. He may have thought it wise to risk his fortunes upon a single strong position rather than take another also, which might tend to weaken it. But whatever the reason was, he can have, here, only the one chance.

Second. If a party desires an instruction upon a phase of the case which is not presented in the charge, or as fully stated as he may think it should be, his remedy is to request a special instruction in regard to it. *Simmons v. Davenport*, 140 N. C., 407. It was there said: "A party cannot ordinarily avail himself of any failure to charge in a particular way, and certainly not of the omission to give any special instruction, unless he had called the attention of the court to the matter

by a proper prayer for instructions. So if a party would have the evidence recapitulated or any phase of the case arising thereon presented in the charge, a special instruction should be requested." *Boon v. Murphy,* 108 N. C., 187. "It also is a familiar rule that if a party desires a more particular charge on any given question, or to present by an instruction any special phase of the case arising upon the evidence, he should bring the matter to the attention of the court by a special instruction." *Coal Co. v. Fain,* 171 N. C., 646, 648; *Gray v. Mitchell,* 146 N. C., 509. The cases sustaining the rule are numerous. *McKinnon v. Morrison,* 104 N. C., 354; *Pate v. Bank,* 162 N. C., 508; *Monds v. Town of Dunn,* 163 N. C., 109. The case of *Pate v. Bank, supra,* is somewhat analogous to this one, and there it was said: "The plaintiff excepted upon the ground that the presiding judge should have charged that the entry of both deposits on the stub of plaintiff's check book by the cashier was prima facie evidence that the deposits were made. No such instruction was requested by the plaintiff, and, in the absence of a special prayer, the omission to so charge, there being no affirmative error, is not ground for reversal, even if plaintiff would have been entitled to the instruction," citing *McKinnon v. Morrison, supra,* and *Simmons v. Davenport, supra.* The plaintiffs now insist that the court should have presented the view to the jury that defendant was liable on the written orders, whether the special promise to pay them was made by him or not; but if they desired this to be done they should have called it to the judge's attention by a special prayer, and in the absence of one, it is to be presumed that they did not desire that phase presented to the jury, but preferred to rely on the promise alone.

Third. All of the evidence as to the real contract between the parties was admitted without objection, and, therefore, the judge might well submit it to the jury. even if he would have excluded it if objection had been made in due time. This is not a case where the agreement, or some memorandum thereof, is required by the statute of frauds to be in writing. If these orders are that kind of a written contract which could not be explained, varied, or contradicted by parol, the rule of evidence governing such a case can be waived by allowing the testimony to come in without objection. In this view, even if the judge should, upon request duly made, have charged that defendant was liable on the orders, he should not have done so without directing the attention of the jury to the testimony as to the true agreement. They have evidently found, under the evidence, that Rosemond was acting not for himself, but as agent of Massey-Walker Lumber Company, and that the orders were drawn with the marginal direction, "Present or mail to Massey-Walker Lumber Company, Roanoke, Va.," so as to

indicate the true relation of defendant to the transaction. But whatever view we take of the case, there was no objection to the testimony and no prayer for instructions. It is too late, after verdict, to complain of the result.

The charge of the court, as to the burden of proof, was correct, as it merely stated that the burden was upon the plaintiff to show "that the defendant is indebted to them, and as to the amount thereof." That embodied the very form of the issue, which was, "Is the defendant indebted to the plaintiffs, and if so, in what amount?" So that the instruction was equivalent to saying that the burden of the issue was upon the plaintiffs.

We find no error in the case, and certainly no reversible error.

No error.

ABRAHAM M. ELLIS, TRADING AS ELLIS BROTHERS, v. MIDWAY IMPROVEMENT COMPANY ET AL.

(Filed 1 November, 1916.)

Issues—Appeal and Error—Principal and Surety.

The submission of issues to the jury which afforded the appellant opportunity to offer all material evidence and make proper defenses will not be considered as reversible error; and in this case one issue as to the liability of a principal and surety under a bond given by them was proper, the liability of each thereunder being the same.

ACTION tried at January Term, 1916, of ALAMANCE, before *Devin, J.*, upon this issue:

Are defendants indebted to the plaintiffs, and if so, in what sum? Answer: "$662.04 and interest."

Brooks, Sapp & Williams for plaintiff.

E. S. W. Dameron, E. S. Parker, Jr., for defendants.

PER CURIAM. The two exceptions to the evidence, in our opinion, are without merit. The refusal of the trial judge to submit the two issues tendered by defendants is no ground for a new trial. The defendants had opportunity to offer any material evidence and make any appropriate defense under the issue submitted. It was not necessary to submit separate issues as to the liability of sureties, as by the terms of the bond sued on their liability is the same as that of the principal as to the payment of the amount due under the contract.

The exception to the charge is without merit. If the evidence is taken to be true, the sum due was correctly stated.

No error.

MRS. AMANDA ROBINSON v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS.

(Filed 15 November, 1916.)

ACTION to recover on insurance policy in defendant order, tried before *Cline, J.*, and a jury, at March Term, 1916. of GUILFORD.

There was verdict for plaintiff. Judgment thereon, and defendant excepted and appealed.

T. C. Hoyle and Brooks, Sapp & Williams for plaintiff.
J. I. Scales for defendant.

PER CURIAM. This cause was before us on a former appeal, and a full statement of the relevant facts and positions of law involved will be found in report of said case in 170 N. C., p. 545.

On that appeal a new trial was awarded to defendant, and this opinion having been certified down, the cause was tried before his Honor, E. B. Cline, judge, and a jury, and plaintiff again recovered.

We have given the present record careful consideration and are of opinion that the case has been tried and the rights of the parties determined in strict accordance with the principles announced in our former decision, and no error has been made to appear.

The judgment is therefore affirmed.

No error.

A. N. MCMILLAN v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 29 November, 1916.)

1. Railroads — Automobiles — Collisions — Negligence — Proximate Cause— Trials—Evidence—Questions for Jury.

Where an intestate is killed by a collision of an automobile in which he was riding, independently driven by another, with defendant's train at a crossing, the question of contributory negligence does not arise, and it is held in this case that the only question presented was, under conflicting evidence, that of proximate cause, for the jury to determine, which was submitted under proper instructions, as to the duty of the engineer to persons on or near the track. *Rosser v. Bynum*, 168 N. C., 340; *Treadwell v. R. R.*, 169 N. C., 394, cited and applied.

2. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

Objection that the trial judge incorrectly stated appellant's contentions should be made at the time to afford opportunity for correction, or an exception thereto will not be considered on appeal.

3. Appeal and Error—Instructions—Objections and Exceptions—Special Requests.

Ordinarily the presentation of any special theory of a case omitted by the trial judge in his charge should be by special request, and exception to the refusal of the court to so charge, in order to have it reviewed on appeal.

4. Appeal and Error—Objections and Exceptions—Evidence—Questions and Answers.

Exceptions to questions asked a witness, which were ruled out, will not be considered when it does not appear what the expected answers would have been.

5. Railroads—Automobiles—Independently Driven—Crossings—Negligence—Evidence—Proximate Cause—Trials.

Where intestate is killed by a collision by an automobile in which he was riding, independently driven by another, with a train at a crossing, the negligence of the driver may only be considered upon the question of proximate cause, in the administrator's action against the railroad.

6. Railroads—Automobiles—Crossings—Signals—Subsequent Charges—Evidence.

In an action against a railroad company for damages for the alleged negligent killing of plaintiff's intestate in a collision while riding in an automobile with defendant's train at a crossing, evidence of subsequent changes in signals or warnings for additional safety made there by the defendant is incompetent, the case falling within the application of the general rule and not the exceptions.

Clark, C. J., concurring in result, discusses grade crossings.

Action tried before *Carter, J.,* at April Term, 1916, of Gaston.

Plaintiff alleged that his intestate, J. W. Stout, was killed by a collision between an automobile, driven by another, in which he was riding, and a train of defendant at a crossing in East Kings Mountain on 17 August, 1914, and that his death was caused by defendant's negligence. The jury returned the following verdict:

1. Was the plaintiff's intestate killed by the negligence of the servants and agents of the Southern Railway Company, as alleged in the complaint? Answer: "No."

2. What damage, if any, is plaintiff entitled to recover? No answer.

Judgment thereon, and defendant appealed.

Mangum & Woltz, N. F. McMillan for plaintiff.

O. F. Mason, George B. Mason, F. M. Shannonhouse and W. S. Beam for defendant.

Per Curiam. There was no issue as to contributory negligence, and there was no such question in the case, as it was not tried upon that theory, but rather upon the question of proximate cause. We have

examined the charge carefully and find it to be an accurate statement of the law as applicable to the facts, and it was in exact accordance with the principles as laid down by this Court in *Crampton v. Ivie,* 126 N. C., 894, and *Bagwell v. R. R.,* 167 N. C., 611. See, also, 2 Ruling Case Law, p. 1205. The questions were as to who was negligent and as to whose negligence was the proximate cause of the intestate's death, unaffected by any contributory negligence on his part. This controversy was submitted to the jury clearly and explicitly, with a fair and impartial statement of the several contentions and a correct application of the law to the facts as the jury might find them to be, following closely the above cited cases. The court instructed the jury that "There is no question of contributory negligence in the case, since the law does not impute the negligence of the driver of the automobile to plaintiff's intestate." The rules in regard to positive and negative testimony (*S. v. Murray,* 139 N. C., 540; *Rosser v. Bynum,* 168 N. C., 340), and the duty of the engineer to persons on or near the track of a railroad, were properly stated by the court and with apt illustration. *Syme v. R. R.,* 113 N. C., 558; *Treadwell v. R. R.,* 169 N. C., 694; 33 Cyc., 800. If the contentions of the respective parties were incorrectly given, it was required of plaintiff that the judge's attention should be called to the error in due time, so that he might correct it. *Nevin v. Hughes,* 168 N. C., 477. If the defendant desired that the court submit to the jury any special theory of the case, which was supported by evidence, he should have asked for an appropriate instruction. *Penn v. Ins. Co.,* 160 N. C., 399. But the contentions of the parties were fully and fairly stated to the jury with proper discrimination as to their bearing upon the issues, and plaintiff has no cause to complain on this score.

There are some questions of evidence, but none of them, had there been any error, is of importance enough to warrant a reversal. The judge was correct in all these rulings. As to some of the questions excluded there was no sufficient indication of what the witness would have answered, and others had no substantial relevancy to the case. The evidence admitted on plaintiff's objections was clearly competent. The requests for instructions as to contributory negligence were given in the charge to the extent that plaintiff was entitled to them. The negligence of the driver was permitted to be considered by the jury only upon the question of proximate cause, and this view is sustained by *Crampton v. Ivie, supra,* and *Bagwell v. R. R., supra.* The subsequent changes in signals or warnings for additional safety were properly excluded under the circumstances as proof of negligence. Precautions against the future cannot be considered as an admission of actionable negligence in the past. *R. R. v. Hawthorne,* 144 U. S., 202 (36

L. Ed., 405). The Court said in that case: "A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." 30 Minn., 465, 468. The same rule appears to be well settled in England. In a case in which it was affirmed by the Court of Exchequer, *Baron Bramwell* said: "People do not furnish evidence against themselves simply by *adopting a new plan* in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. R. R.,* 21 Law Times (N. S.), 261, 263. The Court also said in that case (*R. R. v. Hawthorne, supra*): "Upon this question there has been some difference of opinion in the courts of the several States. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant," citing many cases, and, among others, *Morse v. R. R.,* 30 Minn., 465; *Corcoran v. Peekskill,* 108 N. Y., 151; *R. R. v. Clem,* 123 Ind., 15. Part of the above quotation was taken from the opinion of that learned and able jurist, *Judge Mitchell,* delivered by him in *Morse v. R. R., supra.* We adopted the same rule in *Lowe v. Elliott,* 109 N. C., 581, and approved what is above quoted from opinion of *Mitchell, J.,* in *Morse v. R. R.,* citing three other cases, *Dougan v. Transportation Co.,* 56 N. Y., 1; *Sewell v. Cohoes,* 11 Hun., 626, and *Baird v. Daily,* 68 N. Y., 547. The case of *Lowe v. Elliott* was approved in *Myers v. Lumber Co.,* 129 N. C., 252; *Aiken v. Mfg. Co.,* 146 N. C., 324; *Tise v. Thomasville,* 151 N. C., 281; *Boggs v. Mining Co.,* 162 N. C., 393. We do not say that there may not be peculiar cases in which such testimony may be relevant, but this is not one of them. *Lowe v. Elliott, supra.* We have admitted such evidence under special circumstances. *Pearson v. Clay*

Co., 162 N. C., 224, and in *Boggs v. Mining Co., supra,* it was stated that the general rule as laid down in *Lowe v. Elliott* is subject to certain exceptions, which do not extend, as we have said, to this kind of case.

We have considered the record in this appeal most carefully in view of the commendable zeal of and the able presentation of it here by counsel for plaintiff, but we have been unable to conclude otherwise than that the learned judge who presided at the trial committed no error, but in every respect thoroughly safeguarded the plaintiff's interests.

No error.

Clark, C. J., concurs that the result may be in accordance with the precedents, but deems that the reasoning therein cannot be sustained, and holds that such ruling should be changed either by the Court or by legislation. The public roads are the property of the people of the State, who are entitled to the free and safe use thereof. The operation of numerous fast moving and dangerous railroad trains crossing these public roads on the same grade is a most serious interference with the safe and free use of the public roads as the people were aforetime accustomed to use them and have a right to do still. The cause of the death of these two men, as of so many others, was the negligence of the defendant in crossing the public road on the same grade, without even gates or an automatic electric gong operated by the wheels of an approaching engine.

Throughout Europe the crossing of public roads by railroads on the same grade is utterly forbidden. It has also been forbidden in many States of this country, and the Supreme Court of the United States has held that even where railroads have been permitted to cross the public roads on a grade, the Legislature of any State has the right at any time to require a change so that every railroad track must cross either below or above the public road, and that this change can be required at the expense of the railroad companies, who for their own profit interfere with the traffic and travel along the public roads of the country, and that the permission heretofore accorded railroad companies to cross the public roads on a grade is a mere revocable license and not an irrevocable contract. *R. R. v. Bristol,* 151 U. S., 556, which has been cited and followed in *R. R. v. Kentucky,* 161 U. S., 696; *R. R. v. Defiance,* 167 U. S., 99; *Wheeler v. R. R.,* 178 U. S., 324; *R. R. v. McKeon,* 189 U. S., 509; *R. R. v. Wheeler,* 72 Conn., 488; *Norwood v. R. R.,* 161 Mass., 265; *Chicago v. Jackson,* 196 U. S., 502, and many other cases.

The above decisions have been quoted, and the necessity of preserving the lives of our citizens from this deadly menace caused by the

increasing traffic on our railroads and public roads, and the greater size and speed of the engines, has been called to the attention of the railroad companies in an opinion by the writer in *Cooper v. R. R.,* 140 N. C., at p. 229; and also the necessity of having automatic gong annunciators at every grade crossing until such time as the railroads can with due diligence abolish all grade crossings. This was done at Fall Term, 1905—eleven years ago.

In view of the increasing number of our citizens who are slain every year by the refusal of the railroad corporations to provide for the avoidance of loss of life at grade crossings, the matter was again called to their attention by a concurring opinion in *Wilson v. R. R.,* 142 N. C., 349, at Fall Term, 1906, in which it was shown from the published official reports of the United States Government that nearly 10,000 people were killed annually by the railroads of the country and nearly 90,000 more killed and wounded, and attention was again called to the above quoted cases from the United States Supreme Court. The matter was again reviewed and called to the attention of the public and of the railroads in another opinion in *Gerringer v. R. R.,* 146 N. C., at pp. 35-37, at Fall Term, 1907, showing that the number killed and wounded by railroads in this country had then risen to 105,000. In the nine years since there has been a further increase. Above U. S. cases were cited *R. R. v. Goldsboro,* 155 N. C., 365, which was affirmed on writ of error, 232 U. S., 548.

No attention whatever has been paid by these corporations to the decisions of the United States Supreme Court and to other courts along this line. It is true that as a result of the above decisions in this Court the Legislature of 1907, ch. 469, empowered (but did not require) the Corporation Commission, in their discretion, to abolish grade crossings and to tax the costs thereof, in their discretion. But this has not yet brought about any perceptible diminution in the evil. *Tate v. R. R.,* 168 N. C., 527.

It is within the power of this Court, as it certainly is within the power of the Legislature, to hold that whenever a citizen in the use of the public roads, which is his inherited right, is killed or injured by a railroad train it shall be an irrebuttable presumption of negligence on the part of the corporation.

As was pointed out in the concurring opinion in *Gerringer v. R. R.,* this Court in the *Greenlee* and *Troxler cases,* 122 N. C., 977, and 124 N. C., 189, in the enforcement of the constitutional guarantee of the protection of life and limb, held that when injury or death is caused by the absence of automatic car couplers it is irrebuttable evidence of negligence, and that the corporations are liable for all deaths and injuries sustained from the lack of them. Automatic car couplers had

long been known, but with the same disregard of the safety of the lives and limbs of their employees, these and other safety appliances were not in use. Now such negligence is punishable by act of Congress, 1893, ch. 196; 3 U. S. Compiled Statutes, 3174; also by a similar holding of this Court as to the lack of a block system (*Stewart v. R. R.*, 137 U. S., 687), which was repeated and reiterated in the same case (141 N. C., 253). As a result such system is now required by statute also. Laws 1907, ch. 469, sec. 1 (b).

More recently both State and Federal governments have further intervened to protect employees by requiring other safety appliances, and by providing that contributory negligence should not be a defense, but, if shown, the damage should be apportioned. In every instance there has been an almost total lack of safety appliances and of regard on the part of the railroad managements for the safety and convenience of the employees and of the patrons who furnish the means from which these corporations draw their profits. As to the convenience of the public, the authority conferred on the Corporation Commission to require union stations has been as little effective of benefit to the public as the authority to abolish grade crossings. The story of railroad operations in this country has shown an indifference to the safety of the public and of their employees and for the convenience of the public that has not been overcome except by an imperative statute, or a decision of the courts, compelling respect for the rights of the public and employees. Recently in our State a statute enforced for the protection of the public and employees the limitation of the hours of labor for telegraph operators and other railroad employees, and more recently the Federal Congress has still further limited the hours of labor. Laws 1907, ch. 456; Act of Congress, 4 March, 1907, and October, 1916.

In North Carolina at present there are nearly 5,000 miles of railway track in operation, and the annual receipts of railroad companies in this State are over $36,000,000—very many times the total receipts of the State Government, including the counties and towns. Certainly whatever the net profits of these carriers, there would be abundance for all bona fide stockholders notwithstanding the expense of abolishing grade crossings, furnishing safety appliances, union stations (*S. v. R. R.*, 161 N. C., 270), and all other proper requirements for the safety and convenience of the public.

A recent investigation showed that three-fourths of the stock of one of the great corporations operating in this State was owned in England, and we know that the ownership and control of all railroad corporations is in nonresident capitalists. The presidents and superintendents are merely overseers of the property for alien and other nonresident owners

whose wishes and supposed interests they must regard, and not the safety, convenience, and wishes of the people of North Carolina, from whom these corporations derive their incomes. The public cannot expect such betterments as are required for their safety in traveling the public roads, or on the trains, unless by statutory enactments or decisions of the courts, as in the *Greenlee* and *Troxler cases.* Nothing has been done, and nothing will be done, by the nonresident management of these great properties except under compulsion of statutes or decisions of the courts. Experience in all these years has proven this.

The State and Federal Constitutions and the Declaration of Independence declare that all government "originates from the people; is founded upon their will only, and is instituted solely for the good of the whole." The protection of life and person can be had only by the exercise of the sovereign power of the people, whether by legislative enactment or the decisions of the courts. This Court, as in the *Greenlee* and *Troxler cases,* should now hold that in all cases where citizens traveling along the public road are killed or injured by railroad trains at grade crossings, the corporations should be held liable, and that in such cases contributory negligence is not admissible as a defense, after the action of other States, the decisions of the Supreme Court of the United States, and the reiterated warnings of this Court as far back as 1905. The wholly avoidable slaughter and maiming of our citizens at such crossings is called to the attention of the General Assembly, shortly to assemble, for such action as the members may deem is requisite for the protection of their constituents. The proximate and irrebuttable cause of every killing and injury at a railroad crossing is the negligence of the railroad company in violating the immemorial right of the public to the safe use of their own roads.

At very man places grade crossings can be abolished readily and at small expense, and until this is done (and at all other crossings) there should be gates or electric gongs, which last should be installed also at all stations. In the absence of such protection the railroad company is guilty of negligence, which is, in the case of the absence of car couplers and the block system, the irrebuttable proximate cause of death or injuries accruing to our people who are using their own public roads as they have a right to do.

BOARD OF EDUCATION OF DAVIE COUNTY v. BOARD OF COMMISSIONERS OF DAVIE COUNTY.

(Filed 29 November, 1916.)

Taxation—Schools—Four Months Term—Reference—Mandamus—Costs.

It having been established by a reference in this case that the tax levied by the county commissioners was sufficient for a four months term of school: *Held*, a mandamus to compel them to issue an additional levy for that purpose at the suit of the county board of education was improper. Cost of appeal taxed against plaintiff; allowance to referee, etc., taxed equally against the parties.

APPEAL from *Lane, J.*, at November Term, 1915, of DAVIE.

This action was instituted by the plaintiff, board of education of Davie County, against the board of commissioners of Davie County, brought by the plaintiff to compel the defendant, by writ of mandamus, to levy a special tax of 10 cents on the property and 30 cents on the poll, in addition to the levy made by the defendant for ordinary and special county purposes, to supply an alleged deficiency to run the schools of Davie County for a period of four months. From the judgment and order rendered by his Honor, directing and commanding the defendant to levy said tax as asked for by the plaintiff, the defendant excepted and appealed.

E. L. Gaither for plaintiff.

A. T. Grant, Jr., for defendant.

PER CURIAM. This cause was referred to Hon. W. D. Turner as referee to take the evidence and report to this Court his findings of fact as to whether or not the tax levied by the defendants, the county commissioners, was sufficient to pay the reasonable expenses of the public schools of the county of Davie for the period of four months. The referee files his report, together with the evidence taken in the case, in which it is found that the tax levied by the defendant is reasonably sufficient for the purpose. The exceptions to said report filed by the plaintiff are overruled and the said report is confirmed. The referee is allowed the sum of $71, which includes his fee as referee, together with stenographic and other expenses. The cost of the appeal is taxed against the plaintiff, but the referee's allowance and expenses of $71 are to be equally divided between the plaintiff and the defendant.

The judgment of the Superior Court is

Reversed.

THOMAS J. JEROME v. LESLIE M. SHAW.

(Filed 29 November, 1916.)

Malicious Prosecution — Abuse of Process — Civil Summons — Motive — Demurrer.

An action for malicious prosecution or wrongful abuse of process will not lie upon the mere issuance of a summons in a civil action, where no attachment has been levied, the plaintiff's property has not been interfered with and no process issued against his person; and where such is alleged, with further allegation that the summons in the former action had been served while passing through another State, the motive underlying the issuance of the summons will not be inquired into, and a demurrer is properly sustained.

ACTION heard by *Ferguson, J.*, at February Term, 1916, of ROWAN.

A. H. Price and Edward C. Jerome for plaintiff.
Brooks, Sapp & Williams for defendant.

PER CURIAM. The plaintiff brought this action to recover damages for malicious prosecution, or the wrongful abuse of process, as he states in his brief. Whatever may be the cause of action, whether the one or the other of those named, we think the court properly sustained the demurrer. The defendant brought suit on a note given by plaintiff, and merely caused a summons to be served on him as he was passing through the State of New Jersey on a train. There was no attachment levied, or other interference with the plaintiff's property, nor was there any process against his person. The issuing and service of the summons were all. The defendant had a legal right to sue in this State, New York, or New Jersey, and to serve a summons there on the plaintiff (in this action), wherever he could be found. The case is within the principle stated in *Ely v. Davis,* 111 N. C., 24; *Terry v. Davis,* 114 N. C., 31; *Carpenter v. Hanes,* 167 N. C., 551. The cases relied on in this Court will be found to belong to that class where some other process than a summons has been issued against the property or person of the defendant in the action, as in *R. R. v. Hardware Co.,* 138 N. C., 174 (*s. c.,* 143 N. C., 54); *Jackson p. Tel. Co.,* 139 N. C., 356; *Ludwick v. Penny,* 158 N. C., 104; *Wright v. Harris,* 160 N. C., 542; *Carpenter p. Hanes, supra.* In all these cases there was something more done than the issuing and service of a summons. The case of *Chatham Estates v. Bank,* 171 N. C., 579, upon which the plaintiff relied so much, does not sustain his position. The civil suit, alleged in that case to have been wrongful and which caused injury to the plaintiff, was one to impose a lien upon the defendant's property by a *lis pendens,* of practically the same force and effect as if there had been

an attachment levied. There was something done in the former action which was directly injurious to the plaintiff apart from the issuing of the summons, and all that is said in the *Chatham Estates case* must be considered with reference to that important fact. There is a very able and exhaustive discussion of the doctrine in *Muldoon v. Rickey,* 103 Pa., 110, where the cases are fully discussed. See, also, *Potts v. Imlay,* 1 Southard (N. J.), 330; *Wetmore v. Mellinger,* 64 Iowa, 741; *McNamee v. Minke,* 49 Md., 122; *Johnson v. King,* 64 Texas, 226; *Turner v. Walker,* 3 Gill and Johns, 377; *Bitz v. Myer,* 40 N. J. L., 252; *Mitchell v. R. R.,* 75 Ga., 398. The rule is succinctly stated in *Wetmore v. Mellinger, supra,* as follows, at page 744: "We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of defendant, and no special injury sustained which would not necessarily result in all suits prosecuted to recover for like causes of action," citing numerous cases. And in *Bitz v. Meyer, supra,* the Court said, at p. 255: "In *Goslin v. Wilcock,* 2 Wilson, 302, the defendant in the alleged malicious suit was arrested by process out of a court which had no jurisdiction, and on that ground the action for malicious prosecution was maintained; but my research has not found a case where the defendant was not arrested, and no special grievance was laid in which it has been held that suit will lie where costs were or could have been awarded to the defendant in the original action. Since the statute, 4 James I., ch. 3, which gives costs to a defendant in all actions in case of a nonsuit or verdict against the plaintiff, and other statutes giving costs in other stages of the case, the English courts have not considered the malicious institution of a civil suit a sufficient basis for an action at law, where no arrest or special grievance is alleged. *Saville v. Roberts,* 1 Salk., 14; *Purton v. Honnor,* 1 B. and P., 205. In such cases the measure of punishment to be inflicted upon a plaintiff who is actuated by malice is the costs given by statute." What is said by *Chief Justice Kirkpatrick* in *Potts v. Imlay, supra,* approved in 40 N. J. L., *supra,* is applicable to this case. "In the case of *Saville v. Roberts,* in the time of William III., Salk., 15, which seems to be a leading case on this subject, *Holt, C. J.,* says: 'A civil action differs very far from an indictment in this respect. In a civil action the defendant has his costs, and the plaintiff is amerced for his false claim. To bring a civil action, therefore, though there be no ground, is not actionable, because it is a claim of right in the king's courts, to which every subject may have resort, and he has found pledges, is amercible for his false claim, and liable to costs. It is not enough to declare that such action was

ex malitia et since causa, per quod, he was put to great charges; he must go further; he must show special grievance, as that the prosecutor had no cause of action, or cause of action only to a small sum, and that he had sued out a *latitat* for a large sum with intent to imprison him or do him some special prejudice.' So in *Lord Chief Baron Gilbert's* report of the case of *Parker v. Langley,* Gilb. Cas., 161, about the close of Queen Anne's reign, where this question is investigated with much ability, *Parker, Chief Justice,* in giving the opinion of the Court, says: 'The applying, in a civil action, to a court of justice for satisfaction or redress has been so much favored that no action has ever been allowed against a plaintiff for such suit singly and directly, on pretense of its being false and malicious.' . . . I have had occasion to look into this doctrine once before, in the case of *Woodmansie v. Logan,* reported in Pen., 92. The opinion then expressed is precisely the same which I now entertain upon looking further into the question, aided as I have been by so careful an examination of books and so able an argument at the bar. Upon the whole, upon the strength of these authorities, I think it may be laid down as law that this action cannot be maintained for prosecuting a civil suit in a court of common law having competent jurisdiction by the party himself in interest, unless the defendant has upon such prosecution been arrested without cause and deprived of his liberty, or made to suffer other special grievances different from and superadded to the ordinary expense of a defense. The case before us is for a suit commenced by summons where there could be no arrest; nor does the state of demand set forth any grievance or damage other than or different from the common expenses of making defense, in suits of this kind. That the litigation was protracted as far as the rules of the court would admit; that it was renewed and ultimately discontinued by the party, does not alter the case. These circumstances are, at most, only evidence that the prosecution was malicious and without probable cause; but this is not enough. There must be a special grievance, and that specifically charged in the complaint filed." In *Johnson v. King, supra,* the Court held that "The institution of a civil action by one in his own right for the purpose of enforcing a claim, whether that claim be real or unfounded, affords no cause of action against the party suing, unless by the abuse of process the person or property of the defendant be seized or in some manner injuriously affected. Following *Smith v. Adams,* 27 Tex., 31, and *Haldeman v. Chambers,* 19 Tex., 53. To create a cause of action there must not only be a loss to the plaintiff, but a loss resulting from the violation of some legal right." The facts in that case and those in *Carpenter v. Hanes, supra,* are very similar. There are cases to the

contrary, but some are distinguishable from this case, and the doctrine of others has not been adopted by us.

"Regular and legitimate use of process, though with a bad intention, is not malicious abuse of process." Cooley on Torts (3 Ed.), p. 356, star page 221. When a right is being prosecuted in a lawful and proper way the hidden motive behind it is not taken into account. If there is any loss to the defendant in the suit, it is *damnum absque injuria*. It is alleged in the complaint, and, as against a demurrer, it must be taken as admitted, that there was a suit on the note by the defendant, Leslie M. Shaw, in the Federal court at Greensboro, which resulted in a judgment against the defendant in that suit, plaintiff in this. This tends, of course, to repel any suggestion that the debt was not due or that defendant in this case intended to harass the plaintiff by suing for the recovery of a nonexistent debt; but whether so or not, there was nothing illegal in what this defendant did in New Jersey, and the demurrer, therefore, was properly overruled.

Affirmed.

JANE MILLER v. W. H. GARNER.

(Filed 6 December, 1916.)

Appeal and Error—Trials—Evidence, Withdrawn—Objections and Exceptions.

Where a deed is sought to be set aside for mental incapacity of the grantor at the time, and also for fraud and undue influence of the grantee, and the trial judge has withdrawn from the consideration of the jury the evidence upon the latter phase of the case relating to the alleged fraud, etc., but the jury have answered the issue as to the validity of the deed in the negative: *Held*, exceptions to the competency of some of the evidence withdrawn becomes immaterial.

ACTION to set aside a deed and recover land, tried before *Carter, J.*, and a jury, at July Term, 1916, of RANDOLPH.

There was verdict for plaintiffs. Judgment, and defendant excepted and appealed.

Hammer & Kelly for plaintiff.
Seawell & Land for defendant.

PER CURIAM. We have given careful consideration to the case presented in the record, and are of opinion that the judgment should be affirmed.

It appears that the land in question was owned by Asenath Cox, and in 1912 she, being then 85 years of age, conveyed the same to

defendant W. H. Garner, one of her tenants, the deed being witnessed by Artemus Garner, a brother of the grantee; that three years thereafter said Asenath Cox died, and the deed being then put on record, plaintiffs, the heirs at law of Asenath Cox, brought the present action to set aside the deed, on the ground that same was never executed by said Asenath Cox; that it was not her act and deed, and, second, on the ground of fraud and undue influence on the part of the grantee and his relatives, etc.

The jury rendered the following verdict: "Is the deed of 29 February, 1912, the act and deed of Asenath Cox, deceased? Answer: 'No,'" and from judgment on the verdict defendant excepted and appealed.

During the progress of the trial there were several exceptions to the rulings of the court on questions of evidence.

As now advised, we see no error in these rulings, but the exceptions involved having any significance were to testimony bearing on the questions of fraud and undue influence, and all of the evidence in this aspect of the case, in clear and explicit terms, was withdrawn from the consideration of the jury and the cause was submitted on the single issue as to the execution of the deed. This was purely a question of fact which has been determined by the jury in favor of plaintiffs, and, as stated, we find no error in the record and certainly none that gives the defendant any just ground of complaint.

The judgment is, therefore, affirmed.

No error.

J. R. SHORT v. T. D. GURLEY.

(Filed 22 December, 1916.)

Estates—Remainders—Restraint on Alienation—Wills—Interpretation.

A devise of a life estate to the wife of the testator with remainder to be divided among their children in designated portions, etc., without "power to sell or in any way encumber any part or parcel of the land," and if such should be attempted, then to "his or her lawful heirs": *Held*, a devise to the remaindermen in fee, subject to the life estate. The attempted restraint upon alienation is void.

ACTION heard by *Lyon, J.*, at May Term, 1916, of WAYNE.

This is a controversy without action, heard on the following agreed facts:

Zion Reid, late of Wayne County, died on the .... day of ....., 1890, having executed his last will and testament, duly probated and

recorded in the office of the clerk of the Superior Court of said Wayne County, in words and figures as follows:

Be it remembered that I, Zion Reid, of Wayne County, in the State of North Carolina, being of sound mind and memory, but being well aware of the uncertainty of this life, do make this my last will and testament.

After the payment of my just debts and funeral expenses I bequeath and devise as follows: My wife, Lucy Reid, should she be the longest liver, shall have full control of my property during her life, and then all my land shall be equally divided among my children or their lawful heirs; provided that Billie and Zion J. shall each have 8 acres of land lying around the house and then an equal division with the others of the remainder. Of my other property, in whatever it may consist, Billie and Zion shall each have $150, Julius $100, and Bryant Smith $50 and James $10. After this, each one of my children, except Julius, shall share equally in the remaining. That I further devise that no one of the children shall have power to sell or in any way encumber any part or parcel of said land; that each shall have possession during his or her life, then the same shall be held by his or her lawful heirs during their life, etc. James shall only be subject to hold that part allotted if his family be agreeable to the other children and neighbors. I further direct that my son Isaac and E. E. Smith be administrators of the estate. ZION REID.

Witness: J. F. DOBSON.
J. A. WASHINGTON.

That in the year 1899 the lands devised in said will, and which were at the time of his death owned by the said Zion Reid in fee, were partitioned among the children of the said testator in accordance with the provisions of said will, 8 acres around the house being allotted in severalty to Billie Reid, and also another lot of 13 acres, as his equal share of the other lands; that on 15 January, 1901, the said Billie Reid and wife, ... Reid, executed and delivered to J. R. Short a mortgage deed, sufficient in form to convey a fee, conveying to him all the said lands allotted to said Billie Reid in said division, said mortgage being registered in the office of the register of deeds of said Wayne County in Book 81, page 261; that said mortgage was duly foreclosed and all the lands embraced in said mortgage were duly conveyed by a commissioner, under said foreclosure suit, to the said J. R. Short by deed dated 3 January, 1905, which was duly registered in the office of the register of deeds of said Wayne County in Book 86, page 524, said deed being in form sufficient to convey a fee, and since the execution and delivery of said deed the said J. R. Short has been in possession

of said lands under said deed; that on the .... day of January, 1916, the defendant T. D. Gurley executed a written contract whereby he agreed to purchase from the plaintiff J. R. Short said lands, and on 2 February, 1916, the said J. R. Short executed and tendered to the defendant T. D. Gurley a good and sufficient deed with warranty, sufficient in form to convey to the said T. D. Gurley said lands in fee, free from encumbrances, and the said T. D. Gurley refused to accept said deed and carry out said contract to purchase said land, on the ground that the said deed did not convey a fee-simple title to said lands by reason of the provisions of the will of Zion Reid, which will, the defendant T. D. Gurley contends, devised only a life estate to the said Billie Reid.

That Lucy Reid, widow of the said Zion Reid, died on the .... day of January, 1891; that the said Billie Reid had never been married at the time of the death of his father, the said Zion Reid, and at that time had no children; that the said Billie Reid died intestate in the year 1913, leaving surviving him four children, who are still living.

The questions submitted to the court upon this case are as follows:

1. Was a fee-simple estate devised by the will of Zion Reid, deceased, to his son, Billie Reid?

2. Did said Billie Reid have the right to convey said land by mortgage?

3. Did the mortgage executed by said Billie Reid to J. R. Short convey a fee-simple title to said land?

Judgment was rendered in favor of the plaintiff and the defendant excepted and appealed.

M. T. Dickinson for plaintiff.
Teague & Dees for defendant.

PER CURIAM. The decision of this controversy depends on the construction of the will of Zion Reid, and when the whole will is considered it is manifest that in the first part the testator devised the land in fee to his children, subject to the life estate of his wife, and that in the latter part it was not his intention to reduce the estate to the children from a fee simple to a life estate, but to place a restraint on the right of alienation, which he could not do. *Trust Co. v. Nicholson,* 162 N. C., 263.

Affirmed.

ORIN WEEKS v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 11 October, 1916.)

ACTION to recover damages, tried before *Bond, J.*, at February Term, 1916, of LENOIR.

The nature of the action and the material facts are stated in the report of the former appeal, 168 N. C., 469.

G. V. Cowper, Loftin, Dawson & Manning, and Rouse & Land for plaintiff.

G. M. T. Fountain & Son and Y. T. Ormond for defendant.

PER CURIAM. This action was tried in accordance with the opinion upon former appeal, and as the jury has, upon competent evidence, found the contract as contended for by the plaintiff, the judgment must be affirmed.

No error.

BROWN, J., not sitting.

TAYLOR, ADMINISTRATOR, v. COLE MANUFACTURING COMPANY.

THIS is an action to recover damages for wrongful death.

There was a verdict and judgment in favor of the plaintiff, and the defendant excepted and appealed.

Butler & Herring for plaintiff.

Grady & Graham for defendant.

PER CURIAM. We have carefully examined the exceptions contained in the record, and we find no sufficient reason for disturbing the verdict and judgment.

No error.

W. H. HOPE v. J. R. PETERSON ET AL.

(Filed 11 October, 1916.)

Executors and Administrators—Parent and Child—Wrongful Death—Parties.

An action to recover for the wrongful death of a son must be brought by the executor or administrator of the deceased, and not by his father.

STATE *v.* MERRICK.

THIS is an action brought by the father to recover damages for the wrongful death of his infant son.

The defendants filed a demurrer, which was overruled, and the defendants appealed.

No counsel for plaintiff.

Grady & Graham, Butler & Herring, and Fowler & Crumpler for defendants.

PER CURIAM. The defendant moves in this Court to dismiss the action because it is brought in the name of the father and not by the executor or administrator of the son, and the motion must be sustained.

The case of *Killian v. R. R.*, 128 N. C., 261, decides the exact question in favor of the defendant.

Action dismissed.

STATE v. THOMAS MERRICK.

(Filed 18 October, 1916.)

1. Court's Discretion—Evidence—Motion to Strike Out.

A motion to strike out testimony given on the trial without objection, is in the discretion of the trial judge, and not reviewable on appeal.

2. Court's Discretion—Witnesses—Infant's Testimony.

Objection to the competency of evidence because of infancy and incapacity of the witness should be by motion made to the trial judge to pass upon it, and its sufficiency will be assumed on appeal, nothing else appearing, if this has not been done.

3. Court's Discretion—Verdict—Motion to Set Aside.

A motion to set aside a verdict rests in the discretion of the trial judge, and is not appealable.

4. Instruction—Contentions—Motions—Appeal and Error.

Objection to the statement of the contentions of a party by the trial judge should be made to him, or it will be deemed waived.

5. Homicide—Murder—Instructions—Passion—Malice.

A charge on this trial for murder, as to whether the defendant was actuated and committed the act in the heat of passion, *i. e.*, in anger under circumstances to dethrone his reason, or whether in calm deliberation with malice aforethought, etc., is held full and explicit.

6. Same—Evidence—Trials—Questions for Jury—"Cooling Time."

Exception to the charge in this case of murder, as to whether the anger or heat of passion of the prisoner was assumed as a pretext to vent his malice or to satisfy his spleen, being based upon competent testimony,

and left to the jury, as sensible men, to determine, for what it was worth, with its weight and cogency depending upon the length of "cooling time," is held to be without merit.

7. **Appeal and Error—Reversible Error—Murder—Homicide—Ill-will—Declarations.**

Evidence, though erroneously admitted on the trial, but probably not affecting the verdict, will not be considered as reversible error; and where the defendant has been convicted of murder in the first degree, his declarations, made from six to twelve months previous thereto, that he disliked the deceased and that he was a mean man, are competent to show the defendant's animus, the weight of which is for the determination of the jury.

APPEAL by prisoner from *Stacy, J.*, at May Term, 1916, of NEW HANOVER.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Burke H. Bridgers and William J. Bellamy for defendant.

CLARK, C. J. The prisoner was convicted of murder in the first degree, and on appeal, *S. v. Merrick,* 171 N. C., 788, a new trial was granted, two judges dissenting. A second trial was had in accordance with the opinion of this Court, and the prisoner has been again convicted of murder in the first degree.

It was not denied that the deceased was shot and killed by the prisoner at about 4 p. m., 31 August, 1915, at a bottling plant in Wilmington. The circumstances are detailed and reviewed in the opinion and the dissenting opinion on the former appeal, and need not be repeated.

It was in evidence that the prisoner and the deceased had a dispute about a wagon rein, had some words, and the prisoner refusing to leave when ordered, the deceased caught him by the neck and pushed him towards the front door. When he did so the prisoner's cap fell on the floor near the door and he turned and went to the back of the building. The deceased then went to work unloading his wagon at the front. The prisoner in the meanwhile came back in about three minutes, picked up his cap, and again went off to the back part of the building. There is evidence that he said: "I will get you yet." In another "about three minutes" the prisoner came back a second time, with his gun, opened the breach and put in a cartridge, and as the deceased was setting down a case the prisoner threw his gun to his shoulder, cursing the deceased, fired, and the deceased fell. The prisoner then threw down his gun and ran out the back way.

The evidence is that the deceased said nothing when the prisoner came back with his gun and had nothing in his hand. The prisoner was not working in the plant that day and had no business there, and

the deceased had been authorized to keep those not employed out of the plant. The deceased did not advance towards the prisoner at the time he fired, and said nothing to him.

The facts are so simple and the case has already been so thoroughly discussed in the former opinion that it is not necessary to elaborate the exceptions, of which only one, indeed, requires any discussion. One James Holmes testified that he worked at the plant and saw the prisoner and the deceased there. He also said: "I heard Thomas (the prisoner) say that he didn't like Mr. Hudson; that he was a mean man. This was while Mr. Hudson worked there. I don't know how long this was before Mr. Hudson was killed. I was working there the day he got killed, but I got off soon that day." He further testified that he did not know "just when he said this. It might have been a year or six months before." The witness stated that he was 16 years of age and that on the former trial, the year before, he had testified that he was 12.

The prisoner made no objection or exception to the above testimony, but at the conclusion of this witness's testimony prisoner's counsel moved to strike out the testimony of James Holmes "by reason of the fact that it was vague, indefinite, immaterial, insufficient, and uncertain as to time." The motion was properly denied. An objection to testimony not taken in apt time is waived. *S. v. Downs,* 118 N. C., 1243; *S. v. Braddy,* 104 N. C., 737.

When testimony has thus been admitted without objection, the granting or denying a motion to strike out rests in the discretion of the court. *S. v. Lowry,* 170 N. C., 730; *S. v. Lane,* 166 N. C., 333; *S. v. Efler,* 85 N. C., 585. The prisoner's counsel further contends in his brief that the witness was incompetent by reason of infancy and incapacity. But that was a matter which should have been raised before the court by a motion that the trial judge should pass upon the competency of the witness to testify, and his decision would not be reviewable. Not having done this, it must be assumed that the judge was satisfied of the maturity and mental competency of the witness. *S. v. Tate,* 169 N. C., 373; *S. v. Stewart,* 156 N. C., 636; *S. v. Edwards,* 79 N. C., 648; *S. v. Manuel,* 64 N. C., 601; *S. v. Perry,* 44 N. C., 330.

The second assignment of error is to the refusal of the court of a motion to set aside the verdict, but this rested in the discretion of the trial court. *S. v. Johnson,* 161 N. C., 264; *S. v. Millican,* 158 N. C., 617. The third assignment of error has been waived and the fourth is to an alleged error in summing up the statement of the State's contentions. The counsel not having made this objection at the time, so the judge could pass upon it, it is waived. *S. v. Cameron,* 166 N. C., 384; *S. v. Blackwell,* 162 N. C., 672; *Jeffress v. R. R.,* 158 N. C., 215.

The fifth assignment of error is to a statement of the State's contention (which cannot be reviewed), except the last part, which is to the charge: "If you find that the defendant was actuated, and actually committed the act, in the heat of passion; that is, in anger under such circumstances as if his reason had been dethroned." This is substantially a quotation from what is said in *S. v. Hill,* 20 N. C., 491; besides, the phrase above objected to is immediately followed by: *"Or* that he did not think calmly and deliberately and premeditatedly with malice aforethought, then that would reduce his crime from the highest degree." The charge was full and explicit, especially as to cooling time, and is not excepted to otherwise than as stated.

The sixth assignment of error is to that part of the charge to the jury as follows: "Now, gentlemen, make this distinction: If you should find that the defendant did not act in anger or heat of passion, but that he was using the occasion as a pretext to vent malice, or to satisfy any spleen that he theretofore had against the deceased, if you should find that he had any from this evidence, then he would not be acting upon the spur of the moment or in anger or in heat of passion." The prisoner's brief avers this exception depends upon the exception to Holmes' testimony, as to which the court had already charged: "That evidence, gentlemen, goes to you for what it is worth. You are sensible men and its weight and cogency would depend, and ought to depend, upon the length of time that intervenes between the time it was spoken and the time of the homicide."

As to the evidence excepted to, that at some previous time within 6 or 12 months the prisoner had stated his dislike of the deceased and called him a mean man, the courts do not grant new trials unless the evidence admitted is not only erroneous, but probably contributed to the verdict. This is hardly conceivable upon the facts of this case and the circumstances surrounding the killing as above stated. While it was not necessary in this case to show more than the actual facts surrounding the homicide, still it could not be error to introduce testimony showing that on some previous occasion the prisoner had expressed an unfavorable opinion of the deceased. It may have been unnecessary, but it was not reversible error.

In *S. v. Norton,* 82 N. C., 629, it is held that in an assault and battery evidence of previous declarations of the defendant tending to show malice is incompetent, but "If the defendant had been indicted for murder, for an assault with intent to kill, for a conspiracy or forgery, or any other offense where the *scienter* or the *quo animo* constitutes a necessary part of the crime charged, such acts and declarations of the prisoner as tend to prove such knowledge or intent are admissible, notwithstanding they may in law constitute a distinct crime." The decla-

rations here made, especially in view of the immediate facts surrounding the homicide, probably had exceedingly small if any weight with the jury. But the fact that it may have been made 6 or even 12 months previously did not make such evidence incompetent as a matter of law. As the judge told the jury, the lapse of time was a matter for them to consider as to the weight to be given the evidence.

In *S. v. Exum,* 138 N. C., 605, declarations showing ill-will made several months previously were held by *Hoke, J.,* "undoubtedly competent." To same purport, *S. v. Rose,* 129 N. C., 575, and other cases. Indeed, if previous threats are competent, the prisoner cannot complain of the competency of evidence less effective to show animus.

No error.

STATE v. JOE EURE.

(Filed 13 September, 1916.)

Criminal Law—Principal and Surety—Appearance Bond—Liability of Surety.

The sureties on an appearance bond upon the usual conditions thereof, that the defendant will appear at court "and not depart the same without leave," obligate themselves that the defendant appear according to the precept of the court until discharged, and they remain liable thereon until the defendant is placed in custody, or gives a new bond, or is discharged on acquittal or by order of the court; and where an increase of such bond has been requested, and denied, and without further order the court adjourns, on the failure of defendant to appear at the next succeeding term judgment will be given against the sureties.

APPEAL by defendant from *Bond, J.,* at March Term, 1916, of GATES.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Ward & Grimes and H. P. Godwin for defendant.

CLARK, C. J. The defendant gave bond with the usual conditions to appear at court "and not depart the same without leave." He was put on trial, and the jury not having agreed, on Saturday afternoon a juror was withdrawn and a mistrial ordered. No order was made placing the defendant in custody nor requiring him to give new bond nor discharging him. After the mistrial was ordered, the prosecution asked that the bond be increased. The judge being told, on inquiry, that the bond was $650, declined to increase the amount, but no order was made for a new bond, and court was adjourned *sine die.* At the next term of court, the prisoner failing to appear when called, judgment *nisi* was entered and notice issued to the sureties. Upon hearing counsel for the sureties, the court entered judgment absolute against them.

In this there was no error. An appearance bond by its terms, and under the uniform ruling of the Court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the court.

In *S. v. Smith,* 66 N. C., 620, where a defendant upon the continuance of his case was required to give bond for his appearance at the next term, but departed without doing so, the Court held that the sureties on the bond were responsible for the failure of the defendant to appear at the next term. In *S. v. Jenkins,* 121 N. C., 637, the above case is cited with approval, the Court holding that the defendant continues under the penalty of the bond until the trial is terminated or he is discharged by order of the court.

In *S. v. Morgan,* 136 N. C., 602, the Court held: "The continuance of a criminal case does not release the recognizance given for the appearance of the defendant."

In *S. v. Schenck,* 138 N. C., 560, the Court held that the sureties on the bail bond are not discharged by the appearance, conviction, and sentence of the defendant, but they are not released until the defendant is put in custody of the court or sheriff. The Court holds that the bond "binds the sureties for the continued appearance of their principal from day to day until finally discharged by the court, and he must answer its calls at all times and submit to the final judgment."

In *S. v. White,* 164 N. C., 410, the Court holds that the recognizance binds the defendant to three things:

"1. To appear and answer either to a specified charge or to such matters as may be objected to.

"2. To stand and abide the judgment of the court.

"3. Not to depart without leave of the court.

"And it was held that a surety on a recognizance is not relieved of liability because the principal appeared at the trial and entered a submission, but while the sentence of the court was being considered for several days, departed from the State; for the appearance of the defendant at the trial is not a full compliance with the obligation of the surety in respect to the recognizance." The fact of conviction of the principal does not discharge the sureties unless they surrender him or he is taken in custody by the sheriff.

The same rule is stated in 5 Cyc., 123, as follows: "The effect of an adjournment upon the liability of sureties depends largely, if not exclusively, upon the conditions of the obligation. If such condition is, in effect, a *continuing* one, as that accused will appear and answer and *not depart without leave*, or that he will abide the order and judgment

of the court, it requires an appearance also at legal adjournments from day to day or from term to term at the peril of forfeiture of the bail bond for noncompliance with said obligation."

"Neither does the obligation end with the term at which the principal is recognized to appear, but, if the case against him be continued, the bail are bound to have him in court at each succeeding term thereafter until he is convicted or acquitted, or they are otherwise legally discharged." 3 A. and E. (2 Ed.), 714.

In *S. v. Horton,* 123 N. C., 695, it was held that where a defendant gave bond to appear at a regular term which was not held by reason of the absence of the judge, such defendant is responsible on his bond for his appearance at a special term held between that time and the next succeeding regular term.

It is not unusual for the court upon the continuance of a cause to direct that the defendant give a new bond, but in the absence of such order, or on failure to comply with it if made, the original bond remains liable. In the same manner when a witness is once subpœnaed it is his duty to attend every succeeding term of the court until discharged, though it is not unusual to refresh the memory of witnesses by issuing new subpœnas. This, however, is an unnecessary expense. A person once in court by service of summons or subpœna, or by giving bond for his appearance in a criminal action, must continue to appear, according to the precept of the court, until discharged, and in the latter case his sureties remain liable until the defendant is placed in custody or gives a new bond or is discharged on acquittal or by order of the court.

The judgment absolute against the defendant and his sureties is

Affirmed.

STATE v. J. S. BURBAGE.

(Filed 13 September, 1916.)

1. Municipal Corporations—Cities and Towns—Sunday Ordinances—Statutes.

Established municipal authorities may enact such ordinances as are promotive of the peace and good order of the town, and enforce them by appropriate penalties, when they are not unreasonable or unduly discriminative, or manifestly oppressive and in "derogation of common right." Revisal, sec. 2923.

2. Same—Public Policy—Drug Stores—Discrimination.

It is against the public policy of this State that one should pursue his ordinary business calling on Sunday, and such may not only be regulated

by town ordinances, but altogether prohibited on that day; and an ordinance of this kind is not rendered invalid, as unduly discriminative, by reason of an exception in favor of drug stores or on account of Revisal, sec. 2836, forbidding work "in ordinary callings on Sunday under penalty of $1."

3. Municipal Corporations—Cities and Towns—Sunday Ordinances—Admission to Stores.

An ordinance designed to prevent people from gathering at business places in the town at a time when business there has been lawfully prohibited is a reasonable regulation in promotion of the public policy which the ordinance intends to enforce; and an ordinance which prohibits a storekeeper from transacting business on Sunday except in cases of necessity, and from allowing persons other than himself or clerk from entering his place of business on that day, imposing a fine of $10 for its violation, is valid and enforcible. Revisal, sec. 2836. *S. v. Thomas*, 118 N. C., cited and distinguished.

WALKER and ALLEN, JJ., dissenting.

CRIMINAL ACTION heard on appeal from Recorder's Court at August Term, 1916, Superior Court of Beaufort County, before *Allen, J.*, and a jury.

The charge was for violating an ordinance of the town of Bath which prohibited a dealer from keeping his store or shop open on Sunday for purpose of buying or selling or transacting business except in case of necessity, and also prohibiting the proprietor of a store from allowing third persons, persons other than himself or clerk, from entering his place of business on Sunday; the fine for violation of such ordinance being fixed at $10. The ordinance contains provision also that drug stores may be kept open at all times.

There was special verdict rendered as follows: "That on a Sunday in August, 1915, the defendant entered his store in the town of Bath and allowed one Clyde Paul to enter the same with him, and while he and the said Paul were in the store two or three others entered without objection by defendant; that on a Sunday in November, 1915, defendant again entered the store in the town of Bath, and while there allowed one Archbell to enter the same (who was not a clerk). If upon the foregoing facts the court be of opinion that the defendant is guilty, the jury so find for their verdict, and if the court be of opinion that he is not guilty, the jury find him not guilty."

The court being of opinion that, on the facts as found, defendant was guilty, it was so entered. From judgment imposing the fine, defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Small, MacLean, Bragaw & Rodman for defendants.

HOKE, J., after stating the case: Chapter 73, Revisal, sec. 2923, empowers town commissioners to pass ordinances, rules and regulations for the better government of the town, not inconsistent with the provisions of the act and the law of the land, and to enforce such ordinances, etc., by appropriate penalties. In construing this and similar legislation elsewhere, the courts have very generally held that the established municipal authorities may enact such ordinances as are promotive of the peace and good order of the town, the limitation being that the regulations may not be unreasonable or unduly discriminative nor manifestly oppressive and in "derogation of common right."

It is against the public policy of the State that one should pursue his ordinary business calling on Sunday, and, where this is the case, it is very generally understood not only that ordinary business pursuits may be regulated, but altogether prohibited on Sunday. *S. v. Medlin,* 170 N. C., 682. This case also holds that an ordinance of this kind is not rendered invalid, as unduly discriminative, by reason of the exception in favor of drug stores, nor on account of section 2836, Revisal, forbidding work "in ordinary callings on Sunday under penalty of $1," and we are unable to see that a regulation of this kind is either unreasonable or oppressive or in derogation of common right. Evidently framed to prevent people from gathering at business places in the town at a time when business there has been lawfully prohibited, it would seem to be a most reasonable regulation in promotion of the public policy which the ordinance is designed to enforce, and, in certain localities and conditions, it is probably the only way in which the regulation could be made at all effective. The ruling of his Honor finds full support, we think, in the case already cited, *S. v. Medlin, supra,* and in many other well considered cases on the subject here and in other jurisdictions. *S. v. Austin,* 114 N. C., 855; *Hellen v. Noe,* 25 N. C., 493; *Barbier v. Connelly,* 113 U. S., 27; *Soon Hing v. Crowley,* 113 U. S., 703; *S. v. Freeman,* 38 N. H., 426; *St. Louis v. Cafferata,* 24 Mo., 44; Dillon Mun. Corp. (5 Ed.), secs. 589 *et seq.*

We were referred by counsel to *S. v. Thomas,* 118 N. C., 1221, as an authority for defendant on the question chiefly presented. That case involved the validity of an ordinance prohibiting a proprietor from going into his own store within certain hours, a thing he might be called on to do in the legitimate exercise of the rights of private ownership and where the act would many times have no necessary or natural relation to the maintenance of the peace and order of the town; a case readily distinguished from the present one where the ordinance is clearly promotive of the established public policy in preventing the carrying

on of ordinary business on Sunday, and, as heretofore stated, "well calculated to render such policy efficient."

There is no error, and the judgment below will be affirmed.

Affirmed.

WALKER and ALLEN, JJ., dissent.

STATE v. DOC. BRIDGERS.

(Filed 13 September, 1916.)

1. Homicide—Murder—Circumstantial Evidence—Motive.

Where there is no direct proof that the prisoner on trial for murder committed the crime with which he is charged, and recourse is had to circumstantial evidence, the question of motive is properly considered in the chain of proof.

2. Same—Identification—Trials—Evidence—Questions for Jury.

Upon a trial for murder there was evidence tending to show that the deceased, a married woman, was the paramour of the prisoner; that he was the last seen with her when she was going to her husband's home, and was afterwards seen no more alive, but was discovered murdered near the place he had been with her; that he was jealous of her husband and threatened her life, and to take from her feet shoes he had given her, should she go back to him; that he told a witness of the deceased if she were found dead the witness would know who killed her; that he said, after her disappearance, that he knew where she was, but would not say for fear the witness would tell; that when the body was found, shoes that the prisoner had given her had been taken from her feet in accordance with his previous threat, etc. *Held*, sufficient to identify the prisoner as the murderer and sustain a verdict of murder in the second degree.

INDICTMENT for murder, tried before *Lyon, J.*, at March Term, 1916, of EDGECOMBE.

The prisoner was charged with having murdered Easter Grimes on 2 January, 1916. There was a verdict of murder in the second degree and a sentence of twenty years in the State Prison, from which judgment the prisoner appealed.

There was a motion for judgment of nonsuit when the State rested, and again at the close of all the testimony, and the only question presented for review is raised by the exceptions to the denial of those motions.

The deceased disappeared on the first Sunday or Monday in January, 1916, and her dead body was found February, 1916, about 1 mile from

the courthouse in Tarboro, near the road leading to Rocky Mount. It was in the woods about 300 yards from the road, and had been dragged part of the way and was much decomposed; there was a hole in her head. The prisoner was arrested same evening and placed in jail, where he remained until trial. Easter Grimes lived with Della Killebrew and had been there since 1 September, 1915. Della Killebrew testified that the prisoner came to see Easter twice during that time. There was evidence by Walter White that the defendant had been seen with her several times around Tarboro, and Eliza Powell, a State's witness, testified that she saw him with her the first Sunday in January about dusk, two blocks south of courthouse. This was the last time she was seen by any State's witness. The prisoner introduced several witnesses who saw her Monday morning coming towards Tarboro by the place where she was found dead.

Fannie Killebrew, daughter of Della Killebrew, testified as to what defendant said to her on 7 January: "Doc said, 'Where is Easter?' I said, 'I don't know, Doc; do you know?' He said, 'No,' then said, 'I am just joking; I would tell you, but you would tell.' I said, 'Where is she?' He said, 'No, I ain't going to tell.' 'Did you see the shoes I bought her?' I said, 'Yes; they certainly is pretty. How much did you pay for them?' He said, 'Four dollars.' I said, 'You didn't pay $4; you paid $3.50, because I got mine for $3.50; they were on sale.' 'Don't you know I almost forsaken my wife for that woman?' He said: 'I'd suffer in hell before I let her go back to her husband. When you hear she is dead, you'll know d—n well who did it.'" She further testified: "After she disappeared, he came twice, calling for her; about two or three weeks after she disappeared; told him I did not know where she was."

Eliza Powell testified that the prisoner and the deceased were at his sister's, two blocks south of courthouse, on Albemarle Avenue, talking, and left her house on Sunday about dusk, going toward Main Street, and she said that she was going home. She further said that the prisoner told her that Easter Grimes had gone to Rocky Mount on the first Sunday in January.

Carrie Killebrew testified: "Walter White came to our house."

Rosa Hart testified that she had a conversation with the defendant, after the deceased disappeared, as follows: "He asked if I had seen Easter; I told him no, and asked if he had seen her. He said no; I said, 'I thought she was in Rocky Mount with her husband.' He said, 'She is.' I said, 'How do you know?' He said, 'No, she's not there; but I know where she is. If you knew, would you go to her?' I said, 'Yes.' He said, 'If you promise, I will carry you to see her. You be ready and I'll carry you there to see Easter.'"

Walter White testified that he had seen the defendant and deceased together several times and heard the defendant tell her that "he had bought her the shoes and whenever she wore them to Rocky Mount to see George he was going to kill her and pull them off." He further testified that at the preliminary hearing he only said, "On Saturday after Christmas I saw them in E. Saide's store; she had shoes in her hand and they were side by side; I was outside as she came out; she had a shoe box under her arm," and said nothing about any threat.

J. W. Thomas, deputy sheriff, described the body and the place where it was found, and stated that "the body was found at 4:30 and defendant was arrested right after supper; that defendant held his nerve well when arrested; always said he was not guilty; that he had taken him out of the cell and talked with him."

E. B. Hyatt testified that one shoe was found near the body, 30 or 35 feet away, after body was buried.

The above is the evidence which the State relied on to connect the defendant with the murder, and at the conclusion of the same, the prisoner moved for judgment of nonsuit, which was refused.

The defendant testified that he went with the deceased on that Sunday evening to Dora Jackson's (about 2 miles from Tarboro) and left her there; this was 1 mile beyond where the body was found; that the deceased was a woman of bad character; he offered the testimony of Dora Jackson, who testified that the deceased spent the night with her and that she left for home the next morning; and the testimony of John Leggett, Arthur Lawrence, and Alex Parker, that they saw her coming from Dora Jackson's towards Tarboro next morning; and of Wiley Andrews, that she saw her at Dora Jackson's house on Monday morning; of B. S. Price, Dossey Pittman, and Joe Dickens, that the defendant worked on Monday, Tuesday, and Wednesday after the first Sunday in January on the Knightland farm. B. S. Price also testified that the demeanor of prisoner was the same before and after January 1st, and that he made no effort to escape.

Dr. W. W. Green, coroner, testified (page 18): "Saw body; had been dead for about a month or longer; couldn't say what killed her, nor how long she had been dead."

The defendant again moved for judgment of nonsuit, which was refused.

The jury convicted the prisoner of murder in the second degree, and he appealed from the judgment upon the verdict.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. O. Howard for defendant.

WALKER, J., after stating the case: There is but a single point for us to decide in this case, and that is whether there is any evidence, even a scintilla, of the prisoner's guilt. This is sometimes, and, we may say, quite often, a difficult question to answer, the difference between some evidence, though slight, and no evidence, requiring in many instances very fine discrimination. We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict, and should not be left to the jury. *S. v. Vinson,* 63 N. C., 335; *Brown v. Kinsey,* 81 N. C., 245; *S. v. Christmas,* 101 N. C., 749; *S. v. Costner,* 127 N. C., 566; *S. v. Lytle,* 117 N. C., 799; *S. v. Carmon,* 145 N. C., 481; *S. v. Walker,* 149 N. C., 527. We said in *Byrd v. Express Co.,* 139 N. C., 276: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. *Cobb v. Fogalman,* 23 N. C., 440; *Wittkowsky v. Wasson,* 71 N. C., 451; *Sutton v. Madre,* 47 N. C., 320; *Pettiford v. Mayo,* 117 N. C., 27; *Lewis v. Steamship Co.,* 132 N. C., 904. In the last cited case the subject is fully discussed by *Connor, J.,* and the cases collected. It all comes to this, that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer at least some evidence which reasonably tends to prove every fact essential to his success." So it was held in *Campbell v. Everhart,* 139 N. C., 503, 516: "The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury," citing authorities. It will not do, it is conceded, to convict any man of a crime upon mere conjecture, or even the strongest suspicion, if it does not rise to the dignity and certainty of legal proof which excludes all reasonable doubt of his guilt. But we are not embarrassed in this case by the necessity of resorting to nice refinement in our reasoning, or

any fine-spun distinction between what is *some* and what is *no* evidence, for the facts and circumstances here do not approach the border line separating the one from the other.

Where there is no direct proof of the commission of the criminal act by the prisoner, and we must have recourse to circumstantial evidence, it is proper to consider the motive to do the act, if he had it, as one of the links in the chain of proof. This was decided in *S. v. Adams*, 138 N. C., 688, 697, in this language: "When the evidence is circumstantial, the proof of a motive for committing the crime is relevant, and sometimes is important and very potential, as it may carry conviction to the minds of the jurors, when otherwise they would not be convinced. This is all that is meant by the Court in the cases cited by counsel. *S. v. Green*, 92 N. C., 779. Murder may be committed without any motive. It is the intention deliberately formed, after premeditation, so that it becomes a definite purpose to kill, and a consequent killing without legal provocation or excuse, that constitutes murder in the first degree. The existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the defendant as the slayer, but motive is not an essential element of the crime, nor is it indispensable to a conviction of the person charged with its commission." Citing *S. v. Wilcox*, 132 N. C., 1143; *S. v. Adams*, 136 N. C., 629. The prisoner had the motive to commit this crime, because he so declared himself. The deceased had been his paramour; he was infatuated with her and jealous of her husband. She had frequently been his companion and was seen with him by the neighbors. He was with her shortly before she disappeared to be seen alive no more. The evidence fairly warrants the inference that he was the last person who was with her just before her death. A few days after she was last seen on Sunday, 2 January, or Monday, 3 January, 1916, he inquired of Fannie Killebrew where Easter Grimes was, and when she replied that she did not know, and asked him if he knew, he, at first, said, "No," but immediately corrected himself and then admitted that he was joking when he said "No," and that he did know, but would not tell her, lest she might tell it to some one else. The jury might well conclude from this admission that he knew where she was, and, if so, that he knew she was then dead and where her body lay. If this be true, and he had knowledge then of her death, which was a violent one, it would not be unreasonable or unsafe to infer that he was present when she was killed. But this is not by any means all of the evidence pointing to the prisoner as her slayer. He treated this serious matter with some levity, and talked a great deal in a light vein. This may have been merely characteristic of his race, or idle and frivolous talk; but it is not inconsistent with the cold-heartedness and manifest indifference with which he had

threatened her life if she dare return to her husband at Rocky Mount. In this connection his last words to Fannie Killebrew after talking about the shoes are significant: "Don't you know, I almost forsaken my wife for that woman? I would suffer in hell before I would let her go back to her husband. When you hear she is dead, you will know damned well who did it." He had given her the shoes as his mistress, and was determined, and so warned her, that she should not attempt a return to her husband, where she belonged, except at the cost of her life. All this means that if she started back to Rocky Mount, where her husband lived, he would kill her first and then pull the shoes from her feet, and that is what was done. She was on her way back to her husband and had gone one mile or more when he executed his threat by killing her, dragging her body into the woods, and then taking her shoes off and dropping one of them near where her body lay. He knew that she had gone to Rocky Mount on the first Sunday in January, for he told Eliza Powell so, and this shows that he must either have gone with her for the one mile, or that he overtook her, after he had discovered her whereabouts, and then slew her, as she was doing what he had forbidden her to do on pain of her life. It makes little or no difference which version is the true one, whether he went with her or caught up with her on her way to her husband's home. The fact that he was with her at the time is the material and vital one. He told Rosa Hart that Easter was not in Rocky Mount, and he knew where she was. How could he know she had not reached Rocky Mount, but was killed on her way to the place, unless he was with her? He knew that she had started for her husband's home, and there is no evidence that any one else was with her or knew where she had gone. This evidence points strongly to the prisoner as her guilty companion in her last moments. But why is not his own words to Fannie Killebrew and Rosa Hart substantially a confession of his guilt or at least of his presence when and where the homicide was committed? He admitted when Easter was lying dead in the woods that he knew where she was, and he told Fannie Killebrew, "When you hear she is dead, you will know damned well who did it," and he said this because he had threatened to kill her if she went to her home with the shoes, and his neighbors knew of his threat. Therefore, it was that he said to one of them, "You will know who committed the deed when you hear of her being dead," meaning , without any doubt, that he had done it, as Easter was then dead. If she had been killed after he made these statements, the evidence would still be strong, but being dead at the time, his words amount to a present confession of his guilt, and not merely to a threat of committing the act in the future.

The prisoner, as a witness in his own behalf, denied that he had said to the State's witnesses what they testified that he did. The evidence

offered by him, except his own denial of the charge, is not necessarily inconsistent with the fact that he killed Easter Grimes. It does not account for his presence elsewhere for the whole period of time during which the homicide may have been committed, and besides it was the province of the jury to decide whether the evidence was true. It does not appear that any other person had any motive to commit the crime, or the opportunity, but, on the contrary, the combination of motive, threat, time, place, and circumstances, as detailed by the witnesses, all tend to establish the guilt of the prisoner. *Brown v. State,* 141 Ga., 5.

There was no error in overruling the motion to nonsuit and submitting the case to the jury upon the evidence.

No error.

STATE v. WALTER WOODLIEF.

(Filed 11 October, 1916.)

1. Criminal Law — Concealed Weapons — Apprehensions — Aggravation — Courts—Sentence—Statute.

Carrying concealed weapons in reasonable apprehension of deadly assaults is not justification of a violation of the statutory offense, but in aggravation thereof, and may be considered by the trial judge in imposing the sentence, according to the discretion given him therein by Revisal, sec. 3708.

2. Criminal Law—Sentence—Court's Discretion—Review—Appeal and Error.

Where a statute leaves the punishment for its violation within the sound discretion of the trial court, the sentence imposed by him will not be reviewed by this Court on appeal where its exercise has not been grossly or palpably abused.

3. Same—Constitutional Law—Cruel and Unusual Punishments.

Where a defendant, indicted for carrying a concealed weapon and an assault therewith, submits as to the first count and is acquitted by the jury on the second one, the trial judge, in whose discretion the sentence is left by the statute, Revisal, sec. 3708, may consider the evidence on the second count, in pronouncing judgment, and determining the extent of the sentence he will impose; and under the circumstances of this case it is *Held* that a sentence imprisoning the defendant for thirty days is not open to the objection that it is "cruel and unusual." As to the jurisdiction of this Court to review the exercise of discretion by the trial judge in imposing the sentence in this case, *quere?*

CRIMINAL ACTION for carrying a concealed weapon, tried before *Connor, J.,* at April Term, 1916, of WAKE.

STATE *v.* WOODLIEF.

Defendant was indicted in two separate bills for an assault with a deadly weapon on Huley Mangum, and carrying a concealed weapon, with which the assault was alleged to have been committed. By consent, the two cases were consolidated and tried together. At the close of the evidence the court adjourned from Tuesday to Wednesday, and on the latter day, when the trial was resumed, defendant pleaded guilty to the indictment for carrying a concealed weapon. Huley Mangum, witness for the State, testified: "I was driving along the road one Sunday afternoon. Saw two buggies standing on one side of the road with their horses headed in an opposite direction from that in which I was going; two men were on the front of the buggy, the other two men were out tusseling in the road. As I drove up I said, 'Look out!' and drove on by, and my front wheel struck the leg of the defendant, who was one of the men in the road. Then the defendant caught my rear buggy wheel. I then told defendant to turn the wheel loose or I would make him turn it loose; thereupon I struck the horses I was driving and they jerked the wheel away from the defendant. Defendant then threw dirt and rocks at me, and, when I got farther away, took a pistol from his pocket and shot at me several times; one ball fell in a yard near me; saw it hit a limb on a pear tree; others went over my buggy; and then he fired across the fields in another direction. My wife was on the buggy with me. I was on a top buggy with curtains up, but saw the defendant take the pistol from his pocket and shoot several times."

The defendant testified that he and Roger Coley were driving along the road on a buggy, and they met Demie Champion and Louis Champion on another buggy. The Champions had a jug of wine and asked them to have a drink, and drove their buggy out to the right side of the road; he and Coley drove past them and turned around, and stopped their buggy just behind the one on which the Champions were sitting. He and Coley then got off their buggy and went to the other one to get the wine. While he was standing by Champion's buggy, Huley Mangum came along; they had given more than half of the road. Mangum drove his front wheel against defendant, striking and skinning his leg, and would have struck him with the hind wheel had he not caught the wheel. Mangum made no stop, but struck his horses with whip and threw the defendant down into the ditch and drove on. While he was down in the ditch some one fired a pistol twice; did not see who it was. He had a pistol in his pocket, but did not take it out at all. He had carried it for six months; he carried it because his life had been threatened; certain men thought he had informed revenue officers about their stills, and threatened to kill him, and had waylaid him and shot at him many times. On cross-examination he was asked if he had not left the State to escape the process of the court. He said he had not; that

he went to Arkansas last fall to visit his relatives; did not know that the grand jury had presented this matter, but when his people at home wrote him that the sheriff was looking for him, he came home and surrendered himself and gave bond for his appearance. The defendant introduced W. S. Hockaday and W. G. Ray, who testified to the good character of the defendant.

The State then introduced Demie Champion, and after him Louis Champion. They testified substantially the same as did the defendant, stating that he did not see any one shoot, and did not see defendant have a pistol, but heard two shots fired from behind them; their horse became unmanageable, and they did not see who it was that did the shooting. Lyon testified that he was some distance away, but heard two shots; could not see the person who fired; he went on down the road, up one hill, down and up another, and saw two buggies and Roger Coley and defendant and two other white men he did not know and had not seen since; defendant was standing by a buggy with his pistol in his hand. Defendant, recalled, denied seeing Lyon or having a pistol in his hand. Roger Coley was not present at the trial. State closed. This was Tuesday afternoon about the usual hour for adjournment of court. The judge requested the jurors to get their hats and go out quietly, and asked everybody to remain seated till court was adjourned. He then called up the two State's witnesses, Demie and Louis Champion, and the defendant, and reprimanded them severely for false swearing, and required them to give bonds for their appearance next morning to answer the charge of perjury. The two Champions, upon his order, were taken in custody by the sheriff and seated with the prisoners from jail. After some time he told the clerk to take the recognizance of the Champions to appear next day, and said the defendant was already under bond to appear in the cases then before the court. On next morning, by leave of the court, the defendant recalled W. G. Ray, who testified that the character of the two Champions was good and that of the two negroes, Huley Mangum and Lyon, was bad.

The solicitor accepted service of the defendant's case, but filed no exceptions thereto or counter-case, and the appeal was heard in this court on the case tendered by the defendant, who appealed from the judgment of the court imprisoning him for thirty days, and assigned as error that the punishment was cruel and unusual.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

N. Y. Gulley for defendant.

WALKER, J., after stating the case: It is no defense to a charge of unlawfully carrying a concealed weapon that it was done for the pur-

pose of self-defense. *S. v. Speller,* 86 N. C., 697; *S. v. Woodfin,* 87 N. C., 526; *S. v. Brodnax,* 91 N. C., 543. The guilt appears legally from the intent to carry the weapon concealed. *S. v. Dixon,* 114 N. C., 850; *S. v. Pigford,* 117 N. C., 748; *S. v. Brown,* 125 N. C., 704. The above cases show that one of the mischiefs intended to be remedied is the practice of carrying concealed weapons to be used on an emergency. *Justice Ashe* said in *S. v. Brodnax, supra:* "The mischief intended to be remedied by the statute was the practice of wearing offensive weapons concealed about the person, or carrying them so concealed with a purpose to be used offensively or defensively upon an emergency." And *Justice Ruffin* said, in *S. v. Speller,* 86 N. C., 697: "The right to wear secret weapons is no more essential to the protection of one man than another, and surely it cannot be supposed that the law intends that an unwary advantage should be taken even of an enemy. Hence it takes no note whether the secret carrying be done in a spirit of foolish recklessness or from a sense of apprehended danger, but in either case declares it to be unlawful. Indeed, were there any difference made we might expect it to be against one who felt himself to be under some pressure of necessity, since in his case the mischievous consequences intended to be avoided might the more reasonably be anticipated. And it would be a strange passage in the history of legislation to enact that it shall be unlawful for any person to carry concealed weapons about his person except when it may be supposed he shall have occasion to use them." The learned counsel for defendant does not contend that the apprehension of danger would justify the defendant in carrying a concealed weapon, but merely that it should be considered, in the admeasurement of punishment, as an extenuation of the offense, and upon the question he raises as to whether the sentence to confinement in the jail was cruel and unusual. We have cited the above cases and quoted therefrom the very language of the Court in order to show that carrying a concealed weapon for a hostile or even a defensive purpose, instead of being an excuse for the act, or mitigation of the crime, tends rather to aggravate the offense, and amounts to doing precisely what the statute plainly intended to forbid. The serious consequences which the Legislature had in mind and which were provided against by the law, are what the State alleges have followed, in this case, the defendant's violation of the statute. Whatever his motive was, he deliberately broke the law by carrying a weapon concealed on his person.

We may assume, for the sake of discussion, the jurisdiction of this Court to review a judgment below, upon the ground that the particular punishment imposed by the court is "cruel and unusual," where the law gives to the judge a discretion to fix the punishment, as it does in respect to this crime. Revisal, sec. 3708. *S. v. Manuel,* 20 N. C.,

bottom page 122 (4 Dev. and Bat., 20); *S. v. Driver,* 78 N. C., 423. In the *Driver case* the Court held that "there is a limit to the power of the judge to punish, even when it is expressly left to his discretion. What the precise limit is cannot be prescribed. It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be abused." The Court adds that it ought not to be interfered with "except where the abuse is palpable." In *S. v. Manuel, supra, Judge Gaston,* discussing the question now before us. said: "There are great if not insuperable difficulties in a court undertaking to pronounce any fine excessive which the Legislature has affixed to an offense. It must be admitted that the language of this section of the Bill of Rights is addressed directly to the judiciary for the regulation of their conduct in the administration of justice. It is the court that requires bail, imposes fines, and inflicts punishment, and it is commanded not to require excessive bail, not to impose excessive fines, not to inflict cruel or unusual punishment; and it would seem to follow that this command is addressed to it only in those cases where it has a discretion over the amount of bail, the quantum of the fine, and the nature of the punishment. No doubt the principles of humanity sanctioned and enjoined in this section ought to command the reverence and regulate the conduct of all who owe obedience to the Constitution. But when the Legislature, acting upon their oaths, declare the amount of bail to be required, or specify the fines to be imposed, or prescribe the punishments to be inflicted in case of crime; as the reasonableness or excess, the justice or cruelty of these are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a coördinate branch of the Government. Without attempting a definite solution of this very perplexing question, it may at least be safely concluded that unless the act complained of (which it would be almost indecent to suppose) contain such a flagrant violation of all discretion as to show a disregard of constitutional restraints, it cannot be pronounced by the judiciary void because of repugnancy to the Constitution." But the statute in regard to carrying concealed weapons has left the punishment to the sound discretion of the trial court, the exercise of which in any given case will not be reviewed save where there has been gross or palpable abuse. In *S. v. Hamby,* 126 N. C., 1066, the defendant was convicted of carrying concealed weapons and sentenced to confinement in the county jail for two years, and assigned to work on the public roads. It was held that the punishment was not unusual, and in *S. v. Farrington,* 141 N. C., 844, the defendant was indicted for unlawfully retailing liquor and sentenced to work one year on the public roads. The punishment was declared to be within the law and not cruel or unusual, the Court saying: "It is equally

settled that when no time is fixed by the statute, this Court will not hold an imprisonment for two years to be cruel and unusual," citing *S. v. Driver, supra; S. v. Miller,* 94 N. C., 904. And *S. v. Dowdy,* 145 N. C., 433, is to the same effect, except that the defendant in that case was sentenced to serve two years on the public roads for unlawfully selling liquor, instead of one year as in *S. v. Farrington, supra.* In the *Miller case* the defendant was fined $2,000 and imprisoned one month for keeping a gambling house, and the punishment was held not to be cruel and unusual within the prohibition of the Constitution, the Court through *Chief Justice Smith* saying: "As the measure of punishment, within the limits of the law, for the offense is and must be within the discretion of the judge, as he may estimate its criminality, so must be his hearing or refusing to hear a petition for its change or modification, and testimony in relation thereto. It might obstruct or paralyze the administration of criminal justice if this Court were to undertake to revise that discretion, or listen to suggestions that it has been unwisely exercised in a particular case. The judge who tried the cause and heard the testimony is the best as he is in law the sole judge of the merits, and if he acts within the boundaries prescribed by law, his decision is final and unreviewable in the appellate court."

We have referred to the above cases for the purpose of disclosing the extreme trend of judicial thought upon this subject. Our opinion is that the learned judge kept entirely within the bounds of the law when he imposed the punishment of thirty days confinement in the jail. While the jury acquitted defendant of the other charge, because, as they explained to the judge, the evidence had not satisfied them of the defendant's guilt, the verdict did not estop the judge, or deprive him of the right to form his own opinion of the defendant's guilt, and to consider it as a circumstance in estimating the degree of punishment he should impose for carrying the concealed weapon. The prosecutor had testified positively and directly to defendant's guilt in the assault case, and two other witnesses who were present said that they heard two pistol shots, and Lyon stated that he heard the report of two shots and saw defendant standing by the buggy with a pistol. Defendant denied that he had used his pistol, but the evidence was calculated to make and did make an impression on the judge quite different from that it seems to have made on the jury. He evidently thought that Demie and Louis Champion had not told all that they knew and had testified falsely as to not knowing who had fired the pistol, and also that defendant had testified falsely when he stated that he had not used his pistol. Who else than the defendant could have fired the pistol, unless it was Coley? and the evidence tends to show that it was not he. There is no doubt that a pistol was fired. Who is more likely

to have fired it than defendant, the only one, so far as the evidence shows, who had a pistol? The judge heard the witnesses testify, and saw the other incidents of the trial. The demeanor of the Champions and the defendant seems to have impressed him very unfavorably. His conclusion is much more reliable than any opinion we could form, if we had the power to review it at all, or even the inclination to do so. It will not, therefore, be disturbed.

We are unable to see how the legality of the punishment can be affected by the other matters stated in the record—the fact that the judge ordered witnesses into custody for perjury, or that he appeared to disapprove the verdict and asked the jury why they had rendered it. Whether the punishment was cruel or unusual depends upon the nature of the crime and the circumstances under which it was committed and other relevant facts. What evidence the judge will hear upon the question of punishment is for him to determine. If the case is considered with many others, where the judgments have been sanctioned by this Court, it will be found that the defendant has not by any means been harshly dealt with, but has fared well in comparison, and, therefore, has nothing of which to complain. As said in *Farrington's case, supra,* while we disclaim any intention to review the judgment below upon its merits, we may properly say that the facts and circumstances of the case amply sustain the judgment. The defendant was not observing the Sabbath very reverently—drinking wine, carrying a pistol, and otherwise behaving in an unseemly manner—to say the least of it. He claims to have carried the pistol in self-defense, but appeared to be ready for a fight on small provocation, and quick with the trigger. While he was acquitted, the evidence against him in the case for assault seems to have been very strong and was sufficiently so to justify, of itself, the sentence of the court, if it needed any such justification. He cannot be punished for one offense merely because he has committed another, but his general conduct may be considered in gauging punishment.

We are not prepared to say that this Court cannot review the judge, as to the quantum of punishment, even where there is a limit set to the exercise of his discretion; but if the right exists, we will not do so except in a plain case, where the violation of the constitutional provision is palpable, and not involved in any doubt—a case not likely to occur.

The oral argument of defendant's counsel on the general question involved, which is carefully epitomized in his brief, was able and instructive, and has received our close attention; but after further examination we regard the law, as stated by us, to be well settled by a great mass of authority.

No error.

STATE v. J. E. TAYLOR.

(Filed 1 November, 1916.)

1. Criminal Law—Removing Fence—Possession—Defenses—Title—Statutes.

Where the State, upon trial under an indictment for unlawfully and willfully removing a fence, Revisal, sec. 3673, shows actual possession in the prosecutor, the defendant cannot exculpate himself by showing title to the land upon which the fence was situated.

2. Criminal Law—Removing Fence—Evidence — Possession — Indictment — Trials.

Evidence is sufficient to convict under an indictment for unlawfully and willfully removing a fence (Revisal, sec. 3673) which tends to show that the prosecutor had been in possession for twenty-three years and that the defendant moved the fence without his knowledge or consent; and the indictment is sufficient as to the prosecutor's possession which charges that he owned the property and the fence inclosed the yard around his dwelling.

3. Motions in Arrest—Judgments.

A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it.

INDICTMENT under section 3673, Revisal, for unlawfully and willfully removing a certain fence, tried at May Term, 1916, of NEW HANOVER, before *Stacy, J.* The jury rendered verdict of guilty. From the judgment rendered the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Herbert McClammy for defendant.

BROWN, J. There are three assignments of error directed to the evidence. In our opinion, the evidence to which they are directed was not at all material and the assignments are without merit. They need no discussion. The defendant excepted to the following charge:

"The State contends that the prosecuting witness had a fence which had been in a certain place for twenty-three years, and that the defendant removed that fence without any authority from the prosecuting witness. I charge you, gentlemen, that if you find as a fact from the evidence, and you are satisfied beyond a reasonable doubt that this fence inclosed this yard, and it so inclosed it for a period of twenty-three years, then the defendant had no right to remove that fence without authority from the owner, or if he removed that fence without such authority, it was done unlawfully."

We see no error in this instruction. It is well settled that where the State, in an indictment under section 3673 for unlawfully and willfully removing a fence, shows actual possession in the prosecutor, the defendant cannot exculpate himself by showing title to the land upon which the fence was situated. *S. v. Campbell,* 133 N. C., 640; *S. v. Fender,* 125 N. C., 649; *S. v. Howell,* 107 N. C., 835; *S. v. Marsh,* 91 N. C., 632; *S. v. Graham,* 53 N. C., 397.

In *Fender's case, supra,* it is held that "Offenses in the nature of trespass are against the possession; where the actual possession is in the prosecutor, the defendant cannot exculpate himself by showing title to the land upon which the fence was situated and from which it was unlawfully removed by defendant."

Mr. Justice Douglas well says: "Of course, if the prosecutor were admittedly a naked trespasser, without pretense of right, it might be different; but the courts do not encourage the trial of title upon the criminal docket."

The prosecutor Otten testified that he owned and was in possession of the property partly inclosed by the fence; that he had been in possession of it for twenty-three years, and that the fence had been there all those years; that defendant removed the fence without his knowledge or consent. Under the authorities, the charge was fully justified by the evidence.

The defendant moved in arrest of judgment upon the ground that the bill of indictment did not charge that the prosecuting witness was in possession of the property from which the fence was moved. In support of this motion defendant relies upon *S. v. Mason,* 35 N. C., 341, and *S. v. Whitener,* 92 N. C., 798. We are not disposed to now question the authority of these cases, although the first was decided in 1852 when great particularity in criminal pleading was required.

The second case cited was practically overruled in *S. v. Whitener,* 93 N. C., 591, the Court pointing out that the indictment in that case was not under section 3673 (then 1062) of The Code."

The indictment sufficiently charges that the property was in the possession of the prosecutor H. F. Otten. It charges that he owned the property and that the fence which was removed inclosed the yard around the dwelling-house. The court properly overruled the motion.

A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. *S. v. Ratliff,* 170 N. C., 707; *S. v. Francis,* 157 N. C., 621.

No error.

STATE v. C. U. WILLIAMS.

(Filed 1 November, 1916.)

Trials—Courts—Expression of Opinion—Statutes—Schools — Teachers—Assaults.

Where a school teacher is tried for an assault upon a lad, his pupil, and the evidence is conflicting as to whether he acted in the exercise of proper chastisement, or "slung him around," hit him against a wall, and he fell to the floor, causing an injury, a charge of the judge to the effect that the judge believed in whipping posts, but that the defendant had no right to sling the boy against the house and bruise him, and that the proper way was to have taken a switch and whipped him, is an expression by the court of his opinion on the evidence, forbidden by the statute.

CRIMINAL ACTION, originating in the recorder's court and tried upon appeal in the Superior Court of COLUMBUS County, April Term, 1916, *Peebles, J.*, presiding. The warrant charges an assault and battery upon Henry C. Jolly, Jr., by "slamming him down on the floor, and up against the side of the house in a very cruel and hurtful manner." The defendant was adjudged guilty by the jury and from the judgment appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

R. H. Miller, Irwin B. Tucker for defendant.

BROWN, J. The State introduced evidence tending to prove that H. C. Jolly, Jr., 8 years of age, a pupil in the Chadbourn High School, hit one Willie Smith, another pupil, and that defendant, who was principal of said school, took Jolly by the collar, "slung him around," hit him against the wall, and he fell to the floor, causing a scar or bruise on his hip, and otherwise injuring him.

There was also evidence tending to prove that defendant was angry and "looked mad" when he punished the boy.

The defendant testified in part: "As this Jolly boy's grade was coming up through the door, some of them marching on one side and some on the other, I noticed him draw back and hit another boy in the back, and I, being very busy right then, caught the boy by the coat collar and pulled him out of ranks and shook him up in the meanwhile. I had no other way of punishing him at that time, and I was going to the auditorium to conduct the exercises. I did not strike him." And further: "I did not throw the boy 4 feet. . . . I did not throw him at all. I caught him by the collar and gave him a twist, and when

I did my hand came loose and he fell on the floor, and I caught him up and shoved him in line with the rest of the grade."

Among other instructions to the jury, his Honor charged: "It is very true that teachers have a right to chastise the children in the usual manner with a whip, and the law presumes that they do it properly until the contrary appears. Nobody believes more in the use of the whip than I do. I think if we would go back to the old whipping post we would have less crime in the land than we have got now. But school teachers have got no right to take a boy and sling him up against the house and bruise or make a bruise on him, and have no right to catch (him) by the collar and sling him around and throw him down on the floor and cause a bruise on him. The proper way is to take a switch and whip him."

The exception to these remarks of the court must be sustained. They are undoubtedly a strong expression of opinion upon the facts, and clearly in violation of the statute. The learned judge seemed to be inadvertent to the testimony of the defendant, who denied the acts charged against him. The defendant was entitled to have the jury pass on his defense free from the influence of the court's opinion upon the facts.

Our statute prohibits the trial judge from expressing an opinion upon the facts, and it is the very bulwark of a free and impartial trial by jury. Without the statute verdicts of juries would in most cases simply reflect the opinion of the court.

New trial.

STATE v. E. W. MINCHER.

(Filed 9 November, 1916.)

1. Indictment—Evidence—Variance.

Where a guard is charged in an indictment for an assault with a club upon a convict, and the evidence tends to show that the assault was with a leather strap, the variance between the charge and the evidence is not fatally defective.

2. Convicts—Assault—Excessive Punishment.

Where a guard is charged with an assault upon a convict, and it is shown that his superior officer instructed him to take the convict over the hill away from the rest of the prisoners and give him five or six licks for refractory conduct; but that the guard used a leather strap 2½ inches wide, 2½ feet long, and ¼ inch thick, upon the prisoner's bare back, with other prisoners holding his head, legs, and feet, in the presence of the "whole crowd," and administered "fifteen or twenty licks," it is

held that the guard exceeded his authority, and the punishment inflicted was excessive and unnecessarily humiliating.

3. Convicts—County Commissioners—Rules—Punishments.

It is the duty of the county commissioners to prescribe rules regulating punishment to be given refractory prisoners, stating the kind and quantum of punishment, to what breach of discipline applicable, and by whom to be inflicted, which duty they cannot delegate; and where this has not been done, their order that the road superintendent be authorized to use such means as he may deem necessary to enforce obedience cannot be construed to authorize the infliction of corporal punishment. *S. v. Nipper* cited and applied.

4. Trials—Evidence—Ex-convicts—Questions for Jury.

A guard indicted for unlawfully assaulting a convict may be convicted upon testimony of ex-convicts, the weight and credibility of such evidence being for the jury.

ALLEN, J., concurring in result; CLARK, C. J., filing concurring opinion.

INDICTMENT for assault and battery, tried at May Term, 1916, of LENOIR, before *Bond, J.*

There was a verdict of guilty. The court sentenced defendant to twelve months imprisonment in the common jail of Lenoir County, not to be worked on the roads. The defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

G. V. Cowper for defendant.

BROWN, J. The defendant was a convict guard of the county of Lenoir, acting under the superintendent of the road force, one Bryant Taylor. He is indicted for whipping Junius Potter, a convict. At the conclusion of all the evidence the court instructed the jury that if they found the facts to be as testified to by the witnesses, they should render a verdict of guilty. The only witness introduced by the State was Jim Benton, an ex-convict, who had served a term on the roads. He testified that while he was on the roads he saw defendant whip Junius Potter with a strap 2½ inches wide, 2½ feet long, and ¼ inch thick or more; that he was whipped on his bare back; that defendant made Potter get down and pull down his pants and had men to hold him; one held his head and one sat on his legs and one held his feet; that the "whole crowd" were present and fifteen or twenty licks were administered on the bare flesh.

The defendant was not examined as a witness, but offered evidence substantially as follows:

The superintendent of the road force, Bryant Taylor, testified that Potter would not work; that he ordered him to get a shovel and go to work, and he again refused; that this order was repeated three or four

times, and Potter still refused; that Potter's health was good and he made no excuse that he was unable to work. In consequence of such repeated refusals to work, witness instructed defendant to take him over the hill away from the other convicts and strike him five or six licks.

Dr. Parrott testified that he examined Potter that night, and found no bruises on him; that he examined him to see if he had been whipped too much, and found no evidence that he had been bruised; that Potter was then suffering with a very mild type of venereal disease for which witness treated him.

Bryant Taylor, being recalled, testified that "after Mr. Mincher had given him the licks that I mentioned, in respect to his obeying my requirements to work, it had great effect. We never did have to whip him any more, for four months; he worked after then. He had been doing mighty sorry before then. That was the only trouble that I had had with him."

The defendant introduced the following portion of the minutes of the county commissioners of Lenoir County for 5 October, 1914. "Ordered: That the superintendent of the roads be and is hereby authorized to use such means as he may deem necessary to enforce order and obedience by the convict force."

Evidence was offered tending to prove that the board of commissioners of Lenoir County enacted certain rules and regulations for the punishment of refractory and unruly convicts, and that they were in typewriting and posted in the convict camps, but no evidence whatever is in the record as to what the regulations were. They were not recorded on the minutes of the board, as they should have been, and no one seems to know anything about them.

1. The defendant contends that there was a variance between the indictment and the proof, in that the indictment charged the assault to have been committed with a club, whereas the proof showed the use of a strap 2½ inches wide and ¼ of an inch thick, or more. The defendant could not have been misled, as the person the indictment charged him with assaulting had been on the road force, and the defendant must have known that the charge against him was for unlawfully flogging a convict.

In *S. v. Gould,* 90 N. C., 658, it was held that where an indictment for murder charged that the mortal wound was inflicted with a rock, and the proof was that the instrument used was a stick, there was no variance. The Court said: "The bill charges that the wound was given with a rock, and the proof rather tended to show that it was given with a stick. It can make no difference whether the deceased

was struck with a rock or a stick; for it is held that where the instrument of death laid in the indictment and that proved are of the same nature and character, and the method of the operation is the same, though the instrument is different, there is no variance."

In *S. v. Weddington,* 103 N. C., 364, the indictment charged that the killing was done with a piece of plank, and the proof showed that it was done with a piece of iron. It was held that the variance was not necessarily fatal.

In *S. v. Speaks,* 94 N. C., 865, on an indictment charging that the killing was done with a rock, it was held that there was no error in the charge to the jury that if the killing was done with a rock or other missile, etc., and the Court emphasized the principle stated in the *Gould case,* that there is no variance when the wound is inflicted with "some other isntrument of the same nature and character when the method of the operation is the same."

2. It is contended that the court erred in the charge. We think the charge is fully warranted by the evidence. If the evidence is believed, the defendant administered an excessive and unnecessarily humiliating punishment to the convict. What credit or faith the jury should give to the evidence of the ex-convict Benton was a matter for them. It was within their prerogative to discard it entirely. Nevertheless, they acted on it and convicted the defendant.

The defendant's witness Taylor, the superintendent, testified that he instructed defendant to take Potter over the hill away from the rest of the convicts and strike him five or six licks.

The State's witness testified that the convict was made to get down and remove his clothing; that one man held his head, another sat on his legs; and another held his feet, and that defendant struck him fifteen or twenty blows with the strap on the bare flesh in the presence of the "whole crowd."

If this evidence is believed by the jury, as it seems to have been, the defendant exceeded the instructions given him by his superior, Taylor, and the punishment inflicted was excessive and unnecessarily humiliating.

In that view the defendant is guilty. There is another view in which the defendant is guilty. There is nothing in the record to prove that the board of county commissioners enacted any rules and regulations for disciplining convicts by the administration of corporal punishment. There is evidence that the board adopted some regulations, but they were not recorded and no one has testified as to their purport. The order of the board that the road superintendent be authorized to use such means as he may deem necessary to enfoce obedience by the convict force does not authorize the infliction of corporal punishment.

It is a delegation of a power which the board only can exercise and commits to the discretion of the road superintendent a very vital and important matter which must be regulated and prescribed by the commissioners themselves. It is their duty to prescribe the kind and quantum of punishment to be administered, for what breaches of discipline and by whom it is to be inflicted.

In the prevailing opinion in *S. v. Nipper,* 166 N. C., 272, *Mr. Justice Hoke* says: "These statutes clearly contemplate that the control and discipline of convicts, and particularly in reference to their punishment, corporal or other, shall be pursuant to rules formerly made and published by the board of county commissioners, or their duly authorized agents, and I would not hesitate to hold that these rules should be humane, reasonably designed to affect the well ordered goverance of convicts, and that, in their prominent features, they should be made known beforehand to each and every prisoner, that they may live and act with knowledge of the penalties attendant on disobedience. In applying such a standard, I am not prepared to say that never, under any circumstances, is corporal punishment permissible, or that carefully prepared rules looking to such result are in all instances unlawful; but the question is not presented on this appeal, for there is no proof or suggestion that there were any rules or regulations of any kind which authorized the punishment inflicted in the present case."

Since that opinion was published, the General Assembly has convened and failed to forbid corporal punishment as a means to discipline convicts sentenced to work upon the public roads of the State. The kind of punishment that may be inflicted in order to enforce obedience to discipline upon the part of convicts engaged in working the public roads of the State is a difficult problem of serious importance addressed to the wisdom of the General Assembly. The convict system of working the public roads is well established in a majority of the counties of the State, and many hundreds of miles of good roads have been constructed since it was first adopted. The convicts are necessarily worked at considerable distances from the county jail. Such jails are not equipped with dark cells and other instrumentalities for enforcing obedience employed in well regulated penitentiaries, and if they were, they are not accessible.

If the convict is returned to jail because he will not work, he accomplishes his purpose. It is what he desires, and it destroys entirely the efficiency of a sentence to hard labor upon the roads. If the convict system of working the public roads is to be maintained, some kind of summary punishment must be inflicted in order to compel the unruly convict to work and in order to enforce discipline and obedience to

authority. If this cannot be done, the system may as well be abolished.

No error.

ALLEN, J., concurs in result.

CLARK, C. J., concurring: Prior to the Constitution of 1868 corporal punishment was allowed, such as branding for manslaughter, cutting off the ears for perjury, and whipping and setting in the stocks for larceny and other crimes; but in no case without the verdict of a jury of twelve impartial men, rendered in open court, and the sentence of a judge. The advancing civilization of the age required that corporal punishment, even in such cases and with such safeguards, should be abolished, which was done by the Constitution, Art. XI, sec. 1. This removed from our statute book all possibility of whipping or other corporal punishment, even by the verdict of a jury, with the guaranteed right of the benefit of counsel and the judgment of a court. Certainly it could not have been contemplated that whipping should be inflicted without a verdict, without a trial of any kind, and without the sentence of a court. Such punishment without a jury trial and judgment was unknown to the law even in the most barbarous days of the common law. It needed no constitution and no statute to forbid its imposition by the arbitrary act of any officer, and no statute since has authorized the infliction of whipping, branding, or cutting off ears in any case, and the defendant here had no right to inflict either.

Before the jury, the witness Benton testified that he saw the defendant whip Junius Potter, and said: "I do not know how many licks he struck him; I reckon he must have struck him fifteen or twenty. He hit him with that strap, I guess; it looks like the same thing. The strap did not have a handle to it. It was a strap like this; I guess it is the same one. I measured it before I left there; it was 2½ inches wide and 2½ feet long and ¼ inch thick or more. When he struck Junius Potter he struck him right on his bare back. He just made him get right down and pulled down his pants and had two men to hold him. I do not recall who held his head; one did, and one sat on his legs. I think somebody sat on his feet. . . . After he was whipped, Junius Potter worked on that day and went back to the camp that night. I think it was that night that Dr. Parrott was called."

The judge after the conviction of the defendant, according to custom, and in the proper discharge of his duties, as we have held in *S. v. Woodlief, ante*, 887, investigated as to the general character and conduct of the defendant in order to fit the punishment to the crime. This was proper and customary in order that the judge might be informed as to the proper punishment to inflict. Besides, the defendant has

excepted that the sentence of one year in jail is excessive, which made it necessary to send up the evidence in the record. On this investigation Benton, who was one of the prisoners at the time the defendant inflicted the whipping for which he was convicted, and who was the chief witness against him on the trial, and whose testimony must have been found to be true by the jury, testified on such examination by the judge: "I kept a little book about 2 inches wide. There is not but one more man that knew that I kept it. I toted it in my shoe; he was Frank Gray. I kept it from the 20th of July to the 13th of December, what I saw Mr. Mincher whip. Tuesday, July 20, I saw 26 whipped; and one died that night. Tuesday, the 27th, I saw 7 whipped; Monday, the 2d, I saw 7 whipped; Tuesday, August 19, I saw 13 whipped. Tuesday, the 24th, I saw 12 whipped; Tuesday, the 31st, I saw 11 whipped. September 18 I saw 22 whipped. September 25th I saw 4 whipped; the 27th I saw 11 whipped; the 29th I saw 12 whipped. October 26th I saw a woman whipped—no, sir, I didn't see that, but I heard her whipped. I guess it was Mr. Mincher did the whipping. November 2 I saw 6 whipped. Tuesday, the 6th, I saw 9 whipped. December the 13th I saw 9 whipped. The whipping was done with that leather strap, a man sitting on his head and one on his feet, and Mr. Mincher applied it. I saw a man whipped about the Clay Hole; his name was Horace White. Mr. Mincher whipped him three times before he could get away from the place he was at. . . . An ordinary whipping was always from 25 to 50 licks, looked to me like; and your Honor, there was something a-doing when that leather strap went down about 15 or 20 licks. I expect he would about raise the dead. Of course, I never got it. He never struck me, but he threatened me several times." There has been omitted above in the place marked by points (. . .) unprintable evidence of brutality, almost beyond conception. But it is on the record of this Court for all time without any contradiction from the defendant.

The defendant was present in court and was asked by the judge as to his weight, to which he replied that he weighed 240 lbs. The judge, of course, did not go further, but the defendant did not avail himself of the opportunity thus afforded, and the invitation by implication at least to deny any of the above allegations of brutality and gross misconduct. He contented himself merely with putting on evidence that the witness was a man of bad character. As he was a convict, it could hardly be expected that this could not easily be shown; but nevertheless he was the same witness whom the jury had believed on the trial, and the defendant did not avail himself of the opportunity to deny a single item of the testimony. He was a competent witness, and both the jury and judge found him worthy of belief.

There was another witness, one Gray, who testified also to repeated whippings inflicted by the defendant in the brutal manner that had been shown, though he had not seen as many of these whippings as the witness Benton.

It must be noted that prisoners thus committed to the custody of the law can rarely have any witnesses except themselves and their fellow convicts. They have no protection from the bad temper and the brutality of irresponsible and too often brutal officers if the law permitted the infliction of corporal punishments upon them in any case. To allow this is to authorize the officer to be judge and jury in his own case and makes him an irresponsible tyrant without restriction. There can be no more helpless beings on the earth than convicts under such circumstances.

If there is any one who needs the protection of the law it is those who are weak, for the strong are generally able to take care of themselves, and even more than the weak they need the protection of the law who have been placed in custody of the law, under the ban of public opinion and are powerless to protect themselves even against such unspeakable brutality as was inflicted on this occasion.

The State had taken from the victim of this brutal assault his liberty. He could not save himself either by flight or resistance. Had he attempted either he would instantly have been shot and killed. The State owed him protection from violence, especially from its own agents, sufficient food and clothing, and good treatment. Nothing less than this can be tolerated in the treatment of these unfortunates by a Christian, civilized people. It is probable, though it does not clearly appear in the record, that the man thus brutally treated by an agent of the State of North Carolina while in its custody and under its protection was a negro; but that is no defense. It matters not what color an African sun has printed upon him. He was a human being and entitled to the elementary rights of a man. Over the portals of our courthouses and above the judgment seat of the presiding judge the Constitution of the State has written "Equal justice to all and equality before the law."

If a horse or other dumb animal had been treated in this manner, with one man sitting on his head, another on his legs, and another on his feet, with a 240-pound man enraged, and without restraint, coming down on his naked body with a leather strap 2½ inches wide, 2½ feet long, and ¼ inch thick, or more, he would have been punishable by the law. Is it possible that a human being, made in the likeness of his Maker, deprived of his liberty and therefore under the protection of the law, shall be subject to such punishment, and that it is excusable because the victim was a negro?

But it is said that these men are convicts and sometimes insubordinate, and such punishment as this is necessary. "Necessity was ever the tyrant's plea." Such punishment as was here inflicted was never necessary, and to permit whipping convicts in any case is to permit it to the extent and in the manner and according to the temper and unrestricted will of the overseer, for the only witnesses are the cowed fellow convicts who fear a similar punishment at any hour. In *S. v. Nipper,* 166 N. C., 272, the victim of the flogging died within a few hours, but the only punishment inflicted was a fine of $10, because it was not shown that the severe flogging caused the death. In the present case it is in evidence that one of the other convicts thus whipped died the same night. We have no information whether that homicide has been investigated. Presumably it has been. In this very case a physician was called in that night. The victim did not die, but the punishment must have been severe, since the physician was called in.

It does not follow because of the revelation of conditions in the *Nipper case* and in this that such terrible treatment of convicts is usual in this State. On the contrary, doubtless such occasions are rare and the majority of overseers are humane men. But the fact that two such cases have come into court renders it possible that there have been others of which we have heard nothing. The fact that such cases can occur is proof conclusive that the right to flog prisoners ought not to be put in the hands of any man.

In *S. v. Nipper* some of the Court, at least, intimated very clearly that under the Constitution, as flogging was forbidden to be imposed even by the verdict of a jury and the sentence of a judge, it could not be authorized by a resolution of the board of county commissioners, and in this case there were no such resolutions. Though that case was decided two years ago, the Legislature has never thought it had the power to confer upon the county commissioners or overseers of convicts such power, for no act of that kind has been passed. It would be strange, indeed, if it had, when in nearly all other States and countries, even in Mexico and Russia, there are now statutes forbidding the corporal punishment of prisoners under any circumstances.

Nothing is more fatal to discipline in prisons than the infliction of punishment which deprives the convict of self-respect and makes him an outlaw in spirit by its injustice and brutality. Corporal punishment has not only been found unnecessary elsewhere and is strictly forbidden, but kindly treatment with reasonable and just punishment proportioned to the offense, and not inflicted at the arbitrary will of a subordinate, sometimes moved by passion, has been found more successful. In this State last Christmas the Governor gave a furlough, as a reward for good conduct, to a large number of inmates of the peni-

tentiary, and in not a single instance was his confidence abused. Convicts are men and are more moved by appeals to their better natures, and by the hope of reward for good conduct, with moderate and just punishments, only when found necessary, than by such brutalities as appear in this record.

The county commissioners of Lenoir County, 5 October, 1914, passed the following resolution: "Ordered, that the superintendent of the roads be and he is hereby authorized to use such means as he may deem necessary to enforce order and obedience by the convict force." This must mean only "such lawful means" as are necessary. The chairman of the county commissioners who was a witness for the defendant stated: "At the time we passed the resolution I guess we never thought he might take a man down and put a man on his head and one on his feet, and on his bare back put a strap like that on him." The resolution conferred no power on the defendant to inflict corporal punishment, and if it had expressly done so, it would have been invalid. There is no statute which has ever given the county commissioners the power to authorize corporal punishment, seeing that such power has been taken from the judge and jury. Sometimes young white boys, of otherwise good character, are sentenced to the roads for carrying concealed weapons, for the use of a knife or other weapon in an affray, and similar conduct. Shall one of them be subjected to flogging? Certainly the Legislature of North Carolina, in this day, will never pass an act authorizing the infliction of flogging only upon colored prisoners and only by white overseers.

When some forty years ago in *S. v. Oliver,* 70 N. C., 60, this Court abolished the barbarous doctrine of the common law that a husband had the "right to whip his wife with a whip no larger than his thumb," which the Court had then reaffirmed as recently as *S. v. Rhodes,* 61 N. C., 453, the Court needed no other authority than to say with simplicity and directness: "The courts have *advanced from that barbarism* until they have reached the position that the husband has no right to chastise his wife under any circumstances." Even if the common law had ever recognized the right of an official in charge of prisoners to whip them at his own pleasure and to any extent he wishes (which it never did), and if, further, the Constitution had not forbidden the infliction of such punishment even under authority of a verdict by a jury and sentence by a judge, still the Court, in response to the sentiment of a more enlightened and juster age, would need no authority further than to say, *"We have advanced from that barbarism."*

Both on the trial, as well as on the investigation by the judge, above set out after the verdict, the defendant thought best not to go upon the stand, though an innocent man in the face of the testimony of such

brutality could not have allowed such evidence to go down to posterity on the record without contradiction.

The Attorney-General cited *S. v. Hatch,* 116 N. C., 1003, and asked the Court to construe the responsibility of the county commissioners in a case of this kind. In this request the defendant's counsel concurred. The Court has not done so; but as the writer of that opinion, speaking for myself only, and under the authority of that case, as I understand it, and the cases citing it in the Anno. Ed., I think that if the county commissioners had given the defendant the power to inflict such punishment as this they would have been responsible both by indictment and by civil action for damages; and that if such punishment had been previously inflicted so often that by reasonable supervision the county commissioners should have heard of it, and had not removed the overseer and caused him to be prosecuted, they would have been equally responsible both by indictment and by an action for damages by the party aggrieved for willful omission and neglect of duty.

There is no evidence that by reasonable care the commissioners could have heard of the infliction of such punishments by the defendant or others. There is no reflection upon the people of the county or the people of the State, who certainly would not have tolerated such conduct. On such conduct becoming known, it has been promptly and properly punished by court and jury in this case. When there is a foul sore on the body concealment aggravates it. When it is in the conduct of government the remedy is to probe it and treat it. A sound public opinion, like the rays of the sun, cleanses and purifies.

NOTE.—Laws 1917, ch. 286, sec. 7, now forbids any prisoner to be flogged unless of the "incorrigible" class at the State prison, and then only in the presence of the State physician or chaplain.

STATE v. ROBERT FOWLER.

(Filed 9 November, 1916.)

1. Criminal Law—Housebreaking—Evidence—Appeal and Error.

Where an indictment charges the defendant with breaking in a building and stealing a certain sum of money therefrom, it is reversible error for the court to admit testimony, over the defendant's objection, that other buildings had been broken into and other thefts therein committed, when there is no evidence that the defendant committed any of the other crimes or had anything to do with them.

2. Criminal Law—Warrant—Arrest—Reasonable Suspicion.

Police officers of a town, charged with the duty of preventing breaches of the peace and arresting violators of the law, when acting upon reasonable suspicion thereof, and when necessary in case of a felony,

may make an arrest without a warrant, and take the person so arrested, within a reasonable time, or as soon as they can conveniently do so, before some magistrate authorized to hear the charge against him and commit him to bail.

3. Same—Articles in Possession—Evidence—Legal Possession.

It was made to appear upon affidavit and found as a fact by the trial judge that numerous houses had been unlawfully broken into in a certain community, and that the police officers of a town arrested the defendant at the depot at 4 o'clock a. m. with his confederate, who on seeing the uniformed officers, and being hailed by them, tried unsuccessfully to make their escape; that the officers suspected these men of having committed a felony, arrested them without a warrant, and upon one of them refusing to take his hand from his pocket, seized him and found therein a pistol of large caliber, the scabbard of the pistol in another, and a chisel in still another pocket; that he was charged with carrying a concealed weapon, and these articles kept by the order of the chief of police and solicitor to be used as evidence, and the prisoner was finally convicted of housebreaking: *Held*, the articles retained were in the legal possession of these officers, and the prisoner's motion to repossess them was properly denied.

4. Criminal Law—Constitutional Law—Search—Seizure of Articles—Possession of Premises—Consent—Legal Possession.

Where after arrest and upon investigation of a crime the officers of the law go to the residence of the accused and find his sisters in possession, request to search the premises for incriminatory evidence, obtain permission, and find certain articles which have a bearing as evidence upon the defendant's guilt, which are claimed by his sisters as their own, and voluntarily surrendered by them to the officers, these acts complained of by the prisoner are not an unconstitutional seizure of his property or search of his premises, but the articles came lawfully into the possession of the officers of the law, and defendant's motion to repossess them was properly disallowed.

INDICTMENT for housebreaking and robbery, tried before *Long, J.*, and a jury, at July Term, 1916, of FORSYTH.

The prisoner was indicated for breaking into the banking house and storehouse of the Center Mercantile Company and stealing therefrom $100 in money. There was evidence tending to prove the guilt of the prisoner.

J. J. Cofer, a witness for the State, testified, among other things, as follows:

Q. Prior to this time do you know how many safes had been robbed in the city of Winston-Salem within two months preceding this time? A. I know that there had been some eight or ten of them.

Q. In the last six or eight months? A. Hauser Brothers had a store opened about eight months before that. Barbee-Sharp Company was opened some time later. Standard Oil Company had one blown

open. Armour & Co. had one that was attempted, but did not get it opened. I had that one opened and found there the nitroglycerine had been put on and soap at the top did not work. J. H. Thomas had one blown open. The Norfolk and Western Railway ticket office had one blown open, Center Mercantile Company had one blown open. One in Mount Airy, N. C., was blown open, and one in Lexington, N. C.

The prisoner objected to this testimony in apt time; the objection was overruled, and he excepted.

Before the case was called for trial the prisoner submitted a motion, based upon affidavits, for the return to him of certain property which he alleged had been taken from his person by the officers when he was arrested, to wit, one pistol, one chisel, and one flashlight, and from his sister's house one clipping from a newspaper and one mutilated silver dollar. He alleged that this property was taken by the officers when they had no warrant for his arrest, nor any search warrant, and in violation of his constitutional rights; that the property is in the possession or custody of the officers, who are acting under instructions of the solicitor, and that the latter intends to use them as evidence against him on the trial. The judge reserved his decision on the motion until the evidence could be heard, and afterwards he found the facts to be as stated in the testimony of the officers. It appears from their testimony that they suspected the prisoner of having committed a felony by breaking and entering a house and stealing therefrom. As they said, several houses had been thus entered recently or just before the arrest was made. They found defendant and his companion, presumed to be his confederate or "pal," near the Union Station at 4 o'clock a. m., and, on seeing the officers, who were wearing their uniforms, and being hailed by them, they tried to make their escape, but were halted by the officers. The latter had no warrant, but were known officers of the city of Winston. It appears that they suspected the two men of having committed a crime, and they were on the lookout, because so many house-breakings had been committed about that time. These officers had special instructions from the chief of police to keep a careful watch for suspicious persons on the streets because of the recent robberies. The officers arrested the two men, and the officer who arrested the prisoner grabbed his hand, which was in his overcoat pocket, because he had asked him to take it from the pocket, which the prisoner had refused to do. The officer then pulled his hand out of the pocket and found a pistol of large caliber in it, and a chisel in the right hip pocket, the scabbard of the pistol being in the left hip pocket. The prisoner was then turned over to another officer and taken before the recorder, under a warrant for carrying a concealed weapon, convicted,

and sentenced to the roads. Officers afterwards went to the home of Ida Fowler, a sister of the prisoner, in consequence of information they had received. A sister-in-law of the prisoner also lived in the house. They were invited by the women to come in, and they did enter and search the house, but not until they first had received the voluntary and full permission of Ida Fowler to do so.

J. A. Thomas, a State's witness, testified in regard to the search as follows: "I did not learn that defendant's name was not Robert Feltz (name given by him) until he was tried for carrying a concealed weapon. He was being carried to jail and some man saw and recognized him, and furnished us the information. After his trial for carrying a concealed weapon, and in consequence of what others said, I took some officers with me and went where my information was that he lived. There were two ladies in the house when we got there, and I think two small children. One of the ladies said she was a sister, and she is the lady sitting there (pointing to Ida Fowler). That is the lady who occupied the house, about 2 miles from here south, about ½ mile from Center Mercantile Company. The ladies there gave me permission and told me to go ahead and search; I was perfectly welcome to search the house. They never made any demands for process after I got to the house. I told them that I came there and wanted to look over the house and explained my position, and they said it was perfectly all right, to go ahead and look just where I wanted to. I told them I was chief of police and was making an investigation. At the time I went to the house Mr. Cofer, first sergeant of the police force, Mr. Smothers, a member of the police force, Mr. Hauser, deputy sheriff, were with me. All the police officers were dressed in their uniforms. Mr. Hauser had on his badge to show that he was deputy sheriff. No threat of violence or any offer of intimidation was made. They invited me in and I got in the house and told them what my business was, and they told me to go ahead. We began the search. A large trunk was back in the back room, and I asked Miss Ida whose trunk that was, and she told me it was hers. I told her I wanted to look into it and she said all right, and I opened the trunk and looked into it and picked up a hand satchel. It had a man's handkerchief in it with a lot of silver money in it tied up, and I picked up the money and asked what that was, and the amount there was in it; told her that was one thing I was looking for. She told me she had $16 in it. I found $24 in it, that is, $15 in silver dollars and $9.50 tied up in a man's handkerchief. I examined the money and found one silver dollar in there. I examined the money and found this dollar. I examined the dollar and asked her where she got it, and I exchanged with her; gave her a dollar of mine and took this dollar. The silver

dollar was offered in evidence. The exchange was with her consent, and that was the extent of my search. I found a chisel-hammer in a bureau drawer; I did not bring it away. I showed the dollar I got from Miss Ida Fowler to some person connected with the Center Mercantile Company, and the chisel that was taken from the prisoner was taken over to the Center Mercantile Company. After I came from where I had seen Ida Fowler, and from the Center Mercantile Company where I had taken the chisel to compare with the imprints on the door, I went to the jail and served a warrant on the defendant for burglary. When I went to the house on Southside I found this woman, and she gave me her name as Ida Fowler; she told me it was her room, and it was her trunk, and this handbag in the trunk she told me was hers. She told me everything in the room was hers. When I went in she told me to go ahead and search, and made no objection, and made no protest to my taking the dollar. She showed me her brother's room —Robert's room, the defendant. Said she had a brother by the name of Robert, and showed me which room he occupied. The woman who was in the house with Ida Fowler was the defendant's brother's wife. I found no men's clothes in the house."

J. J. Cofer, a State's witness, testified: "I was with the chief of police on the occasion when he searched the house of Ida Fowler. The chief and Mr. Hauser went in Miss Ida's room and were searching there, and I stepped in where the other brother's wife was. She was lying across the foot of the bed, and I stopped and talked with her some, and told her that I wanted to search the house to see if we could find any stolen goods, or any money or anything that was taken from the Center Mercantile Company's safe. She said, 'All right; go ahead and search where you please.' I searched that room while the others were searching the west room, and I found a newspaper clipping that was in the room where her brother's wife was. The newspaper clipping had the report of the safe burglary at Centerville. I found a lot of flashlight batteries lying around the closet that had been burned out and thrown out—about half a dozen—and found a pair of shoes in the back room which had rubber heels on them and had little indents in them. The indents were filled with what looked like plaster paris. I found a chisel-hammer, or the wood part that goes with the chisel, in the washstand of the room where I was looking. I found some money in an envelope in another room. Miss Ida said it was her money, probably a $1 and a $5 bill."

The prisoner when arrested told the officers his name was Robert Feltz and that he lived in South Carolina. There was evidence tending to show defendant's guilt, besides that already stated.

The court refused to grant the order for the delivery of the property to the prisoner, and he excepted.

The jury convicted the prisoner and he appealed from the judgment upon the verdict.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Hasting & Whicker and Fred M. Parrish for defendant.

WALKER, J., after stating the case: The testimony in regard to the number of housebreakings which had recently been committed was incompetent and should not have been admitted by the court. It was irrelevant to the issue, as it did not tend to prove the fact of guilt, and was certainly prejudicial to the prisoner. Nothing could be more harmful than such evidence. It was calculated to inflame the minds of the jurors against the prisoner and to prevent that calm and impartial consideration of his case to which he was entitled. No connection is shown between the alleged crimes and this one, and there is no evidence even that the prisoner had anything to do with the commission of the other offenses. The evidence had no tendency to prove any relevant fact and had the effect only to provoke hostility to him. Underhill on Criminal Ev., sec. 87; *S. v. Frazier,* 118 N. C., 1257; 12 Cyc., 405; *S. v. McCall,* 131 N. C., 798; 16 Cyc., 1114; *S. v. Jeffries,* 117 N. C., 727; *Deming v. Gainey,* 95 N. C., 528. There are some exceptions to the rule excluding evidence of other distinct offenses, but they need not be discussed, as there is not even any proof here that the prisoner committed any of the other crimes. The evidence was wholly irrelevant and very prejudicial. Its admission entitles the prisoner to another trial.

As to the motion for the surrender of property to the prisoner, we are of the opinion that there was no error in the denial of it by the judge.

First. The property taken from the prisoner's person at the Union Station came lawfully into the possession of the officers. Numerous housebreakings had been committed in that vicinity and the policemen were on the lookout for the guilty parties. It is clearly inferable from the testimony that they suspected the two men seen by them on the night of the arrest, the prisoner being one of them. Being known officers, charged with the duty of preventing breaches of the peace and with arresting violators of the law, they had the right, on suspicion, to arrest the prisoner without a warrant and take him within a reasonable time, or as soon as they conveniently could do so, before some magistrate authorized to hear the charge against him and to commit or bail him.

This they did. It is said in *S. v. Belk,* 76 N. C., 13, that "A peace officer may arrest without warrant upon suspicion of felony, and for a breach of the peace committed in his presence." 5 Ruling Cases, sec. 5; *S. v. Bryant,* 65 N. C., 327; *S. v. Shelton,* 79 N. C., 605; *Neal v. Joyner,* 89 N. C., 287; *S. v. Campbell,* 107 N. C., 948; *Brockway v. Crawford,* 48 N. C., 433; 3 Cyc., 878. *Chief Justice Smith* said in *Neal v. Joyner, supra:* "A constable having reasonable ground to suspect that a felony has been committed is authorized to detain the party suspected until an inquiry shall be made by the proper authorities. And to this effect are the authorities in the absence of controlling legislation," citing *Allen v. Wright,* 8 Car. and P., 522; *Rohan v. Sawin,* 5 Cush., 281; *Burns v. Erben,* 40 N. Y., 463; Cooley on Torts, 175; *Brockway v. Crawford,* 48 N. C., 433. There is ample evidence upon which the jury were authorized to convict of the felony, and the principles stated in the above cases show that the officers were within the law when they arrested the prisoner. This being so, the case of *Weeks v. U. S.,* 232 U. S., 383, upon which the prisoner's counsel so much relied, does not support their position, but rather sustains the view that the property came lawfully into the possession of the officers. In that case it appeared that the officers acted illegally and in a high-handed and unjustifiable manner, and it was said: "What, then, is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, sec. 211; Wharton Crim. Plead. and Practice (8th ed.), sec. 60; *Dillon v. O'Brien and Davis,* 16 Cox C. C., 245. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused." It is needless to cite other authority upon this branch of the case.

Second. As to the newspaper clipping, mutilated coin, and any other property taken from the house of Ida Fowler, sister of the prisoner, the case, if anything, is much stronger for the State. The testimony of the officers—which the court found to be true, having found the facts to be as therein stated—was all to the effect that they were careful not to enter the house without the consent of its owner, and that before they entered they had actually been invited by her to come

in, and that everything done by them after they entered was with the express consent of Ida Fowler and her sister-in-law. They were told by Ida that the house belonged to her, and also the contents of the room in which the search was made. She claimed the money and other property, and consented to an exchange of the mutilated silver coin for one of similar kind and denomination. We do not see how, upon this showing, the case can be brought within the principles declared in *Weeks v. U. S., supra.* There the papers were seized *in invitum,* while here they were taken by the officers with the full consent of the parties having at the time possession of them with apparent ownership —a consent that the judge finds from the officer's testimony was given voluntarily and without the display of any force or compulsion. In *Weeks v. U. S., supra,* the Court said that where incriminatory documents (or other articles) are found in a lawful search, even where the find is incidental merely to a legal search for other goods, as, for instance, gambling paraphernalia, they may be used as evidence against the accused on a trial of an indictment for the crime to which the documents related, citing *Adams v. New York,* 192 U. S., 585. The Court further said, approving in that respect the doctrine as stated in 1 Greenleaf on Evidence, sec. 254a: "It was no valid objection to the use of the papers that they had been thus seized, and the courts in the course of a trial will not make an issue to determine that question, and many State cases were cited supporting that doctrine. The same point had been ruled in *People v. Adams,* 176 N. Y., 351, from which decision the case was brought to this Court, where it was held that if the papers seized in addition to the policy slips were competent evidence in the case, as the court held they were, they were admissible in evidence at the trial, the Court saying: 'The court, when engaged in trying a criminal cause, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence. *People v. Adams,* 176 N. Y., 351; 98 Am. St. Rep., 675; 68 N. E., 636; 63 L. R. A., 406. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof.'" There could not be any objection to the introduction in evidence of the articles found by the officers and voluntarily given up by the two women who had them in their possession. This was not an illegal search and seizure within the meaning of the constitutional provision against them. 12 Cyc., 401, so declared, and the text is well supported by the cases cited in the notes. *Commonwealth v. Carbin,* 143 Mass., 124; *S. v. Griswold,* 67 Conn., 290 (33 L. R. A.,

227); *S. v. Van Tassel,* 103 Iowa, 6; *S. v. Atkinson,* 40 S. C., 363 (42 Am. St. Rep., 877).

It was held in *S. v. Griswold, supra:* "Searching the office of an accused person with the consent and aid of his servant, an agent, who was in possession, in order to obtain evidence against the accused is not in violation of the constitutional provision against unreasonable searches; and the taking away of an article found there, with the consent of the agent, is not a 'seizure.'"

That case would, therefore, seem to be precisely in point and a conclusive authority, if followed, as to both questions raised upon this record. The prisoner based his motion on the fourth, fifth, and fourteenth amendments to the Federal Constitution, and on the Constitution of the State, Art. I, secs. 11, 15, and 17.

With reference to a similar question presented in *S. v. Atkinson, supra,* the Court said: "The provisions of the Constitution of the United States relied upon are the fourth, fifth, and fourteenth amendments, and the provisions of the Constitution of this State may be found in sections 13 and 22 of Article I. In the fourth amendment of the Constitution of the United States it is declared that 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated,' etc. In the fifth amendment it is declared that no person 'shall be compelled in any criminal case to be a witness against himself,' etc.; while in the fourteenth amendment the declaration is: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' etc. In the first place, we do not understand that the limitations imposed by the fourth and fifth amendments have any application to the powers of the State governments, but apply only to the powers of the Federal Government. As was said by *White, C. J.,* in *Spies v. Illinois,* 123 U. S., 166: 'The first ten articles of amendment were not intended to limit the powers of the State governments in respect to their own people, but to operate on the National Government alone, was decided more than half a century ago, and that decision has been steadily adhered to since,' citing numerous cases. Nor can it be said that the fourteenth amendment has the effect of extending the operation of the fourth and fifth amendments to the States; for, as was held in *Minor v. Happersett,* 21 Wall., 171: 'The amendment (speaking of the fourteenth) did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.' And the same doctrine was held in *United States v. Cruikshank,* 92 U. S., 542. Besides, the same rights which are guaranteed by the fourth and fifth amendments to the Constitution of the United States are expressly

declared by sections 13 and 22 of Article I of the State Constitution; for in the former section the declaration is that no person shall 'be compelled to accuse or furnish evidence against himself,' while the language in section 22 is: 'All persons have a right to be secure from unreasonable searches or seizures of their persons, houses, papers, or possessions. The question now presented for our decision is not whether the persons who found the pieces of paper in the room of the defendant John Atkinson violated any of his legal rights by entering his room without authority, but whether the papers there found could be offered in evidence in this case; for, while it may be possible that it was a technical trespass to enter his room without authority, yet it does not by any means follow that the pieces of paper there found could not be offered in evidence.'"

This doctrine as to the competency of writings obtained by illegal means is well stated in 1 Greenleaf on Ev., sec. 254a: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." It was further said in *S. v. Atkinson, supra,* 42 Am. St. Rep., at p. 884: "'There was nothing in the evidence tending to show that the defendants, or either of them, was compelled to furnish these papers, or that they were even asked to do so. Indeed, it seems that neither of the defendants was present, or even knew that the papers were found in the room when they were found; and there can, therefore, be no pretense that the defendants were compelled to furnish these papers as evidence against them."

So it will be seen that under the authority of those cases there has been no illegal search of his home, or forcible seizure of the prisoner's property, either from his person or his house, but all the property was obtained by the free consent of those who had charge of the place where they were found, in the case of some of the articles, and, as to the others, they were taken from his person in a lawful manner, as we have shown. The question as to the competency of the evidence is fully discussed and decided in *S. v. Wallace,* 162 N. C., 622.

The result is that a new trial is ordered because of the admission of improper testimony, and the order of the judge refusing to require the officers to deliver up the property is affirmed.

New trial.

STATE v. JOAB SCALES ET AL., EXECUTORS, ETC.

(Filed 9 November, 1916.)

1. Taxation—Inheritance Tax—Interpretation.

Our inheritance tax laws should be liberally construed to the end that all property coming within their provisions may fairly and reasonably be taxed, keeping in view the history of this legislation and the statutory amendments made from time to time.

2. Same—"Section."

Our statutes passed upon the subject of inheritance tax are construed as showing an advancing tendency to include all property, to decrease exemptions, and to maintain a distinct classification of persons, placing the lineal descendant, the lineal ancestor, husband and wife in the most favored class, and the stranger and the corporation in the class subject to the highest tax; and construing the act of 1913, applying the exemptions only to those in the first class, with the act of 1915, reducing the classifications from five to three, and allowing an exemption of $2,000 to "all other beneficiaries in this section": *Held*, the word "section" was intended and meant for the subdivision in which it was placed, and does not apply to the whole section to exempt strangers of the blood of the testator along with the beneficiaries of the first class.

3. Same—Intent.

The inheritance tax law, in grading the widow and blood relations, etc., of the deceased into one classification, exempting property to the value of "$2,000 to a child over 21," and permitting but one exemption to grandchildren of one child of the deceased, etc., cannot rationally be construed, by the additional words to this classification, "all other beneficiaries in this section, $2,000," to apply to the second and third classification, so as to give this exemption to strangers of the testator's blood, who take under his will.

CIVIL ACTION tried before *Long, J.*, at September Term, 1916, of FORSYTH.

This is an action to recover an amount alleged to be due as an inheritance tax from the estate of James S. Scales, who died leaving a will in which there are certain devises and legacies.

The material facts agreed to by the parties are as follows:

"3. That the assessed value of the real and personal estate of the testator, James S. Scales, has by the proper and legal authorities been ascertained to be $162,969, which amount embraces the amount received on specific legacies and the residuary legatees as set out in paragraph 4 of the complaint, to wit:

"To J. A. Scales, trustee of Sarah Elizabeth Scales, sister, her life interest in legacy of $10,000, equal to $1,503. To J. A. Scales, trustee

of Peter Nathan Scales, brother, his life interest in a legacy of $10,000, equal to $3,069. To Peter Nathan Scales, brother in his own right, $10,000. Susan A. Scales, trustee of Joseph Temple Crews, cousin, a legacy of $2,000. H. H. Riddle, stranger in blood, legacy of $2,000. J. K. Norfleet, stranger in blood, legacy of $2,000. George S. Norfleet, stranger in blood, legacy of $1,000. Charles M. Norfleet, stranger in blood, legacy of $500. To Mary Llewellyn, cousin, legacy of $500; Mit Taylor, cousin, legacy of $500; John L. Shelton, cousin, legacy of $500, making a total of specific legacies paid by said executors of $23,572.

"Residuary legatees received $139,497, divided as follows: Under section 13 of the will: Susan A. Scales, sister, one-third, $46,499; Joab Scales, brother, a one-third, $46,499; to W. A. Shelton, nephew, one-sixth, $23,249.50; to Clara Stephens, niece, one-sixth, 23,249.50.

"4. That the defendant executors have paid to the State of North Carolina as inheritance tax the sum of $4,666.93; the plaintiff, the State of North Carolina, claims a balance of $765, the same being the full amount of inheritance tax claimed as due upon the specific legacies and the residuary legatees.

"5. The defendants contend that under chapter 285 of the Public Laws of 1915, inheritance tax schedule AA, Section 6, that each legatee, specific and residuary, is entitled to an exemption of $2,000, and that therefore he does not owe the State of North Carolina any further inheritance tax.

"6. The defendants further contend that under the Revenue Law, Chapter 285, Public Laws of 1915, that each and every one of the legatees, whether special or residuary legatee, is entitled to an exemption of $2,000.

"7. The plaintiff, the State of North Carolina, contends that there is no exemption upon any one of the legacies, special or residuary, and therefore the estate of James S. Scales is due to the State of North Carolina, on inheritance tax under the property as assessed, the sum of $765."

His Honor held that all legatees, special, general, and residuary, were entitled to an exemption of $2,000 each, and rendered judgment in favor of the defendants, and the plaintiff excepted and appealed.

C. A. Vogler for plaintiff.
Jones & Clement for defendants.

ALLEN, J. The origin and history of the inheritance tax are given in the case of *In re Morris,* 138 N. C., 259, and in construing statutes upon this subject of taxation we have followed the rule of the New

York courts of a liberal construction to the end of taxing all property fairly and reasonably coming within their provisions. *Norris v. Durfey*, 168 N. C., 323. There were inheritance tax laws in this State as early as 1847, but the first of the present system was adopted in 1901, and at each session of the General Assembly since then it has been retained as a part of our scheme of taxation.

At first only personal property was subject to the tax, but in 1905 the General Assembly declared its purpose to include real property, and while under the acts of 1905, 1907, and 1909 the question was raised as to whether the machinery had been provided for taxing real property, this was put beyond question in the act of 1911 by provision, which is retained in the acts of 1913 and 1915.

In the original act and down to the act of 1913 the section of the Revenue Act devoted to this subject stated what property should be subject to the tax, and then provided that the tax on the excess of $2,000 should be levied as follows, thereby giving an exemption from taxation of property of the value of $2,000 to all legatees and devisees (*S. v. Bridges*, 161 N. C., 258), and then followed in all of the acts from 1901 to 1911, inclusive, five subdivisions of the section, classifying the persons taking the estate by inheritance or by purchase and fixing the rate on each class.

In these acts devises and bequests to husband and wife and to religious, charitable, and educational institutions were exempt from tax, and in the first class subject to the tax were lineal issue, lineal ancestor, brothers and sisters, and one standing in the relation of child, who were taxed 75 cents on property of the value of $100, while in the fifth class were strangers and corporations, who were taxed on the excess over $2,000 and up to $5,000 at the rate of $5 on each $100 of property, and at a higher rate in excess of $5,000.

In 1913 the General Assembly struck out the clause preceding the classification, providing that the tax should only be on the excess over $2,000; also the provision exempting husband and wife and religious, charitable, and educational institutions from the tax, removed brother and sister from the first class to the second class, in which the rate was $3, and placed husband and wife in the first class, in which the rate was raised to $1.

It also increased the rate in class five on strangers and corporations from $5 to $10 and omitted the provision theretofore in this classification allowing the tax only on property in excess of $2,000.

In the first class, after enumerating those in the class—lineal issue, lineal ancestor, husband, wife, and one standing in the relation of child—there is the following provision:

"The persons mentioned in this class, except as is hereinafter otherwise provided, shall be entitled to an exemption of $2,000 each: *Provided,* grandchildren shall be allowed only the single exemption of the child they represent: *Provided,* a widow shall be entitled to an exemption of $10,000 and each child under 21 years of age to an exemption of $5,000."

In the act of 1915 the classification was reduced from five to three, a graduated tax proportioned to the value of the property was adopted, the persons in the first class remaining as in the act of 1913, except "adopted child" was substituted for "person in relation of child," and strangers and corporations were placed in the third class.

The rate was increased on those in the first class when the property exceeded $25,000 in value, and was decreased on those in the third class.

After stating the rates applicable to the first class, there is this provision in this subdivision of the section: "The persons mentioned in this class shall be entitled to the following exemptions: Widows, $10,000; each child under 21 years of age, $5,000; all other beneficiaries mentioned in this section, $2,000 each: *Provided,* grandchildren shall be allowed the single exemption of the child they represent"; and after the rates in subdivision three the following: *"Provided,* that no tax shall be imposed or collected under this section," etc.

This statement of legislation upon the subject in this State shows an advancing tendency to include all property, to decrease exemptions, and to maintain a distinct classification of persons, the lineal descendant, lineal ancestor, husband and wife, being in the most favored class, and the stranger and the corporation in the class subject to the highest tax.

It also clearly appears that up to 1913 it was the policy of the State to allow an exemption of $2,000 to persons and corporations in all classes, as only property in excess of $2,000 was subejct to the tax, and that this policy was changed in the act of 1913 and the exemptions provided only applied to those in the first class.

The act of 1915 manifests a purpose to continue the policy declared in the act of 1913, as it omits the provision, preceding the classification, limiting the tax to property in excess of $2,000, and the exemptions have the same placing in the first class.

It was, however, necessary to change the phraseology of the act, as a graduated tax was adopted and the five classifications were reduced to three.

It is because of this change in language and on account of the use of the words in the first class in stating the exemptions, "all other beneficiaries in this *section,* $2,000," that the defendants contend that by proper construction the act of 1915 gives an exemption of $10,000

to widows, $5,000 to each child under 21, and that the husband, the child over 21, the grandfather, grandmother, the brother, sister, the remotest kinsman, the stranger and the corporation are classified together, and are alike subject to the exemption of $2,000.

This construction would lead to unnatural and irrational consequences, and "It is presumed that the Leislature does not intend an absurdity, or that absurd consequences shall flow from its enactments. Such a result will, therefore, be avoided, if the terms of the act admit of it, by a reasonable construction of the statute. By an absurdity, as the term is here used, is meant anything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion. The presumption against absurd consequences of legislation is, therefore, no more than the presumption that the legislators are gifted with ordinary good sense." Black on Interpretation of Laws, page 104.

The widow and the children under 21, named in the exemptions, are persons to whom the deceased owner of the property owed the legal duty of support, and as between these the act gives the widow $10,000 and the child $5,000, and the child over 21 has only an exemption of $2,000.

With this spirit manifested in the act to graduate the exemption according to dependency and relationship, is it reasonable to conclude that the General Assembly intended to place the child over 21, who is in the first class as to rate, with the stranger and the corporation in the third class as to exemption, and to say that each should have the same exemption of $2,000?

Again, it is provided in the first subdivision that "Grandchildren shall be allowed the single exemption of the child they represent," and under the construction for which the defendants contend, if a decedent died testate, leaving an estate of $20,000, which amount was to be divided among his five grandchildren, who were the heirs of an only son, and five of his friends, who were strangers in blood, each legatee to receive a legacy of $2,000; the grandchildren collectively would only be allowed an exemption of $2,000, and would have to pay inheritance tax on the remaining $8,000, *while the stranger in blood would have to pay no tax at all*, as the grandchildren together would only be entitled to the exemption of their father or mother, $2,000, and each stranger would have an exemption of $2,000.

We cannot think the Legislature intended such results, and that the word "section" in the phrase, "All other beneficiaries in this section," refers to the first subdivision of the section, and not to the whole section.

Immediately after the levy of the graduated taxes in the first classification, the act says: "The persons mentioned in *this class* shall be

entitled to the following exemptions," thereby declaring that lineal issue, lineal ancestor, adopted child, husband and wife, who are the persons mentioned in the first class, shall have the exemption, and that brothers and sisters, who are in the second class, and remote kinsmen, strangers, and corporations, who are in the third class, shall be excluded from the exemption.

Again, in the third classification in the act of 1915 the word "section" is used in such connection as to indicate clearly that it is confined to that subdivision, thus furnishing additional evidence that the General Assembly was referring to the subdivisions in the use of the word.

This is not a strained construction, as both Webster and the Century define section to be a division, a portion, a paragraph, and Cyc., 35, p. 1282, "A distinct part or portion; the subdivision of a chapter; the division of a law or other writing or instrument; a part separate from the rest; a division; a portion; a distinct part or portion of a book or writing; the subdivision of a chapter, the division of law or other writing; a paragraph," which would justify applying it to the whole section or to a subdivision, and it has been held to refer to a subdivision of a section in *Carter v. Barnes,* 87 S. C., 105; *In re Dossler,* 35 Kan., 683; *Spring v. Collector,* 78 Ill., 105.

We are of opinion that the estate is liable for the tax, as the plaintiff contends.

Reversed.

STATE v. MONROE JOHNSON.

(Filed 9 November, 1916.)

1. Homicide—Murder—Evidence—Premeditation—Continuity—Corroboration.

Upon evidence tending to show that the prisoner worked under the deceased at a mill, was discharged by him, fancied he had a grievance against him, had made threats against his life the day of and the day preceding the homicide; that he went into the mill where the deceased was resting at the noon hour and killed him, without provocation, with a borrowed pistol, etc., testimony of a witness that he had written the prisoner's brother, at his dictation, saying he was in trouble, had been discharged, and asking his brother to get money from his father and come at once, is competent in corroboration, as tending to show continuity of design and the prisoner's purpose to kill.

2. Homicide—Murder—Premeditation—Evidence—Circumstances.

Upon a trial for murder, premeditation and deliberation may be established by circumstantial evidence.

3. Courts—Instructions—Trials—Expression of Opinion—Statutes.

Upon a trial for murder, where the evidence is conflicting, a requested instruction in defendant's behalf that if the jury found a certain phase of the evidence as a fact it should raise a reasonable doubt in their minds as to his guilt, would be improper as an expression of opinion by the judge, prohibited by the statute.

4. Homicide—Trials—Instructions — Deadly Weapon — Presumptions — Evidence—Questions for Jury.

Where a homicide is proven or admitted to have been done with a deadly weapon, a pistol, with evidence tending to show preparation, it is for the jury to determine, upon the evidence, whether the act was done with deliberation or premeditation; and an instruction tendered by the prisoner, that the jury should not find a verdict of murder in the first degree, would be erroneous.

5. Homicide—Trials—Instructions—Inference.

A requested instruction based upon inferences from the evidence should embrace all the evidence necessary for the jury to reach a correct conclusion as to the facts sought to be established, and where a material phase thereof has been omitted, the request is erroneous.

6. Instructions—Contentions—Appeal and Error.

It is the duty of a party to an action to at once call the attention of the judge to an alleged error made in stating his contention in the charge to the jury, in order to have his exception thereto considered on appeal.

APPEAL by prisoner from *Cline, J.*, at March Term, 1916, of GUILFORD.

T. H. Calvert, Assistant Attorney-General, for the State.
Fred M. Parish, Banks H. Mebane, and E. S. Parker, Jr., for prisoner.

CLARK, C. J. The prisoner appeals from a verdict of murder in the first degree. The deceased, Carl Preddy, was overseer in the White Oak Cotton Mills near Greensboro. The prisoner had charge of the north end of the spinning room. It appears in testimony that the prisoner kept company with one of the girls working in his end of the spinning room and that for some reason the deceased, as the overseer, transferred her to the other end of the room, against the protest of the prisoner, where the witness R. C. Moreland was in charge, who testifies that he saw the prisoner on Sunday morning before the homicide, who told him that he was "going to whip Preddy or he is going to whip me." Just then Preddy was passing in an automobile and stopped at the drug store, whereupon the prisoner and another got into the automobile. In about fifteen minutes Johnson came back and stated that he "saw the gentleman and told him he could mark it down

he would get him." This witness further stated that the deceased sent for him, and in consequence of a conversation he had with him, he saw the prisoner that evening and told him that Preddy had sent him his time, which was another way of saying that he was discharged. Thereupon the prisoner jerked out his pistol and said, "I will see him before 8 o'clock." The witness said to the prisoner, "Sit on the bed and let me talk to you a little bit"; that Preddy had told him to tell the prisoner he "did not have a thing against him; he would do anything he could for him and would help him get a job anywhere he could." The prisoner cursed and went out of the door. The next time the witness saw the prisoner was fifteen minutes past 12 the next day, during the noon rest. He was in the White Oak Mills with the deceased; no one else present but himself and Preddy, who was reading the morning paper. The witness was sitting on the table and Preddy on the stool right up against the wall at the end of the table. The witness looked up over the paper he was reading and saw Johnson within about 15 feet; he turned his head and said to Preddy, "Carl, there he comes," and when he turned back to look at Johnson he had his pistol out of pocket in his right hand, shooting as fast as he could. He grabbed him around the neck and slung him off. Preddy dropped his paper in front of the stool, stepped off the stool, and went walking off like he was in a big hurry. He walked about 20 steps and lay down. Johnson cursed the witness and said, "Turn me loose or I will shoot you." Thereupon he turned him loose and he started walking out with his pistol in his hand, and said, "I am going out and give myself up." The witness went down the alley where Preddy lay, and he looked as if almost dead. Johnson went out the same way he came in. He fired three shots—two of them before the witness grabbed him and one shot after that. This last shot went through the window above where Preddy was sitting. The prisoner spoke no word to Preddy and Preddy did not move. He had his foot on the stool and had the paper held up in front of him. The paper did not fall out of his hand till after he was shot. He was reading the paper when the first shot was fired. The prisoner was within 10 or 12 feet before the witness saw or heard him. He says that the prisoner knew that Preddy and he stayed at that place every day during the noon hour. There were other witnesses who saw the prisoner enter the building and pass through the adjoining room with his right hand in his pocket and heard the pistol shots.

The witness Swink testified to the prisoner getting in the automobile with Preddy the day before, as testified to by Moreland, and that when he left, after some conversation with the deceased, he said to the deceased: "I will see you again." There was evidence that the prisoner borrowed the pistol from the witness Mitchell about noon on the day

before, and that on that afternoon the prisoner showed the witness Flintom a pistol like the one with which the killing was done and a pair of knucks; and that in conversation he said that Preddy had moved the girl to the other end of the room out of spite, and threatened that if Preddy should discharge him he would "fix him," showing him the knucks and pistol. At that time he had not been discharged. The witness advised the prisoner to talk the matter over with Miss Clowers and that she would not give him any bad advice. The same witness says that next morning he saw the prisoner, who then mentioned having lost his job, and said that he would ask the deceased for his job back, and if he did not give it to him he would "fix him," and the prisoner further said the witness might tell the deputy sheriff he "need not look for him, for he would come back and give himself up." The prisoner also asked the witness to write a letter to his brother and to tell him he had "lost his job and was in trouble and to get some money from his father and come up there that night." A few minutes after this the witness heard that Preddy had been killed. Another witness, Hilton, testified to a similar conversation about the same time, in which the prisoner made threats against the deceased, and that when the prisoner went out he went towards the mill, and in about five minutes he heard that Preddy was killed.

The two deputy sheriffs, Hobbs and Clark, testified that they arrested the prisoner half a mile from the mill; that he had the pistol in his hand, with three empty cylinders, and they also took from him some knucks and a bottle of whiskey.

Dr. J. W. Meadows testified that he saw Preddy at his office in the mills and found two bullet wounds, one in the right thigh and the other in the abdomen, and the latter caused his death.

The first exception is because the witness Flintom was allowed to testify that at the prisoner's dictation he wrote his brother that he "had lost his job and was in trouble; to see his father and get some money and come up there that night." This was competent in corroboration of the other evidence of intent, premeditation, and preparation. 6 Enc. Ev., 632; 21 Cyc., 923, 925, 930. Premeditation and deliberation may be shown by circumstances. *S. v. Roberson,* 150 N. C., 840; 1 Wigmore Ev., secs. 103, 300. This testimony was proper for the consideration of the jury on the question of deliberation and premeditation in connection with the statements and threats by the prisoner on the afternoon and evening of the day before, and on this same Monday morning, as strongly tending to show continuity of design and purpose to kill the deceased.

The second exception is because the judge refused to charge the jury, as requested, that if they should "find from the evidence that the pris-

oner, after the shooting and his arrest, when he was told by the officer Clark that Preddy was dead, the prisoner said, 'He is not dead; you are trying to scare me,' that such expression on his part should raise a reasonable doubt in the minds of the jury as to whether the prisoner at the time he fired the shot which killed Preddy had the malicious, premeditated intent to kill; and they should not find him guilty of murder in the first degree." This would have been an expression upon the facts, and is prohibited by Revisal, 535; *S. v. Davis,* 136 N. C., 568; *S. v. Dancy,* 78 N. C., 437.

Exception 3 is for the refusal of the court to charge the jury that upon certain stated aspects of the case the jury could not find the prisoner guilty of murder in the first degree; and Exception 8 was because the court refused to charge, "Under all the evidence in this case the jury should not return a verdict of murder in the first degree." The use of a deadly weapon when the slaying is proven or admitted, as in this case, raises the presumption of malice and of murder in the second degree. But when there is evidence, as in this case, tending to show preparation, it is for the jury to determine where the act was committed with deliberation and premeditation; and if the accused previously procured a weapon for the purpose of using it, and does use it, the offense is ordinarily murder. *S. v. Miller,* 112 N. C., 885; *S. v. Hensley,* 94 N. C., 1021; *S. v. Gooch, ib* , 1014.

The deceased was not armed, but there is evidence that there was taken from his pocket, undrawn, after his death, a blackjack. The court charged fully as to murder in the second degree and self-defense, based upon the defendant's own testimony that he fired because he feared the deceased would use the blackjack, and had reached his hand toward his pocket, evidence which was contradicted by Morehead. The court also charged that if the prisoner, without any previous intention to use his weapon, burst into a sudden excess of rage on seeing the deceased, and slew him without premeditation, he would not be guilty of murder in the first degree. The jury did not take the prisoner's version of the homicide.

In the *Miller case, supra,* the Court held that when the prisoner went into the fight with no weapon but his pocket-knife, this alone was not evidence of the premeditated purpose to kill; but it has been held that premeditation and deliberation may be inferred from preparation and threats. *S. v. Booker,* 123 N. C., 713; *S. v. Hunt,* 134 N. C., 684.

Exceptions 4, 5, 6, and 7 were from the refusal of the court to give certain prayers for instruction which omitted consideration of the circumstances showing that the prisoner had prepared himself with a deadly weapon and had made threats tending to show that he expected a difficulty, and went to see Preddy ready for it. In *Ruffin v. R. R.,*

142 N. C., 120, the Court said: "This form of instruction, unless all the material elements of the case be included, is objectionable because it excludes from the jury the duty of drawing such reasonable inference as the testimony would justify."

Exceptions 9 and 10 are to those parts of the charge which stated the contentions of the parties. If there had been any mistake or error in this respect it was the duty of counsel to have called attention to the matter then and there. *S. v. Cameron,* 166 N. C., 384; *S. v. Blackwell,* 162 N. C., 672; *Jeffress v. R. R.*, 158 N. C., 215; *S. v. Cox,* 153 N. C., 638.

We have carefully considered the argument of the learned counsel for the prisoner, but we find no error of which the prisoner can complain. The evidence, if believed, showed malice, premeditation, deliberation, the procuring of a weapon, and theats to kill for a grievance, either fancied or real; it does not matter which. The jury believed the evidence, and in the conduct of the trial by the court we find

No error.

STATE v. J. C. FREEMAN.

(Filed 15 November, 1916.)

1. Criminal Law—Bills and Notes—No Funds—Statutes—Value.

A check for $107, given to the carrier to pay freight charges for the transportation of goods, accepted by it as cash, followed by the delivery of the goods, is for value, within the meaning of Revisal (Pell's), 3434b, making it a misdemeanor for a person to obtain money, etc., or anything else of value by means of a check upon any bank, etc., when it is not indebted to the drawer, etc.

2. Courts—Recorders' Courts—Misdemeanor—Jurisdiction—Statutes.

Pell's Revisal, sec. 3434b, makes it a misdemeanor, and not a felony, for one to draw a check, etc., upon a bank, etc., without funds there, etc., punishable by fine or imprisonment or both, in the discretion of the court; and the offense is cognizable in the recorder's court of the district of Denton, Davidson County. *S. v. Hyman,* 164 N. C., 411, where the statutory offense was a common-law felony, and by the terms of the statute punishable by imprisonment in the State Prison, cited and distinguished.

3. Indictments—Criminal Law—Offense—Judgments—Motions to Quash.

Where the warrant sufficiently charges a criminal offense created by statute, and informs the defendant of the offense with which he is charged, a motion in arrest of judgment is properly denied.

WALKER, J., dissents.

STATE *v.* FREEMAN.

ACTION commenced upon warrant in the recorder's court of the district of Denton, DAVIDSON County. The defendant was convicted, and appealed to the Superior Court and tried at February Term, 1916, *Cline, J.*, presiding. The defendant was convicted and sentenced, and appeals to the Supreme Court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Dallas Zollicoffer, Jerome & Jerome for defendant.

BROWN, J. The defendant was charged with giving a check for $107.06 on the Bank of Cape Fear, N. C., knowing that he had no funds in said bank. The statute creating the offense reads as follows: "If any person, with intent to cheat and defraud another, shall obtain money, credit, goods, wares, or anything else of value by means of a check, draft, or order of any kind upon any bank, person, firm, or corporation not indebted to drawer, or where he has not provided for the payment or acceptance, and the same be not paid upon presentation, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court." Pell's Revisal, sec. 3434b.

In apt time the defendant made a motion to nonsuit upon the ground that the evidence did not show that he obtained anything of value within the purport of the statute. The testimony tends to prove that the check was given to pay freight on a car-load of lumber, which freight amounted to $107.06; that the check was taken as cash and the car-load of lumber turned over to him.

We are of opinion this is substantially a thing of value within the meaning of the statute. Defendant moved to dismiss the warrant for the reason that the recorder's court had no jurisdiction, and that the Superior Court could only acquire jurisdiction by bill of indictment. The offense as defined by the statute is a misdemeanor and punishable by fine or imprisonment, or both, at the discretion of the court.

The case is distinguished from that of *S. v. Hyman,* 164 N. C., 411, which was a charge of perjury. In that case the Court pointed out that though the statute styled the offense a misdemeanor, yet at common law it was a felony, and the statute itself made it punishable by imprisonment in the State Prison, and, therefore, having the actual grade of a felony, though called a misdemeanor, it was held that an offense under the statute could only be prosecuted by an indictment found by a grand jury. The case is within the rulings in the following cases: *S. v. Dunlap,* 159 N. C., 491; *S. v. Shine,* 149 N. C., 480; *S. v. Jones,* 145 N. C., 460; *S. v. Lytle,* 138 N. C., 738.

The motion in arrest of judgment was properly denied. We think the warrant sufficiently charges the offense created by the statute and also informs the defendant of the offense with which he is charged.

No error.

WALKER, J., dissenting: The proceeding should have been dismissed on the motion of the defendant, as the original court had no jurisdiction and the Superior Court, therefore, acquired none derivatively. The only way in which the latter court could get jurisdiction of the case was by indictment of the grand jury in accordance with the express mandate of the Constitution protecting the citizen against prosecution for any criminal offense except a petty misdemeanor, save by presentment or indictment. The crime with which defendant was charged is not such a misdemeanor, but has on the contrary, a very felonious flavor. It is not called a false pretense in the statute, but it is one in reality, as the statutory definition of it contains every element of the offense known as false pretense, or cheating by false tokens. It is "the obtaining of money, credit, goods, wares, or anything of value with intent to cheat and defraud another, by means of a false check, draft, or order of any kind on a bank." In other words, the giving of a check drawn on a bank where the drawee has no funds with which to pay it, and thereby receiving for it something of value. This is, in substance and effect, though not formally, by the law, a false pretense. It is just as heinous in quality as cheating by any other false token or pretense. The statute is merely a slight extension of the common law, as will appear by the following history of the crime of "false pretense" as given by an able and scholarly text-writer (Professor Mikell): The crime of cheating was not very clearly defined in the early common law, the term "cheating" being applied to the defrauding, and even to the attempt to defraud, by means of any artful device whatever. Subsequently cheats were divided into two classes: first, those affecting the Government, and, second, those affecting individuals. In the former class of cases the use of any fraudulent device was sufficient to constitute the crime. In the latter class of cases a false token was necessary. In modern times cases belonging to the first of these classes, while still indictable, have ceased to be denominated cheats, and that term is now restricted to cheats by false tokens. A cheat at common law may be defined as the defrauding of any person by means of a false symbol or token, such as, when not false, is commonly accepted by the public for what it purports to represent. A measure is such a token; therefore, to sell a commodity by a false measure is an indictable cheat. General trade-marks having

a definite meaning in the trade are also such tokens, and the use of a false trade-mark to defraud a buyer is indictable. Since bank-notes pass current, the passing of a false bank-note is a cheat, but the passing of a false promissory note of an individual is not, whether it purports to be the note of the person passing it or of another. Since no mere words amount to a token, drawing a check on a bank in which one has no funds, this being but a written promise or statement, is not a cheat at common law. By 33 Hen. VIII., ch. 1, it was made a penal offense for any person falsely and deceitfully to obtain money or goods in another man's name by color and means of a counterfeit letter or false privy token. This statute is a part of the common law of those of the United States that have adopted the common law of England; but since most of the States early adopted broader statutes against frauds by false pretenses, there are few decisions on the English statute. Under 33 Hen. VIII., ch. 1, and similar statutes, a false token of some kind was still necessary to constitute cheating, and a fraud perpetrated by mere false words alone was a civil injury only and not indictable. The statute of 30 Geo. II., ch. 24, sec. 1, created the crime of obtaining property by false pretenses. It provided that all persons who knowingly and designedly by false pretenses should obtain from any person money or goods with intent to cheat or defraud any person of the same should be deemed offenders against law, etc. Its provisions were extended so as to include the obtaining of choses in action as well as other property by the statute of 52 Geo. III., ch. 64, sec. 1. Most of the American statutes are modeled on these two English statutes. However, the legislatures of many States have added provisions or enacted additional statutes extending the crime to many analogous frauds of various kinds. In a few States, on the other hand, the legislatures have adopted statutes more restricted than the English statutes in their operation, and some have abolished the crime *eo nomine* and assimilated the offense to the crime of larceny, while others have included it under the broader offense of swindling. 19 Cyc., 383 to 393; Mikell Cases Cr. L., 275. The usual definition of a false pretense will show that the statute upon which this indictment was drawn contains every element, at least in a moral sense: "To constitute the crime of obtaining property by false pretense there must be: (1) a false pretense; (2) by defendant or some one instigated by him; (3) knowledge of defendant of its falsity; (4) a reliance on the pretense by the person defrauded; (5) an obtaining of the property by defendant or some one in his behalf; (6) an intent in defendant to defraud; and (7) an actual defrauding." 19 Cyc., 393. Cheating by false tokens or pretense was regarded in the Roman law as analogous to the *crimen falsi.* Stephen Hist. of Cr. Law, 21, 22; 19 Cyc., 386. Other false pretenses

are made felonies by our statute and punished by imprisonment in the State penitentiary not less than four or more than ten years. Pell's Revisal, sec. 3432. While the commission of the offense alleged in this bill is punishable simply "by fine or imprisonment, or both," all the offenses of a like kind are placed in the same general category and even associated in the same chapter of the Revisal as being of the infamous kind. Is cheating by a false and deceitful check any less corrupt or infamous in degree than other cheats, or even than larceny? The element of asportation is the only one that distinguishes the latter from the former. The *mala mens* is the same in both. This being the history of the crime of false pretense, how can we say that it should be dealt with as a petty misdemeanor? It was not so at common law. The punishment, even by imprisonment, is quite as infamous, under our present system, as confinement in the State's Prison. The defendant can be assigned to hard labor on the roads and made to wear stripes. He works in public, where he may be seen of all men, and, perhaps, under a hard and cruel taskmaster. If he happens to be a man of any sense of shame, who has fallen upon evil ways, and who, in his extremity caused by misfortune and poverty, was sorely tempted to get money dishonestly, by a false check, the punishment would surely be as humiliating and as disgraceful to him as the other, and perhaps far more so, and would be equally as severe, harsh, and rigorous. I do not think the framers of the Constitution intended any such meaning when they provided for the trial of petty misdemeanors with the right of appeal. They were referring to such small misdemeanors as would be within the jurisdiction of justices of the peace, where there was no jury—the right of appeal, where a jury could be had in the higher court, being considered a sufficient equivalent. It should be noted that the statute in this case provides a punishment beyond a justice's jurisdiction, as the defendant may be both fined and imprisoned. It would, in my opinion, constitute a dangerous precedent, and one greatly liable to abuse and oppression, to hold that a citizen can be tried without indictment or a jury for an offense punished infamously, and merely because it is called a misdemeanor. When the citizen may lose his liberty and be subjected to infamous and debasing punishment, then, if ever, the rights guaranteed by the Constitution should be carefully safeguarded and preserved to him, without any regard to the mere name of the offense with which he is charged. The law looks to the substance and not to the shadow. If his rights are essentially threatened the Constitution protects him. In *S. v. Dunlap,* 159 N. C., 491, and *S. v. Hyman,* 164 N. C., 411, I dissented from the principle decided, though my opinion, filed in one of the cases, was not in the form of a dissent, as the defendant was otherwise relieved from

the judgment. I have expressed my views somewhat more fully in this case, as, the point being squarely presented, they take the form of a dissent. As it is the last time that I may formally enter my dissent in such cases, I here repeat what I said in the *Dunlap case, supra,* as expressive of my views then and now: "It must not be understood that I assent to the doctrine that the Legislature, under the article of our Constitution providing for the trial of petty misdemeanors, without a jury, but with the right of appeal, has the arbitrary right to declare what offenses shall be petty misdemeanors, so as to confer jurisdiction to try and condemn to infamous punishment without a presentment or indictment by a grand jury and a trial by a petit jury. What difference does it make that we call it a petty misdemeanor, when the crime is punished, upon conviction, with hard labor and with stripes—in other words, infamously and as a felony? It seems to me that it is calling a thing by the wrong name, and is violative not only of the letter and spirit of the Constitution, but of the sacred rights of the citizen as guaranteed by that instrument, and which guaranty existed long before it was adopted. By the use of the term 'petty misdemeanor' was meant such offenses as were known in the law by that name at the time the Constitution was ratified, or offenses of a similar grade. I am not attempting to overthrow the decisions of this Court by argument or precedent—for if that was my purpose, I would proceed in a different way—but merely to enter my earnest dissent to the principle, so often announced, as subversive of the rights and liberty of the citizen, and especially of the consecrated right of trial by jury. If you can, by legislative enactment, make larceny a petty misdemeanor, why not manslaughter, perjury, and other offenses of a higher grade of criminality? But we have often decided that this can be done—that is, that certain offenses which are punished infamously, by hard labor and involuntary servitude, and in a way far more degrading than corporal punishment, can be declared petty misdemeanors. This misdemeanant is sent to the roads, and by the same kind of reasoning he may be sent to the penitentiary, because, at last, it all depends upon the legislative will as to what offenses shall be felonies and what misdemeanors. I think we should retrace our steps and decide the question according to the plain meaning of the Constitution; but until this is done, I must abide by the precedents," 159 N. C., 493, 494.

The punishment of the crime with which the defendant is charged herein, by any other name, such as "felony," would be none the less severe, bitter, and degrading. It is not, therefore, "petty," which means "little, trifling, inconsiderable," but very grave and fraught with serious consequences to the culprit

Until the Court does retrace its steps I shall silently abide by the precedents in this Court, and I would not have prepared this opinion had it not been for the importance and gravity of the question involved.

JUSTICE ALLEN concurs in this opinion.

STATE v. JOHN WALTON.

(Filed 15 November, 1916.)

1. Criminal Law—Fornication and Adultery—Declarations of Woman—Evidence—Trials.

Upon trial under an indictment for fornication and adultery, a statement made by the female defendant to the officer filling in a birth certificate of a two or three months old child, that the male defendant was its father, made within easy hearing distance within the room with him, which he did not deny, but left the room, is competent evidence against him; and if doubtful that he heard such statement, it is a question for the jury under instruction that they do not consider it unless satisfied that the male defendant heard it.

2. Appeal and Error—Instructions—Presumptions.

Where there is no exception to the charge of the court, and the charge is not sent up in the record, it will be presumed on appeal that they were correctly instructed.

CRIMINAL ACTION tried before *Cline, J.*, at February Term, 1916, of DAVIDSON.

The defendant Walton and a female defendant were indicted for fornication and adultery, and from a judgment rendered on a verdict of guilty, Walton appealed. He was sentenced to jail for six months.

It appears that the woman, Mrs. Harris, with whom the defendant is charged with having maintained illegal relations, lives about a mile and a half from the Amazon Mill, and that the defendant was night watchman at that mill. He visited her home almost daily, during the day and at night, and was frequently seen cutting and preparing wood.

On one occasion a policeman went to her house to get her to fill in a certificate of the birth of her child, then two or three months old; that he and another officer sat by the fire, and that the defendant stood by the mantel-board some 4 or 5 feet away. As Mrs. Harris could not read or write, the officer read the questions to her and wrote down her answers. The witness does not know whether the defendant heard

what Mrs. Harris said or not. When, in answer to the question as to the name of the father, she said that the child's father's name was John Walton, he then went out through the dining-room and left. He said nothing.

The defendant excepted to the admission of the statement of the *feme* defendant that he was the father of her child.

The defendant also moved for judgment of nonsuit, which was denied, and he excepted.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

L. B. Williams for defendant.

ALLEN, J. If the declaration of the female defendant, that the male defendant was the father of her child, was made in the presence of the defendant and was heard by him, it was clearly competent, "for a declaration in the presence of a party to a cause becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth; for if he is silent when he ought to have denied, there is a presumption of his acquiescence. And where a statement is made, either to a man or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply, the natural inference is that the imputation is well founded, or he would have repelled it." *S. v. Suggs,* 89 N. C., 530.

The rule and its limitations are fully discussed and the dangers attendent upon the admission of evidence of this character are pointed out by *Hoke, J.,* in *S. v. Jackson,* 150 N. C., 832.

Evidence of practically the same probative effect was admitted in *Toole v. Toole,* 112 N. C., 155.

The witness Reed testified that the defendant was present when the declaration was made, and there is evidence that he heard it. as he was within 4 or 5 feet, and he said nothing and left as soon as he was charged with being the father of the child.

If, however, it was in doubt as to whether he heard the statement, it was proper to receive the evidence and instruct the jury not to consider it unless satisfied that the defendant heard it, and we must assume that the jury was instructed correctly, as there is no exception to the charge, and it is not sent as a part of the record.

The evidence is ample to support the verdict, and there was no error in refusing the motion for judgment of nonsuit.

No error.

STATE v. GILBERT NEWELL.

(Filed 22 November, 1916.)

1. Criminal Law—Juvenile Delinquents—Statutes—Interpretation—Constitutional Law.

Chapter 122, Laws 1915, entitled "An act to provide for the reclamation and training of juvenile delinquents," etc., applying to all children in the State under 18 years of age who come within the descriptive terms of the law as set forth in subsections *a* and *b* of section 1, is a police regulation in the specified instances when the well-being of the child and the interest of the public require that it should for a time be withdrawn from an environment that threatens, and cared for and trained and controlled with a view of making it a law-abiding citizen; and to this extent it is constitutional and valid.

2. Criminal Law—Juvenile Delinquents—Statutes—Courts—Jurisdiction.

The statute relating to the reclamation of juvenile "delinquents" classifies them as those who are violators of State and municipal laws and those who are not, and where such delinquents are to be dealt with as violators of the criminal law in a given case, and on that ground alone, the offense must first be established by some court having jurisdiction thereof, and the orders disposing of the child under the statute may only be justified and upheld as an incident to conviction in the proper court.

3. Same—Recorder's Courts Jurisdiction—Statutes—Interpretation—Misdemeanors—Constitutional Law.

The crime of larceny is a felony punishable in the State's Prison, Revisal, sec. 3506, and a recorder's court, not having jurisdiction thereof, may not make orders disposing of a juvenile "delinquent" under the statute providing for reclamation of such, whether the offense be termed therein a misdemeanor or otherwise, Const., Art. I, secs. 12 and 13; and when such has been attempted, it will be disregarded upon conviction of this offense in the Superior Court having jurisdiction.

4. Criminal Law—Executive Pardon—Trials—Continuance—State's Witness—Court's Discretion.

Under the provisions of our Constitution, a pardon by the Executive is allowed only after a conviction, and where two defendants are separately indicted for participating in the same offense, and one of them has turned State's witness upon the trial of the other, and his case is thereafter called for trial, he may not insist, as a matter of right, that it be postponed to enable him to apply for executive clemency, and the request for continuance is referred to the discretion of the trial judge.

CRIMINAL ACTION tried before *Cline, J.*, and a jury, at June Term, 1916, of GUILFORD.

The defendant was indicted for larceny, and when the case was called for trial he applied to the court for a continuance thereof on the

ground, among other things, that he had been used by the State as a witness against his codefendant, Walter Bradley, in the trial in the municipal court of the city of Greensboro and also on the trial of Bradley in the Superior Court of Guilford County, both of which cases were for the same offense charged in the indictment here. The court overruled the motion and application for a continuance, and the defendant excepted. Thereupon the defendant pleaded former conviction and not guilty, and by consent the jury returned the following verdict:

"1. That on 5 April, 1916, the defendant Gilbert Newell, together with Walter Bradley, was indicted in the municipal court of the city of Greensboro on a charge of stealing $587 from the North Carolina Public-Service Company in the city of Greensboro, and on the said trial the said Gilbert Newell pleaded guilty to the charge and was examined by the State as a witness in the case against the defendant Walter Bradley.

"2. That on the said trial it appeared that the said Gilbert Newell was employed by the North Carolina Public-Service Company in the capacity of traffic clerk, whose duties were, among other things, to receive from the conductors on the cars of the said Public-Service Company the money and tickets taken in by them during the day, and that as such traffic clerk he remained on duty from 6 o'clock p. m. until 12 o'clock p. m., and until all the conductors had turned in their cash and tickets and made their reports.

"3. That on the night of Saturday, 1 April, 1916, in accordance with the plan formed by the said Newell and the said Bradley, the said Bradley, about 3 o'clock in the morning of Sunday, 2 April, 1916, locked the said Newell in the safe of the said Public-Service Company and took the cash on hand, amounting to about $587, the said Newell remaining locked in the safe until about 7 or 8 o'clock the next morning, when the safe was opened and he was found and released, and the money was missed.

"4. That upon investigation it was found that the money had been taken by Bradley and $5 of the same was given by him to Newell, and subsequently the whole amount except about $125 was recovered. That on Sunday, while Bradley was on the street wasting some of the money, Newell went to his room, got one bag of the money containing $200 or more, carried it across the hall, and hid it in a bureau drawer in another room, where it was found and recovered.

"5. Upon the trial in the said municipal court of the city of Greensboro it appeared that the said Gilbert Newell was and is a child over 17 and under 18 years of age, and that this was his first offense, and thereupon the said municipal court, upon the facts above disclosed, sentenced the said Gilbert Newell to two years in the county jail of

Guilford County, to be paroled in the custody of probation officer of that court, and required him to appear before the said court with the said probation officer the first Monday in each month during that time and show his good behavior, the said action of the court being based upon chapter 222 of the Public Laws of North Carolina for the session of 1915.

"6. That the said Gilbert Newell was thereupon taken in custody by the said probation officer and has since appeared before the said municipal court the first Monday in each month, together with the said probation officer, and proved his good behavior.

"7. That the said Walter Bradley, being over 21 years of age, was bound over by the said municipal court to appear at the succeeding term of the Superior Court of Guilford County, where at the May term thereof he was duly indicted and pleaded guilty to the charge of the larceny of the said money, the said Gilbert Newell being used by the State as a witness on the trial.

"8. That after the trial of Bradley, the solicitor for the State sent an indictment to the grand jury against the defendant Gilbert Newell, charging him with the larceny of the said money, amounting to $587, which indictment was returned a true bill, and thereupon the case was continued until the present term of court, when, being called for trial, the defendant Gilbert Newell entered a plea of the former conviction and not guilty, and introduced the record of his trial and conviction for the same offense in the municipal court of the city of Greensboro and the sentence imposed therein.

"9. Whereupon the solicitor for the State demurred to the said plea and evidence on the ground that the said municipal court did not have jurisdiction under the laws of the State of North Carolina to hear and determine the said case, the said court having tried and disposed of the case assuming jurisdiction under and by virtue of the jurisdiction conferred upon it in chapter 222 of the Public Laws of North Carolina for the Session of 1915.

"10. If upon the foregoing facts the court should be of opinion that the said municipal court of the city of Greensboro under and by virtue of chapter 222 of the Public Laws of North Carolina for the Session of 1915, or by any other law of said State, had jurisdiction to hear and determine the case against the said defendant in that court, then the jury finds the defendant not guilty. If, upon the other hand, the court should be of opinion that the municipal court under the laws of North Carolina did not have jurisdiction to hear and determine the said case as aforesaid, then the jury finds the defendant guilty."

Upon the special verdict returned, his Honor being of opinion that the municipal court of the city of Greensboro did not have jurisdiction,

by virtue of chapter 222 of the Public Laws of North Carolina for the Session of 1915, or by virtue of any other law, to hear and determine the case against the defendant in that court, adjudged the defendant guilty, and thereupon sentenced him to the common jail of Guilford County for a period of twelve months, to be assigned to work upon the public roads of the county, to which judgment and sentence the defendant duly excepted and appealed therefrom to the Supreme Court, and assigned for error his exceptions filed to the validity of the trial as follows:

"1. The defendant excepts to the refusal of the court to grant his motion and application for a continuance on the ground that when case was called in the municipal court of the city of Greensboro the defendant was used by the State as a witness against his codefendant, Bradley, and likewise as a witness against him in the trial of the case in the Superior Court.

"2. The defendant excepts to the refusal of the court to sustain his plea of former conviction and not guilty upon the facts set forth in the special verdict of the jury.

"3. The defendant excepts to the ruling and holding of the court that the municipal court of the city of Greensboro did not have jurisdiction under and by virtue of the Laws of North Carolina, and particularly by virtue of chapter 222, section 2, of the Public Laws of North Carolina for the Session of 1915.

"4. The defendant excepts to the judgment of the court sentencing the defendant to imprisonment in the common jail of Guilford County for a term of twelve months, to be assigned to work on the public roads of that county."

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

C. Clifford Frazier and W. P. Bynum for defendant.

HOKE, J., after stating the case: Upon the foregoing record and the facts appearing therein, we are of opinion that the defendant has been properly convicted and sentenced, and his exceptions entered to the validity of the trial should be overruled. Chapter 122, Laws 1915, entitled "An act to provide for the reclamation and training of juvenile delinquents, youthful violators of law, and the probation system," is a statute applying to all children in the State under 18 years of age who come within the descriptive terms of the law as set forth in subsections *a* and *b* of section 1, and was passed as an administrative police regulation in the specified instances when the well-being of the child and the interest of the public require that it should for the time be with-

drawn from an environment that threatens, and cared for and trained and controlled with a view of making it a law-abiding and useful citizen. To this extent, the validity of such legislation is fully upheld with us in the case of *In re Richard Watson,* 157 N. C., 340, a cause involving the construction of the act establishing the Stonewall Jackson Training School, and the significance and effect of an order making present disposition of the child under the administrative features of the law are there fully discussed by *Associate Justice Allen.* This, then, being a valid enactment under the principles and authorities set forth and approved in that well considered opinion, the question on the present appeal is chiefly on the proper interpretation of the present statute as affecting the rights of the defendant on the record and others in like case. In subsections *a* and *b,* section 1, of the statute, delinquent and dependent children are defined as follows:

"(*a*) A child shall be known as a juvenile delinquent when he violates any municipal or State law, or when, not being a violator, he is wayward, unruly, and misdirected, or when he is disobedient to parents and beyond their control, or whose conduct and environment seem to point to a criminal career.

"(*b*) A child shall be known as a dependent child when, for any reason, he is destitute or homeless or abandoned, and in such an evil environment that he is likely to develop into criminal practices unless he be removed therefrom and properly directed and trained."

It thus appears that in case of "delinquent" children they are described and classified as those who are violators of State or municipal law and those who are not, and, although jurisdiction in general terms is conferred on both Superior and recorders' courts, and "like courts in cities where recorders' courts have not been established," it is evidently contemplated and provided that in cases where a delinquent is to be dealt with as a violator of the criminal law, in a given case, and on that ground alone, such violation shall have been first established by some court having jurisdiction of the offense, and the orders disposing of the child under the statute may be justified and upheld as an incident of the conviction. As said by *Justice Allen* in the opinion referred to: "The Legislature has no unlimited and arbitrary power over minors in respect to detaining them in reformatories or otherwise, and, in view of this admitted principle, the necessity for a conviction in the proper court, in order to deal with a juvenile delinquent on the ground that he has committed a single criminal offense, will appear from a perusal of the general provisions of the statute, and is made clear, we think, by a subsequent clause of section 2: "That it shall be the duty of the court or courts, in their discretion, to suspend sentence, when the child is found guilty, and place him on probation for a specified

period, three, six, or twelve months, or a longer period, as the court shall think best."

This, then, in our opinion, being the proper construction of the present law, on the facts established by the special verdict, in any aspect of them, defendant in this instance is guilty of the crime of larceny. *S. v. Stroud,* 95 N. C., 626; *S. v. Gaston,* 73 N. C., 93; and this being a felony, under our statute, punishable by imprisonment in the State's Prison, Revisal, 3506, the recorder's court of the city of Greensboro was without jurisdiction to hear and determine the case, and the sentence and orders made, as to disposition of the defendant, incident to such submission and entirely dependent thereon, are a nullity, and the Superior Court had full power to proceed with the cause and, on conviction, to impose its sentence in punishment of the offense. And the result would seem to be the same though the charge had been properly one for receiving stolen goods, unless the punishment has been changed from that provided in Revisal, sec. 3507, which we do not discover, the court having decided that where the power to punish by imprisonment in the State Prison remains, the calling of an offense a misdemeanor will not make it so or confer the right to deal with a case without a grand or petit jury, as required by the Constitution. Article I, secs. 12 and 13; *S. v. Hyman,* 164 N. C., 411. The position further urged that a new trial should be awarded because the court, having used defendant as a witness against his codefendant, declined to continue the case, that the defendant might have opportunity to apply for a pardon, is without merit. Even in the case to which we were referred by counsel, *"The Whiskey cases,"* 99 U. S., 594, the Court holds that the mere fact that a defendant has testified is not effective as a defense to an indictment. In delivering the opinion, *Associate Justice Clifford* states with approval the position as follows: "Other text-writers of the highest repute besides those previously mentioned affirm this rule that accomplices, though admitted as witnesses for the prosecution, are not of right entitled to a pardon; that they have only a right to a recommendation to Executive clemency, and they uphold that prisoners, under such circumstances, cannot plead such right in bar of an indictment against them nor avail themselves of it as a defense on their trial." The position prevails even when the accomplice has testified on assurance of immunity from the prosecuting officer, he, under the law, having no right to pardon offenses, either in this or any other manner. True, in this last event, the case holds that a trial should be stayed till a pardon could be applied for, but this is only by way of admonition to the lower Federal courts, and should not be regarded as controlling in this jurisdiction, where, under our Constitution, a pardon by the Executive is allowed only after a

conviction (*In re Dick Williams*, 149 N. C., 436), and further, it is the established and usual custom of the Executive Department not to consider such application while such conviction is being in any way resisted by appeal or otherwise. Under these circumstances a criminal prosecution in this State should be subject to the rule very generally obtaining, that an application for a continuance by a defendant is referred to the discretion of the trial judge. *S. v. Sultan*, 142 N. C., 569.

There is no error, and the judgment of the Superior Court must be affirmed.

No error.

STATE v. I. J. BURTON.

(Filed 22 November, 1916.)

1. Homicide—Second Degree—Submission—Arguments to Jury—Conclusion.

Where the defendant upon trial for a homicide admits of record the killing with a deadly weapon, and the solicitor states he will not ask for conviction of murder in the first degree, the fact that the defendant assumes the burden of showing matter in mitigation or excuse does not entitle him as a matter of right to open and conclude the argument to the jury, for this rests within the discretion of the trial judge.

2. Homicide—Threats—General Malice—Evidence—Trials.

Where upon the trial for a homicide the evidence discloses that at night the defendant was annoyed by boys knocking on the door to his store and dwelling and running away, threats made by the defendant before the homicide that he would kill one of them the next time are competent evidence, as tending to show general malice, where he has carried the threat into execution.

3. Homicide—Evidence—Age—Trials.

Where there is evidence tending to convict the defendant of killing one among a number of boys who had been annoying him at night, testimony as to the age of the boy who was killed is competent when merely a part of the history and circumstances of the case identifying the deceased.

4. Homicide—Evidence—Character—Admissions.

Upon a trial for a homicide after the defendant had admitted killing another, for which he had been tried, testimony of a witness that as an officer of the law he had served the warrant for that offense is not prejudicial, or a variance of the rule that only testimony as to general character is permissible.

5. Homicide—Deadly Weapon—Admissions—Burden of Proof.

Where the killing is admitted to have been done with a deadly weapon, the burden of proof is upon the defendant to show matters in self-defense which would excuse the killing.

6. Instructions—Contentions—Appeal and Error.

A mistake made by the judge as to the contentions of a party, in his charge, must be called to his attention at the time, or exception thereto will not be considered on appeal.

7. Homicide—Evidence—Interest—Trials—Instructions.

Upon a trial for a homicide wherein the defendant has testified in his own behalf, it is proper for the judge to charge the jury to consider his evidence in relation to the case, the interest he had in the result of the verdict, and to scrutinize his testimony with care in determining the credence they would give it.

8. Trials—Juries—Officer in Charge—Remarks—Appeal and Error.

A remark to the jury by the officer having them in charge while deliberating upon their verdict, that the judge would keep them until Sunday, though authorized by the judge, would not be reversible error.

APPEAL by defendant from *Carter, J.*, at May Term, 1916, of GASTON.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

S. J. Durham for defendant.

CLARK, C. J. This appeal is from a verdict and judgment for murder in the second degree. The defendant kept a small store in Bessemer in which he took his meals and slept. For several nights he had been annoyed by persons rousing him by knocking at the door and then running off. On the night of the homicide, about 10 o'clock, the deceased, a boy of 16 years of age, went with several other boys to the store and threw a piece of wood against the door and then ran off. The defendant shot at them, and killed the deceased, the bullet passing near the heart and producing instant death.

The witness Dees testified that, hearing the report of a pistol and looking out, he saw the deceased fall, and before he got to him he was dead, lying on the ground with a bullet wound under his left shoulder blade; that defendant said, "I killed him," but added, "I didn't aim to kill him; I intended to shoot him in the legs"; that he also heard the defendant say, as the deceased was running away after being shot, "Oh, yes, God damn you! I will learn you how to prowl around my place here at night."

This witness testified that he was at defendant's place at 6 or 7 o'clock that evening to get some tobacco, and that when he walked into his

place the defendant had a pistol out, wiping out the barrel. The witness said to him, "You are fixing to go to Germany." He said, "No; but I am going to kill a damn son of a bitch." I said, "Don't talk that way; you are too old a man to have such talk," and went in behind the counter and got the plug of tobacco. He said, "I bet you $50 I kill a man tonight." I said, "Mr. Burton, you should not talk that way. It costs something to kill a man in this country." He said, "I expect to kill the first God damn man that taps on my door tonight. I am going to push this door shut and sit down here by it, and the first man that taps on this door I expect to kill him." I said, "You should not talk that way; possibly I should want something in here; how am I to get into the door unless I was to tap?" He said, "It don't make any difference. You heard what I said: the first God damn man that taps on my door tonight I expect to kill him." He further said that the moon was full, bright, and clear. Another witness, Hodges, also testified that the defendant that evening was cleaning his pistol and stating what he would do if any one came around bothering him that night.

The solicitor stated in open court that he would not ask for a verdict of murder in the first degree, but only for a verdict of murder in the second degree, or manslaughter, as the evidence might warrant, whereupon the defendant admitted of record that he killed the deceased with a deadly weapon. He further admitted that he had been convicted of the careless handling of firearms, resulting in the death of his brother, for which he had served a sentence of twelve months. The court refused the motion of the defendant to open and conclude the evidence and argument, and defendant excepted.

The right to open and conclude the argument, except in cases where the defendant introduces no evidence, is in the discretion of the court, and the exercise of such discretion is not reviewable upon appeal. *S. v. Anderson*, 101 N. C., 758. The mere fact that the defendant had assumed the burden of showing matter in mitigation or excuse did not entitle him to open and conclude. 12 Cyc., 536.

Exceptions 2, 3, and 5 are to the above, but evidence as to the conduct and declarations of the defendant the afternoon before the homicide showing preparation and threats was admissible as tending to show general malice. *S. v. Shouse*, 166 N. C., 306. "Threats made by defendant against a class to which deceased belonged, and prima facie referable to deceased, although his name is not mentioned, are admissible against defendant." 21 Cyc., 932. Nor can we sustain the exceptions to the testimony that the deceased was a boy 14 or 15 years of age. There was no testimony of any fight, and this was merely a part of the history and circumstances of the case, showing who the deceased was.

Exception 7 cannot be sustained. A party introducing a witness as to character can only ask him as to general character and reputation, and not as to his personal dealings with the defendant, and it was no error for the court to so hold. *S. v. Hairston,* 121 N. C., 579. The defendant having gone on the stand as a witness in his own behalf, it was competent in cross-examining a character witness introduced by him to ask if he had not heard the defendant accused of several crimes. The witness replied he had not, though he had served the papers when the defendant was in court for killing his brother, which the defendant had already admitted, and he had served papers on him in another case in which he was found not guilty. There was no prejudice sustained by the prisoner in this respect.

Exception 10 is that the court instructed the jury that the defendant having admitted the killing with a deadly weapon, the burden was upon him to excuse the killing on the principle of self-defense, which was correct. The court further told the jury that if the defendant did not fire at the deceased at all, but being suddenly alarmed by being stricken by a stick of wood thrown when he opened the door, whereby he was reasonably caused to fear that a deadly and dangerous assault was being made upon him, and he fired into the ground to warn such person that he was armed and prepared to defend himself, and the jury are satisfied of that state of facts, the defendant would not be guilty of any offense; but that if the defendant saw the deceased running away, and then discharged his pistol for the purpose of frightening and warning the deceased, but not designing to hit him at all, then the killing under those circumstances would be manslaughter only.

The exceptions for stating the contentions of the State cannot be sustained. If there was any mistake in making them, which does not appear, it was the duty of the defendant to then and there have called the attention of the court to the matter, for correction. *S. v. Cameron,* 166 N. C., 384; *S. v. Blackwell,* 162 N. C., 672; *Jeffress v. R. R.,* 158 N. C., 215.

The court charged the jury, in passing upon the evidence: "When you come to consider the evidence of the defendant himself, remember his relation to the case as defendant, the interest which he has in the result of your verdict, and to scrutinize his testimony with care, to the end that you may determine to what extent, if any, his testimony has been biased by his interest."

This was not erroneous, *S. v. Fogleman,* 164 N. C., 462, in which the Court approved the charge in almost the identical language here used, saying: "It calls fairly the attention of the jury to the attendant circumstances which might bias their testimony and left the jury to

judge what weight and effect they should give it." The court placed the matter beyond misconception by immediately adding, as to the defendant's testimony: "You will consider his demeanor upon the witness stand, his manner of testifying, both upon direct and cross-examination; his expression, frankness and clearness in testifying, or lack of such qualities in his testimony; the reasonableness or unreasonableness of the account he has given you of the matter about which he has testified, the credibility or incredibility of his testimony, all the evidence tending to show his general character, all the evidence offered upon his part tending to show that it was good and evidence offered upon behalf of the State tending to show it was bad."

The court further charged: "The defendant relies upon the evidence which he has offered of his good character not only for the purpose of corroborating his testimony in the case, but he relies upon it substantively and contends that notwithstanding the trouble that he may have had in former years, that in view of his character which he has shown to you, he contends that you should be slow to believe that a man of the character which he has disclosed here would have intentionally taken human life.

"Now, gentlemen, you will weigh and consider this evidence in all of its bearings. If it satisfies you beyond a reasonable doubt that the defendant slew the deceased with malice, you will convict him of murder in the second degree. If you fail of murder in the second degree, you will then consider as to whether or not he is guilty of manslaughter. If the evidence satisfies you beyond a reasonable doubt that he unlawfully slew the deceased, but without malice, you will convict him of manslaughter. If you fail to find him guilty either of murder in the second degree or of manslaughter, of course, gentlemen, your verdict will be 'Not guilty.'"

There was more evidence along the same line that the defendant said "I am going to get the first man that strikes the door tonight," and that after the killing, when asked who shot the defendant, replied, "It was me. I was shooting at some damn rascal. He was knocking on my door with a pole."

The conduct of the boys was very annoying, but the defendant had his recourse by appealing to the officers of the law. He chose to take the law in his own hands, and killed the deceased. From the charge of the court, if the jury had found that the defendant merely fired in the ground, but by chance struck the deceased, they would have found him guilty of manslaughter. As it was, his preparation and threats that afternoon to shoot might have justified the jury in finding him guilty of murder in the first degree, for it tended to show premedita-

tion and deliberation, especially as it was a bright moonlight night and there was evidence that he fired at the deceased. The jury found that under all the circumstances the presumption of malice arising from the use of a deadly weapon was not rebutted, and found the defendant guilty of murder in the second degree.

The remark of the officer to the jury on Friday, that if they did not agree earlier the judge would keep them together till Sunday, was as to a matter resting in his discretion, and would not be ground for a new trial, even if the judge had authorized the officer to so tell the jury. *Hannon v. Grizzard,* 89 N. C., 115; *Osborne v. Wilkes,* 108 N. C., 651; *Bank v. Gilmer,* 116 N. C., 684.

No error.

STATE v. ERVIN DAVIDSON.

(Filed 29 November, 1916.)

1. **Criminal Law—Ill-feeling—Evidence.**

Upon trial for an assault upon a woman with intent, etc., evidence of difficulties between the families of the prosecutrix and defendant is too indefinite, and is inadmissible in defendant's behalf, not tending to prove ill-feeling on the part of the prosecutrix.

2. **Witnesses—Evidence Impeaching—Contradiciton—Appeal and Error.**

Testimony which tends to impeach a witness, and brought out for that purpose, is not held incompetent in this case as contradictory evidence.

3. **Court's Discretion—Recalling Witness—Appeal and Error.**

Permitting or refusing a party to recall a witness who has testified is in the discretion of the trial judge, and not appealable.

4. **Instructions—Omissions—Special Requests—Appeal and Error—Objections and Exceptions.**

Exception to an omission of the trial judge to charge that the accused in a criminal action could be found guilty of a less offense, must be to the refusal of the court to give a requested instruction to that effect.

INDICTMENT for an assault with intent to commit rape, tried at April Term, 1916, of RANDOLPH, before *Ferguson, J.*

The defendant pleaded not guilty. The jury returned a verdict of guilty of assault with intent to commit rape.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. C. Hammer, Brittain & Brittain for defendant.

BROWN, J. The testimony of the State tends to prove that the defendant committed the assault charged in the bill upon one Della Rich, a girl 13 years of age, and that he only desisted at the very last moment because an alarm was given and he feared detection.

The testimony of Della Rich tends to prove that she resisted by crying and making an alarm. Her testimony is corroborated by that of another girl, who testifies that she heard cries of Della Rich in the bedroom and gave the alarm that Jack Davidson was coming, whereupon the defendant got up and fled. This testimony is denied out and out by the defendant.

The first exception relates to certain evidence excluded by the court, tending to prove that there was some "hardness and difficulty between the defendant's family and the family of Della Rich." This exception is without merit. It does not tend to prove that there was any ill-feeling between the prosecutrix and the defendant, and is entirely too general in its nature to be relevant.

Exceptions 2, 3, 4, and 5 relate to the admission of testimony tending to contradict the testimony of a witness, Billy Rich. We think this testimony was not offered for the purpose of contradicting any matter which had been brought out only on cross-examination, but was offered to impeach the witness who was introduced by the defendant as to the testimony the witness had given on his examination in chief. The case does not, therefore, come within the principle laid down in *S. v. Roberts*, 81 N. C., 605, and similar cases, which relates to statements of a witness elicited on cross-examination. The other exception to the evidence is without merit. Exception No. 7 is taken to the refusal of the court to permit a witness being recalled and examined. Such exception cannot be sustained. Permitting or refusing a party to reopen his case after he has closed it is a matter resting in the discretion of the trial judge, as also the right to recall a witness. *S. v. Groves*, 119 N. C., 822; *S. v. Jimmerson*, 118 N. C., 1173; *Pain v. Pain*, 80 N. C., 322.

Exception No. 8 relates to the charge of the judge. The judge instructed the jury fully as to the law with regard to an assault with intent to commit rape, but failed to charge the jury that the defendant could be convicted of a crime in lesser degree than the crime charged in the indictment, to wit, simple assault under the statute. The defendant excepted to this omission. The defendant tendered no special requests to charge upon this aspect of the case, and it is therefore no reversible error for the judge to have failed to so charge. *S. v. Groves, supra; S. v. Varner*, 115 N. C., 744; *Cowles v. Lovin*, 135 N. C., 488.

No error.

STATE v. WILL CHESTER.

(Filed 29 November, 1916.)

Criminal Law—Abandonment—Evidence of Wife—Fact of Marriage—Statutes.

The wife is competent to prove the fact of marriage under an indictment against her husband for abandonment, Revisal, sec. 1635; and construing this section with section 1636, it is held that by allowing, under the latter section, the wife to prove such fact under indictments for bigamy, and in actions or proceedings for divorce on account of adultery, it was not the legislative intent that such testimony be excluded upon trial for abandonment, and that these two sections are not in conflict with each other.

INDICTMENT tried before *Ferguson, J.*, and a jury, at August Term, 1916, of CALDWELL. Defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Wakefield & Williams for defendant.

WALKER, J. The indictment was for abandonment of defendant's wife by him. The State introduced as a witness for the prosecution Mrs. Will Chester, the wife of the defendant, who testified, among other things, that she was the wife of Will Chester, and that she and the defendant were married about fourteen or fifteen years ago. To this evidence the defendant objected. Objection overruled. Defendant excepted.

The other exceptions are formal, and need no attention. Counsel for defendant contended that the wife was not competent to prove the fact of marriage, and relied on *S. v. Brown,* 67 N. C., 470, which held that by Public Laws of 1868, ch. 209, sec. 4, the wife was made a competent witness to prove the abandonment and neglect to provide for her an adequate support, but not to prove the fact of marriage. The statute in question provided only that she might testify to the two facts, of abandonment and failure to support, and from this provision, which expressly restricted her testimony to the proof of those facts, an implication was raised by the Court that her competency for any other purpose, forbidden by the common law, was excluded (*Expressio unius est exclusio alterius*). The Court added: "No departure from the rules of evidence, which have been accepted by the courts, as sanctioned by the wisdom of the ages, can be allowed, unless it be so expressly enacted." (*Pearson, C. J.*) The Legislature afterwards changed the phraseology of the law so as to provide as follows: "In all criminal

prosecutions of a husband for assault and battery upon the person of his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the State against the said husband." Code, sec. 1354; Revisal, sec. 1635. This change in the form of expression was doubtless made to meet the decision in the *Brown case*, but whether so or not, the language is broad enough to fully warrant the construction that it was intended to make the wife competent generally as a witness in such prosecutions, that is, to prove any and all material facts. It will be noted that she is made competent in indictments for bigamy to prove the fact of marriage, and also, in any action or proceeding for divorce on account of adultery, to prove the same fact. Revisal, sec. 1636. It would be singular that she should be competent as a witness to prove the fact of marriage in an indictment for bigamy and a proceeding for divorce based upon adultery, and not in indictments for abandonment. There would be no good reason for excluding her in the last case that would not apply with equal if not greater force to the other two. Sections 1635 and 1636 are not inconsistent when construed together in view of the evident and leading purpose to make the wife competent to prove the fact of marriage in the three cases of abandonment, bigamy, and divorce for adultery, although in codifying the statutes some little confusion may arise by the generality of the language of section 1636. It surely was not intended to confine the wife's competency to prove that fact to bigamy and divorce and repeal what had been provided in section 1635. There is no such contention as this by defendant, but we thought it advisable to mention the apparent discrepancy, as it might be thought that we had overlooked it, or that it had escaped our attention.

There was no error in the ruling of the court.

No error.

STATE v. O. C. KLINGMAN.

(Filed 6 December, 1916.)

1. Criminal Law—Principal and Agent—Embezzlement—Misapplication of Funds—Indictment—Statutes.

A sales agent for automobiles was indicted for embezzling moneys he had received for his principal from a sale to a certain person, and it appeared that he had in fact paid his principal for this sale, but from funds he had received for his principal from a sale to another person, with the misappropriation of which the indictment did not specifically charge him. *Held*, the agent's direction that the funds received from the other machine be applied to payment of the machine named in the indict-

ment was a wrongful misapplication of funds within the meaning of Revisal, sec. 3406, the facts being peculiarly within the knowledge of the agent and unknown to his principal, and the facts disclose that he had been guilty of two acts of embezzlement instead of one; and a conviction of the offense as charged was proper.

2. Criminal Law—Indictment—Several Counts—General Verdict.

A general verdict of guilty in a criminal action covers all counts in a bill of indictment, and if good as to any count it will be upheld when the offenses charged are of the same grade and punishable alike.

ALLEN, J., dissenting; HOKE, J., concurs.

APPEAL by defendant from *Cline, J.*, at Special June Term, 1916, of GUILFORD.

T. H. Calvert, Assistant Attorney-General, for the State.

E. D. Broadhurst, Dorman Thompson, King & Kimball, and William P. Bynum for defendant.

CLARK, C. J. The defendant is indicted and convicted of embezzlement as manager of the Greensboro branch of the J. I. Case Threshing Machine Company. In June, 1914, he was informed that his connection with the company would cease on 1 July, 1914. He thereupon went to Racine, Wis., and in an interview with one of the officials at headquarters stated that while he did not consider himself an embezzler, he had sold property belonging to the company and had used the money to about the amount of $5,000. He promised on his return to Greensboro to furnish a statement of the property sold and the proceeds used. Instead of returning, he went to Seattle, Wash., where he changed his name and let his hair and beard grow, but was located and arrested some fourteen months later and brought back to this State, at great expense, upon requisition papers issued upon this indictment.

The indictment alleges the embezzlement of two checks, one for $55.85 and one for $1,050, which had been received by him as manager for said J. I. Case Threshing Machine Company from the sale of an automobile to Dr. E. C. Brasington. It is in evidence that these checks were handed by Brasington to H. C. Bowden, a traveling salesman of the company, who indorsed and turned them over to the defendant, who indorsed the $55.85 check and deposited it to his personal account in bank, and afterwards it was drawn out by him on his personal checks. The $1,050 check was cashed by him and used, together with other money, in the purchase of a check on New York for $1,366, which the defendant remitted to the J. I. Case Threshing Machine Company, requesting that $1,275.83 thereof should be credited on the sale of an automobile previously sold to one T. L. Bland, which he had reported sold

for cash. The sale of the automobile (19587) to Brasington was never reported by the defendant to the home office at Racine and no remittance covering the proceeds of said sale was ever received by said company, but it was reported by him to be on hand at Lancaster, S. C., in July, 1914, at the time the defendant was dismissed from the service of the company.

The contention of the defendant is that inasmuch as the J. I. Case Threshing Machine Company received out of the money arising from the Brasington sale a check for $1,050, that therefore there had been no embezzlement. There had been a previous embezzlement by the defendant in not remitting the proceeds of the sale of the machine to Bland, and when this second embezzlement was made in the sale of another machine to Brasington the fact that the defendant used part of the proceeds in paying to the machine company what he had received on the Bland machine did not condone the embezzlement of the money received for the machine sold to Brasington. The defendant simply committed two embezzlements instead of one, and used the proceeds of the latter embezzlement to make good, without the knowledge or consent of his principal, the first embezzlement of the proceeds of the sale to Bland.

The plea of the defendant (as was said by this Court in regard to a defense pleaded by this writer for the defendant in *Spilman v. Navigation Co.*, 74 N. C., 678) "is worth preserving for its amusing fallacy." The plea in this case has its parallel in the man who purchased a hat of a merchant and then suggested he would like to exchange it for a pair of shoes. As he was leaving the store the merchant demanded payment for the shoes. The buyer responded, "I paid you the hat for them." The merchant said, "But you have not paid for the hat," to which the reply was, "But you have your hat over there behind the counter." No ingenuity can change the fact that the defendant sold the machine to Brasington as agent for the prosecuting company, that it was the defendant's duty to have remitted the proceeds in payment thereof, but that instead he used $1,050 of it in part purchase of a check to pay his former defalcation of the proceeds of the machine sold to Bland, and that the $55.85 has been checked out by the defendant for his own purposes.

The $1,050 of the proceeds of the machine sold to Brasington thus included in the draft sent forward to make good the defalcation in the proceeds of the Bland machine is none the less an embezzlement. *S. v. Foust*, 114 N. C., 842. It was used for the personal purposes and benefit of the defendant to screen himself from punishment on that defalcation, and the $55.85 was also drawn out for his own purposes.

Revisal, 3406, denounces a fraudulent misappropriation or misapplication. That statute says "shall fraudulently . . . misapply," and it does not matter how it was done or for whose benefit. *S. v. Foust,* 114 N. C., 842. "The using by a clerk of money of his employer to replace other sums previously appropriated by him to his own use constitutes embezzlement, for which he is liable to his employer in a civil action. *Bowman v. Brown,* 52 Iowa, 437.

In *Gibson v. State,* 13 Ga., 459, relied on by defendant, it was held that a payment made by an agent on a wrong account was not embezzlement when it appeared that all the money collected by him as a fiduciary had been fully paid in. But here, in a matter peculiarly within the knowledge of the defendant and in which the company had to rely on his statement, he reported that this check was to be credited on the Bland purchase (in which he had defaulted), and without its knowledge or consent he directed this application of the check, part of the proceeds of which he had derived from the sale of the machine to Brasington. This was a fraudulent misapplication of the proceeds of the check to protect himself from liability for the embezzlement of the proceeds of the Bland sale. A willful misapplication of funds by a fiduciary is within the terms of Revisal, 3406.

The National Bank Act provides that any agent "who embezzles, abstracts, or willfully misapplies any of the money, funds, or credits" with which he is intrusted shall be guilty of a misdemeanor. In construing that statute in *U. S. v. Northway,* 120 U. S., 332, it is said: "It is evidently the intention of the statute not to use the words 'embezzle' and 'willfully misapply' as synonymous. In order to misapply the funds of the bank it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterwards criminally misapply them, or by virtue of his official relation to the bank he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of willful misapplication."

A general verdict of guilty covers all counts in the bill of indictment, and if good as to any count, it will be upheld when the offenses charged are of the same grade and punishable alike. *S. v. Toole,* 106 N. C., 739; *S. v. Robbins,* 123 N. C., 730; *S. v. Sheppard,* 142 N. C., 586; *S. v. Avery,* 159 N. C., 495. Even if there had been any error as to the count on the $1,050 check, there was testimony not contradicted, showing the misappropriation of the proceeds of the $55.85 check, and nowhere in the record or in the brief of the defendant is there any

suggestion that there is any exception to the form of that count, and there being evidence, the general verdict would stand.

This is not the case of proving other offenses, but of proving this offense by showing that the proceeds of the sale of the machine to Brasington were fraudulently misapplied to cover up another defalcation by the defendant to the same company, not for the purpose of proving the former defalcation, but incidentally to show the fraudulent misapplication thereto of the proceeds of the sale to Brasington.

No error.

ALLEN, J., dissenting: The defendant is indicted for the embezzlement of two checks, one for $55.85 and the other for $1,050.

He was the manager of the branch house of the Case Machine Company at Greensboro, and there was employed by the machine company at the same branch house a cashier named Kornegay, who was under bond and whose duty it was to receive the money and funds of the company.

As to the check for $55.85, the State offered evidence tending to prove that it was received by the defendant and placed to the credit of his personal account in bank and checked out by him.

The defendant admitted that he received this check, that he placed it to his personal account, and checked it out. He, however, testified that a few days before he received the check he had paid to the State Treasurer the $500 automobile tax due by the Case Machine Company to the State, at the request of the machine company and of its cashier at Greensboro, and that the check for $55.85 was handed to him by the cashier at Greensboro for the purpose of reimbursing him in part for the money which he had advanced.

This evidence of the defendant was not contradicted by any evidence offered by the State, although if it was not true, all the facts were within the knowledge of Kornegay, the cashier of the machine company.

As to the check for $1,050, the evidence offered on the part of the State shows that it was turned over to the cashier of the Case Machine Company, and that he used this check and other checks to buy a New York check for $1,366.27, payable to the Case Machine Company, and that this latter check of $1,366.27 was transmitted to the Case Machine Company and was received and used by the company. This check was sent in a letter prepared by the cashier and signed by the defendant, in which the Case Machine Company was requested to credit the account of T. L. Bland with $1,275.83 of the amount. Bland had bought a machine for cash and he owed no account to which the amount could be credited.

The defendant testified that he did not know that this request to credit the account of Bland was in the letter; that the letter was prepared by the cashier and, with other letters prepared by him, placed on his desk for signature, and that he signed the letter in the ordinary course of business. This was not contradicted by Kornegay, the cashier.

The State also offered evidence of several officers of the machine company to the effect that after the defendant was discharged by the company he went to Racine and in conversation with them he admitted that he had used moneys belonging to the company amounting to about $5,000, although they say he denied that he had embezzled any of the money or funds of the company, and they do not say that either of the checks mentioned in the indictment was referred to.

The defendant admitted that he had a conversation with the officers of the company in Racine, but he denied telling them that he had used any money or property of the company. He says that he was indebted to the company in the sum of $5,000 or $6,000 for automobiles bought from the company in the regular course of business, and with the knowledge of the officers of the company, and that he went to Racine for the purpose of asking for time in which to pay; that after he left Racine he went to see several of his relatives for the purpose of borrowing the money with which to pay the company; that he was unable to do so, and that when he was arrested he was at work in a regular business, and that it was his intention to pay the company all he owed it.

The defendant introduced sixteen witnesses who testified to his good character, and no witnesses were introduced to prove the contrary.

On this evidence I think the defendant was entitled to an instruction that if the jury believed the evidence they ought to acquit the defendant, because as to the first check of $55.85, the uncontradicted evidence shows that he received it from the cashier to reimburse him for moneys that he had advanced for the machine company, and as to the second check, the defendant received no benefit from it, did not convert it to his own use, and it was sent to the machine company, whose property it was, and used by it.

His Honor instructed the jury, among other things, as follows: "The court instructs you, as a matter of law, that if you find from the evidence beyond a reasonable doubt that this defendant, as a branch house manager, in that capacity, by reason of that position and in connection with the company, received this check for $1,050, and that it was the property of the company, it came into his hands in that relationship, and then, with the intent to defraud and deceive the company, did wrongfully and feloniously *misrepresent the facts about it to the company, and made a statement to the company to the effect that it was the proceeds of another collection*—I say, with the intent to

deceive and cheat and defraud the company, *did transmit to them this money as ostensible payment of the Bland automobile,* a cash sale, when it was in truth and in fact the sale of the Brasington automobile, and you find *that in that way* he so misappropriated and misapplied the funds of the company, and so applied, without the company's knowledge, *misleading the company about the facts,* the money from the Brasington automobile in satisfaction of the sale of the Bland automobile, then *upon such finding of facts,* if you are satisfied beyond a reasonable doubt, *I charge you as a* matter of law *it would be your duty to find the defendant guilty."*

I think this instruction erroneous, for two reasons:

In the first place, he charges the jury that the defendant can be convicted under the bill of indictment if he misapplied and misappropriated the two checks, and the bill of indictment does not charge a misapplication or misappropriation.

The language of the indictment is that the defendant did "fraudulently, unlawfully, and feloniously take, make away with, and secrete with intent to embezzle and fraudulently convert to his own use the property, and then and there fraudulently, unlawfully, and feloniously convert to his own use and embezzle the said property; and the jurors aforesaid, and upon their oaths aforesaid, do say, that the said O. C. Klingman then and there in manner and form aforesaid, did fraudulently, unlawfully, and feloniously embezzle and convert to his own use the said property of the said J. I. Case Threshing Machine Company."

In the next place, I cannot understand how a defendant can be convicted of embezzling and converting property to his own use when he has not used the property and when it has been turned over to the owner and has been used by the owner, although he may have intentionally directed it to be applied to some other account; and the authorities seem to support this position, and I find none to the contrary.

In *Commonwealth v. Este,* 140 Mass., 279, the treasurer of a town obtained money from a bank on a promissory note of the town and used the money in paying proper town charges. It was held that he could not be convicted of an embezzlement of the money, although he did not account for it to the town, and although such use of the money was contrived as a part of a scheme to defraud the town and to cover up an embezzlement of money already made or intended to be made. On page 284 of that case the Court says: "We deem it clear that whatever part was so used and intended to be used was not embezzled, even if the use was contrived as part of a scheme to defraud the town. The fact that the payment was a means of embezzling other money in the past would not make it an embezzlement of the money paid. Neither

would the fact that he represented it to the town (not to the payees) as a payment of other town money; that is, as a payment from his balance on hand, and not from the notes. Embezzlement retains so much of the character of larceny that it is essential to the commission of the crime that the owner should be deprived of the property embezzled by an adverse holding or use. No doubt, questions may arise as to what is a sufficient deprivation or adverse holding, as in *Commonwealth v. Mason,* 105 Mass., 163, and cases cited. . . . But the principle remains, and, when property is held at every moment as and for the master's property, fraud as to the source from which it comes, or fraudulent intent as to something else, is not a sufficient substitute for the missing element. To this extent we entirely agree with the English cases of *Regina v. Poole,* Dearsley & Bell, 385; *Regina v. Holloway,* 2 C. and K., 942, and 1 Denison, 370; and *Rex v. Webb,* 1 Moody, 431. We think that the fourth ruling requested should have been given. Justice to the defendant also required that a similar instruction should have been given as to the other transaction not embraced in that request."

The fourth ruling above referred to, which the Court says should have been given in behalf of the defendant, is as follows: "If the jury shall find that the $1,800 received by the defendant of the Marlborough Savings Bank was used by the defendant in paying proper town charges, and he intended so to use it, then such use would not be embezzlement, although it was not accounted for in his account with the town."

The same principle is also announced in *Chaplin v. Lee,* 18 Neb., 440; *S. v. Schumacher,* 162 Iowa, 231; *Higbee v. State,* 74 Neb., 331. In this last case the Court says: "Unless the owner is deprived of the thing (the money or property) involved in the transaction, there can, of course, be no embezzlement." Citing several cases.

In *State v. Jones,* 25 Idaho, 587, "The correct rule of law governing such facts is that unless the owner is deprived of the money or property involved in the transaction there can, of course, be no embezzlement. The owner must be deprived of the use of the property claimed to be embezzled by an adverse use or holding."

A case involving the principle contended for by defendant is *Gibson v. State,* 13 Ga. App., 459, rehearing denied 23 September, 1913. Gibson was elected tax collector of Brooks County, Georgia, to fill the unexpired term of his deceased father, who had held that office for many years. At the time he was inducted into office there was a shortage in the accounts of his father of several thousand dollars which had been collected as taxes for 1908. In 1909 the defendant Gibson

collected the taxes for that year and applied them to the settlement of the shortage of 1908. In the summer of 1910 Gibson was called upon for a settlement, but he was unable to comply with this demand because the funds had been applied as collection upon the accounts of his father for the year 1908. He was thereupon indicted for embezzlement, tried and convicted, and upon appeal the judgment was reversed. Among other things, the Court says: "The single proposition upon which we base our ruling is that one cannot be shown to be guilty of embezzlement who has paid over all the money which he has collected to the person to whom it is due, even though he may have paid it upon the wrong account. The record shows that every dollar collected by this defendant was paid by him, either to the county of Brooks if it was county tax, or to the Comptroller-General if it was a State tax. It is true, he directed that the money be applied to the shortage of his deceased father, in the effort to preserve the memory of that father from disgrace; but, after all, the county of Brooks and the State of Georgia received every dollar he collected, and it requires nothing more than the application of these payments to the proper account to correct the wrong, if any, done by the defendant."

The defendant seems to have been found guilty upon the general idea that he has done something wrong, without regard to the charge in the indictment, and it is only in this way, as I see it, that the conviction can be sustained.

HOKE, J., concurs.

STATE v. ANDERSON TANKERSLEY, ARTHUR KELLY, AND CLYDE WILSON.

(Filed 6 December, 1916.)

1. Criminal Law—Criminal Negligence—Evidence—Homicide.

In order to hold one a criminal for a negligent act of omission or commission, the act complained of must be a higher degree of negligence than is required to establish negligent default on a mere civil issue, and in order to a conviction of involuntary manslaughter, attributable to a negligent omission of duty, when engaged in a lawful act, it must be shown that a homicide was not improbable, under all the facts existent at the time and which should reasonably have an influence and effect on the person charged.

2. Same—Locomotive Engineer—Collision—Signals.

Three northbound trains were ordered to pass at a certain station at night, the first to proceed to the station and stop on a parallel track, the

second 1,200 feet south of the station, an irregular stopping place, and near a cross-over switch by means of which it could have taken an available siding, but which was permitted to remain on the main track for seven minutes until collided with by the third, a fast passenger train required to make its schedule, which it was then making. South of the location of the second train the track curved 2½ or 3 degrees for a distance of about 600 feet, and at its southern termination was an electric signal, with another such signal about 1,000 feet further south, both operated at the railroad yards beyond, and with which the prevailing conditions of the track should have been shown, but the first showed track was clear and the second that the main-line track switch was set for a side-track and that the engineer can proceed to the station "prepared to stop within the limits of his vision." There was nothing to indicate to the engineer of the third train that the second one was ahead on the main-line track, and that he should stop his train; and the employees on the second train failed to comply with the company's rules to place torpedoes behind them on the track or send a man back with a lantern to warn approaching trains. *Held*, the evidence was insufficient to convict the defendant engineer on the third train of manslaughter, in the absence of evidence that he was aware that a train was ahead of him on the track at the time, or that a homicide would reasonably be expected to follow from anything that he did or failed to do.

3. Criminal Law—Homicide—Nonsuit—Appeal and Error—Judgment—Verdict.

Upon motion to nonsuit upon the evidence on a trial for a homicide, now allowed by statute, when it appears that the evidence is insufficient for conviction, the action will be dismissed, and, under the statute, the judgment thereof has the same force and effect as a verdict of not guilty.

INDICTMENT for murder of C. E. Hall and H. C. Severs, tried before *Ferguson, J.*, and a jury, at May Term, 1916, of ROWAN, the charge being that the killing of these persons was caused by the criminal negligence of the defendants Anderson Tankersley and Arthur Kelly, engineer and fireman on train No. 38, and Clyde Wilson, flagman of train 2d No. 32, both being trains of the Southern Railway Company going north from Charlotte via Salisbury, N. C., and by reason of which No. 38 ran into 2d No. 32, stationary on the north main line of the Southern road, about 1,200 feet south of the railway station at Salisbury. The killing of the persons stated by train 38 and the attendant circumstances having been shown forth in evidence, defendant, as allowed by chapter 73, Laws 1913, in apt time, moved that the action be dismissed as on judgment of nonsuit. The motion was allowed as to the fireman, Arthur Kelly, denied as to the other two defendants, and, these being put on trial, there was verdict of not guilty as to Clyde Wilson and defendant Tankersley was convicted of manslaughter. Judgment on the verdict, and defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

A. H. Price, L. H. Clement, and T. F. Hudson for defendant.

HOKE, J. We have given this case the careful consideration that the supreme importance of the issue demands, and are of opinion that the conviction of manslaughter cannot be sustained. The facts in evidence tended to show that on the night of 24 November, 1915, three fast passenger trains of the Southern Railway departed from the station at Charlotte, N. C., going north via Salisbury, No. 32, the regular train from Jacksonville to New York, leaving Charlotte at 8:06 p. m., second No. 32, the "Baseball Special," leaving Charlotte at 8:10; No. 38, the S. W. Limited from New Orleans to New York, leaving Charlotte at 8:31; this last being a heavy train on a fast run and expected and required to make its schedule time. That first No. 32 arrived at Salisbury at 9:14 and was allowed to proceed on up to the station; that second 32 arrived at Salisbury at 9:30 and was stopped 1,200 feet south of the station on the main line of the north-bound track and not far south of the cross-switch, by which north-bound trains were let in on parallel side-tracks leading up to the station; there were three of these side-tracks, all available to this train, if so directed, so far as the evidence shows; that this train remained on the main track at the point indicated seven minutes, until 9:37, when it was run into by train No. 38, and two of its passengers killed, those mentioned in the bill of indictment, and many others seriously injured; that proceeding south from the position of second No. 32, the main tracks curve to the right, on a curvature of 2½ to 3 degrees, which extends for about 600 feet, when the road again goes off at a tangent; that at or about the southern termination of this curve and at the ice factory crossing there is an electric signal, No. 3370, with double arms, the upper arm being to indicate conditions of the main tracks; that most of these block signals on the Southern Railway have only one arm, but this and another just north of the station, No. 3363, have two; that further south, on the tangent, about 1,000 to 1,200 feet from the ice factory signal, there is another electric cautionary signal, its purpose being chiefly to give notice of conditions prevailing at the ice factory or block signal; that these two electric signals are controlled from the yard at Salisbury and that at the ice factory can be made to show only red lights, which called for a stop of approaching trains, and it can also show, by red upper and green lower light, the conditions existent at the time of the catastrophe; that the main-line track switch is set for one of the diverging side-tracks and that the engineer can proceed to the station, prepared to stop within the limits of his vision. The proof showed further

that the stop made by second No. 32 was an irregular stop, and, when one of that character occurred, the flagman was required by the rules of the company to proceed immediately back and "protect his train"—"Go back eighteen telegraph poles and put down one torpedo, then go back nine poles and place two torpedoes, ten yards apart, then come back to one and remain until called in. If a first-class train is due within ten minutes he would have to stay there and come in on that train. If the evidence in this case should show that the special or second 32 was between the passenger station and the switch south of the cross-over diverging switch into the station, it was the duty of the flagman to proceed back at once in accordance with Rule 99, and if train 38 was due to arrive at that point within ten minutes it was the duty of the flagman on second 32 to stay there and flag 38, inform them where his train was, and come in on the engine of 38. Rule 99 is a rule that applies to flagmen."

2. That this was a most unusual stop, one of the State's witnesses testifying that he had never known a passenger train stopped at that place since he had been connected with the Southern Railway, and, in view of the fact that a fast passenger train was scheduled to arrive in the course of a few minutes, a stay there of seven minutes was an inexcusable stop unless the train had been fully protected by proper and adequate signals, and the evidence is uncontradicted that no such protection was afforded or even attempted. Second No. 32 was provided with torpedoes and with a red lantern, but no flagman went back to place former, and no adequate attempt even was made to protect the train with a lantern. The conductor of second No. 32 testified that, after being there for a few minutes, he saw the flagman at the end of the train with a white lantern, and he told him he had better go back and look out for 38; that the flagman had to go into his train and get his red lantern, and, almost immediately after he had started back, the light of No. 38 was seen as it came around the curve from the south. According to testimony, the flagman only got back about 200 feet, and there is much disinterested testimony to the effect that he did not leave the rear of his train. Again, under the circumstances disclosed by this evidence, with that train filled with passengers on the north-bound main line and south of the cross-over switch, with No. 38 approaching around a curve and to arrive in a few minutes, these electric signals, by every rule of prudence, should have called to the engineer to stop. It was shown that it could have been done by a simple turn of the hand by some one in the yard; but no such warning was given. On the contrary, the testimony tends to show that the cautionary signal at

the cotton mill crossing gave indication that the track was clear and the ice factory signal gave no order to stop his train, but that "the main line switch is set for one of the diverging tracks; proceed with caution and be prepared to stop within the limits of your vision." This, as argued by counsel, was at best an indeterminate signal, leaving much to the discretion of the engineer of the approaching train, "both as to speed, distance, and vision."

The testimony on the part of the State varies as to the exact speed to which defendant had reduced his train at the time of the collision, different witnesses giving it, by estimate, at 10, 15, 18, and 20 miles per hour; but, under the circumstances disclosed by the record, with only a signal of that character to guide him and with nothing whatever to show that there was a passenger train between him and the cross-over switch or any likelihood of it, even if he had not reduced his train to the speed required by the highest prudence, or even if he did fail to stop it within 120 feet, the distance he was able to see ahead, around the curve, this, while it might be considered an error of judgment, or even a negligent default on a civil issue, should not by any reasonable or just estimate of his conduct be imputed to him for a crime. The decisions of the courts have described in different terms the kind of negligence required to constitute crime. In some of them it is said to be negligence that is "culpable and gross." In others, that it must be such as to show a reckless disregard of the safety of others, etc., but all of the authorities are agreed that in order to hold one a criminal there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue, and that in order to a conviction of involuntary manslaughter, attributable to a negligent omission of duty, when engaged in a lawful act it must be shown that a homicide was not improbable under all the facts existent at the time and which should reasonably have an influence and effect on the conduct of the person charged. As apposite to the facts of this record, the position is very well stated in 1 McLean's Criminal Law, sec. 350, as follows: "A negligence which will render unintentional homicide criminal is such carelessness or recklessness as is incompatible with a proper regard for human life. An act of omission as well as commission may be so criminal as to render death resulting therefrom manslaughter. But the omission must be one likely to cause death." Many cases on the subject show this to be a correct statement of the principle and are against the validity of the present conviction. *S. v. Vines*, 93 N. C., 493; *S. v. O'Brien*, 32 N. J. L., 169; *S. v. Moore*, 129 Iowa, 514; *S. v. Goetza*, 83 Conn., 437; *People v. Barres*, 182 Mich., 179; *Fergu-*

son's case, Lewis Crim. cases, 181; 1 Russell on Crimes (9 Ed.), pp. 877-878; 21 Cyc., p. 765.

Recurring to the facts in evidence, as we are enabled to understand them, the defendant on the night in question was the engineer on a fast passenger train going north, and expected and required to make his schedule, and was running on his usual time. A cautionary signal 1,600 or 1,700 feet south of the switch gave no indication that the track ahead was obstructed in any way; another signal, 600 feet back, gave him no order to stop his train, but only, "Switch turned for diverging track; proceed with caution, prepared to stop within the limit of your vision." There were no torpedoes placed to warn him that a train, filled with unsuspecting and helpless passengers, was on the track ahead and exposed to destruction; not even a red lantern waved at any point likely to give him notice. There was not only nothing to warn him of the perilous position of second No. 32, but it was not shown that he had any knowledge of the existence of such a train on that night, and the only signal given him, to our apprehension, signified that there was no train between him and the cross-over switch where he was notified to go in on a side-track. On the record, therefore, defendant should not be convicted of the crime of manslaughter, because of an utter absence of proof that a homicide could have been reasonably expected to follow from anything that he did or omitted to do, and his motion to dismiss the case against him should have been allowed.

This will be certified, to the end that the prosecution against the defendant be dismissed and that under the statute the judgment shall have the force and effect of a verdict of not guilty.

Action dismissed.

STATE v. FRANK FOSTER.

(Filed 6 December, 1916.)

1. **Jurors—Expressed Opinion—Findings—Impartiality—Appeal and Error.**

A juror who states that he has formed and expressed an opinion adverse to the defendant on trial for a homicide, but that he could hear the case and render a verdict according to the evidence and the law, is not held on appeal to be disqualified to serve, when the trial judge has ruled that he was fair and impartial.

2. **Appeal and Error—Exceptions—Assignments of Error.**

An assignment of error not based upon exception will not be considered on appeal.

3. Appeal and Error—Evidence—Competent in Part—Exceptions.

Exception taken to evidence generally, some of which is competent, will not be held for reversible error on appeal, for exception should be taken specifically to the part that is not competent.

4. Homicide—Common Design—Evidence.

Where there is sufficient evidence that two defendants were acting together with common design to commit a homicide, the declarations or conduct of one of the parties in furtherance of their purpose is competent against the other.

5. Instructions—Trials—Evidence—Statements of Counsel.

Upon this trial for a homicide, a charge of the court is held without error which instructed the jury to find the facts upon the evidence, and not from what the counsel and the court said.

6. Homicide—Murder—Evidence—Restricted Inquiry.

Where there is no evidence of manslaughter, upon a trial for a homicide, it is proper for the trial judge to restrict the inquiry to murder in the first or second degree, when there is evidence thereof.

7. Homicide—Burden of Proof—Matters in Excuse.

Upon a trial for a homicide the burden is on the State to show beyond a reasonable doubt that the killing was done with premeditation and deliberation, to convict of murder; and for the defendant to show matters in justification, mitigation, or excuse which would reduce the degree of the crime.

8. Homicide—Murder—Instructions—Appeal and Error—Harmless Error.

Where upon a trial for a homicide the trial judge has sufficiently defined the words "premeditation and deliberation" necessary for a conviction of murder in the first degree, the mere use of the words disjunctively, in a single instance, will not be held as reversible error.

9. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

Objection to an alleged prejudicial misstatement of the contention of a party by the judge in his instructions to the jury must be taken at the time, and exception thereafter taken comes too late, and will not be considered on appeal.

10. Homicide—Instructions—Intoxication—Evidence—Appeal and Error.

While the state of intoxication which will prevent deliberation and premeditation on the part of one accused of a homicide, and reduce the crime from murder in the first degree, does not depend upon whether the intoxication was voluntary on his part, it will not be held prejudicial error for the trial judge to have so charged the jury, when it appears that there was no sufficient evidence that the accused at the time of the homicide was too intoxicated to premeditate or deliberate upon the crime, but that it was preconceived and committed by him with a fixed purpose to perpetuate it.

11. Instructions — Homicide — Murder — Intoxication — Appeal and Error — Harmless Error.

Where the charge of a judge, upon a trial for a homicide, taken as a whole, correctly states the law as to the prisoner's state of intoxication which would reduce the crime from murder in the first degree, an accidental slip of the judge in the use of the words "involuntary drunkenness" in connection therewith will not be held as reversible error.

INDICTMENT for murder, tried before *Lane, J.*, and a jury, at April Term, 1916, of POLK.

The prisoner and Ed. Bridgeman were indicted for the murder of John Hayes on 25 December, 1915. The jury convicted the prisoner of murder in the first degree and he has appealed from the judgment upon the verdict. Ed. Bridgeman was convicted of murder in the second degree, but the verdict was set aside by the court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Spainhour & Mull, A. Y. Arledge for defendant.

WALKER, J. There are many exceptions in the record, but when they are classified and each assigned to its proper group, there are really very few. We will consider the assignments of error in their numerical order.

First. The challenge to a juror because he had formed and expressed an opinion was fully met by the ruling of the court, upon evidence, that he was fair and impartial. He stated that, notwithstanding the opinion he had formed, he could hear the case and render a verdict according to the law and the evidence. The exception, therefore, falls within the principle as stated in *S. v. Banner,* 149 N. C., 519, and is overruled. See, also, *S. v. DeGraff,* 113 N. C., 688; *S. v. Green,* 95 N. C., 611; *S. v. Kilgore,* 93 N. C., 533. It does not clearly appear that the challenges of the prisoners had been exhausted. Gregory's Supplement, sec. 3263; *S. v. Banner, supra.*

Second. This assignment is not based upon any exception, and cannot, therefore, be considered. *Worley v. Logging Co.,* 157 N. C., 490; *McLeod v. Gooch,* 162 N. C., 122; *S. v. Freeze,* 170 N. C., 710. It does not appear, though, that this prisoner excepted individually to the evidence of Mrs. Hulda Haynes, nor do we see that it was prejudicial to him. Besides, there was no serious denial, and could not be, that this prisoner committed the homicide, whether excusably or not. The exception, if it may be regarded as properly taken in apt time, extended to a mass of evidence, some of which was competent upon certain phases of the case. It should have specified the objectionable testimony. *R. R. v. Mfg. Co.,* 169 N. C., 156; *S. v. English,* 164 N. C., 508; *Wilson v. Lumber Co.,* 131 N. C., 163; *S. v. Ledford,* 133 N. C., 714.

Third. The evidence covered by this and the next six exceptions, which will include the ninth, was competent in part, and each of the exceptions is, therefore, amenable to the rule we have just stated when passing upon the second exception. The evidence was either competent as to both prisoners or as to Ed. Bridgeman, and the exceptions are made jointly. But upon a review of all the evidence embraced by these exceptions we do not see that it was prejudicial to the prisoner. It may also be said that there was sufficient evidence to show that the prisoner and Ed. Bridgeman were acting together or in concert, and when there is such concert of action, or common design, the declarations or conduct of one of the parties in furtherance of their purpose is competent against the other conspirator. *S. v. Anderson,* 92 N. C., 733; *S. v. Turner,* 119 N. C., 841, 848. It was held in *S. v. Anderson, supra,* as appears by the headnotes: "While it is a general rule of evidence that the acts and declarations of a person in the absence of the prisoner are not admissible in evidence against him, yet there are exceptions, one of which is in case of a conspiracy to do an unlawful act, when the acts and declarations of conspirators, in furtherance of the common purpose, are competent, although made in the absence of the others. The least degree of consent or collusion between parties to an illegal transaction makes the act of one the act of the others." A large part of the testimony, and the material part, related to what was done at the time and place of the homicide, and was competent as *pars rei gestæ.*

Fourth. This and the next two exceptions relate to the testimony of Florence Thomason, Mule Russell, and Horace Johnson, as to the conduct of Ed. Bridgeman and the prisoner. These exceptions are all open to the same criticism as the second of the exceptions. Some of the evidence to which objection was made was competent, and the objectionable part is not specifically stated. But we think the evidence is generally relevant to show the condition of the prisoners, their temper and disposition towards the parties they overtook when the homicide was committed, and their object in going to the place. While not very strong, we cannot say it was not some evidence for the purpose of disclosing those facts. It, at least, did no harm to this prisoner.

Fifth. The thirteenth and fourteenth exceptions are clearly untenable. It was manifestly proper for the court to tell the jury that they must find the facts from the evidence and not from what counsel or the court had said.

Sixth. The next three exceptions cannot be sustained. There was no evidence of manslaughter, and the judge correctly restricted the inquiry to murder in the first or second degree or acquittal. There was no sudden heat of blood or legal provocation. The court's definition of the different degrees of homicide was correct.

Seventh. That the burden is upon the prisoner to satisfy the jury by

proof of any matters of justification, excuse, or mitigation has been too long settled to be now questioned. The jury were instructed that the burden was upon the State to establish beyond a reasonable doubt that the prisoner killed the deceased with premeditation and deliberation. The charge was correct and in accordance with the authorities. *S. v. Brittain,* 89 N. C., 481; *S. v. Simonds,* 154 N. C., 197; *S. v. Rowe,* 155 N. C., 436; *S. v. Yates,* 155 N. C., 450; *S. v. Vann,* 162 N. C., 534; *S. v. Cameron,* 166 N. C., 379. This disposes of the nineteenth assignment of error.

Eighth. The court sufficiently defined the meaning of the words "premeditation and deliberation," and the jury could not have been misled as to what was necessary to be found by them in order to convict of murder in the first degree, and the mere use of the words disjunctively in a single instance was inadvertent and did not prejudice the prisoner, as, in other parts of the charge, the law was stated so clearly and repeatedly that the jury could not have misunderstood it. A similar expression was used in *S. v. Logan,* 161 N. C., 235, and held not to be reversible error, as it was sufficiently overcome by the charge, if read as a whole.

Ninth. There were several exceptions taken to the statement by the court of the contentions in the case, but if they were not properly stated, objection should have been made at the time, so that the necessary correction could be made. *S. v. Cox,* 153 N. C., 638; *Jeffress v. R. R.,* 158 N. C., 215; *S. v. Blackwell,* 162 N. C., 672; *S. v. Cameron,* 166 N. C., 379. It will not do to take the chance of a favorable verdict and except afterwards if it is adverse. The objection then comes too late. Parties must be watchful and diligent if they would preserve their rights, and this means that every objection must be made in apt time and in the proper way. *S. v. Tyson,* 133 N. C., 692. We said in that case at p. 699: "A party will not be permitted to treat with indifference anything said or done during the trial that may injuriously affect his interests, thus taking the chance of a favorable verdict, and afterwards, when he has lost, assert for the first time that he has been prejudiced by what occurred. His silence will be taken as a tacit admission that at the time he thought he was suffering no harm, but was perhaps gaining an advantage, and consequently it will be regarded as a waiver of his right afterwards to object. Having been silent when he should have spoken, we will not permit him to speak when by every consideration of fairness he should be silent. We will not give him two chances. The law helps those who are vigilant, not those who sleep upon their rights. He who would save his rights must be prompt in asserting them."

Tenth. This brings us to the consideration of what is the main exception of the prisoner. He complains by one or two exceptions that in

one instance the learned judge used the expression "involuntary drunkenness" when instructing the jury with respect to the effect of drunkenness upon the prisoner's guilt or upon his capacity for premeditation and deliberation. It makes no difference, it is true, as to whether the drunkenness is voluntary or involuntary, and the expression "involuntary drunkenness," considered by itself, or abstractly, might be error, but it was clearly harmless here. We considered, somewhat at large, the question as to the effect of intoxication upon criminal guilt in *S. v. English,* 164 N. C., 497. Drunkenness is no excuse for crime, as has often been said; but where a specific intent is essential to the criminality of the act, or there must be premeditation or deliberation, or some mental process of the kind in order to determine the degree of the crime, it is proper to consider the prisoner's mental condition at the time the alleged offense was committed. If he was not able for any reason to think out beforehand what he intended to do, and to weigh it and understand the nature and consequences of his act, he should not be held to the same measure of responsibility as one with better faculties and a clearer mind should be. Wharton says, in his work on Homicide (3 Ed.), p. 811: "Intoxication, though voluntary, is to be considered by the jury in a prosecution for murder in the first degree, in which a premeditated design to cause death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such a design, not because, *per se,* it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear. Drunkenness as evidence of want of premeditation or deliberation is not within the rule which excludes it as an excuse for crime. And a person who commits a crime when so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree. The influence of intoxication upon the question of the existence of premeditation, however, depends upon its degree, and its effect on the mind and passions. No inference of the absence of deliberation and premeditation arises from intoxication as a matter of law; and intoxication cannot serve as an excuse for the offender; and it should be received with great caution, even for the purpose of reducing the crime to a lower degree." This principle was approved in *S. v. English, supra,* and *S. v. Shelton,* 164 N. C., 513, and in the last cited case it was said, at p. 517, quoting from *S. v. Murphy,* 157 N. C., 614: "Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence. Accordingly, since the statute dividing the crime of murder into two degrees, and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the killing was deliberate and premeditated, these terms contain, as an essential element of the crime of murder, a purpose to kill previously formed after weighing the matter (*S. v.*

Banks, 143 N. C., 658; *S. v. Dowden,* 118 N. C., 1148), a mental process embodying a specific definite intent; and if it is shown that an offender charged with such crime is so drunk that he is utterly unable to form or entertain this essential purpose, he should not be convicted of the higher offense. It is said in some of the cases, and the statement has our unqualified approval, that the doctrine in question should be applied with great caution. It does not exist in reference to murder in the second degree nor as to manslaughter. It has been excluded in well considered decisions where the facts show that the purpose to kill was deliberately formed when sober, though it was executed when drunk, a position presented in *S. v. Kale,* 124 N. C., 816, and approved and recognezed in *Arzman v. Indiana,* 123 Ind., 345, and it does not avail from the fact that an offender is, at the time, under the influence of intoxicants, unless, as hereinbefore stated, his mind is so affected that he is unable to form or entertain the specified purpose referred to." This case in some of its features is much like *S. v. English, supra,* and *S. v. Shelton, supra.* In the *Shelton case* the Court thus stated the rule: "All the authorities agree that to make such defense available the evidence must show that at the time of the killing the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. As the doctrine is one that is dangerous in its application, it is allowed only in very clear cases; and where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense." Keeping these principles in mind, and testing this case by them, we do not think there was sufficient evidence of intoxication to make them applicable, and if the language of the judge was erroneous in itself, it does not invalidate the trial, as it was immaterial and harmless. It was Christmas day and the prisoner may have been drinking, but he introduced no testimony, and that of the State tends to show that he was sober, and so does his conduct immediately preceding the fatal shot. There is evidence from which it may be inferred that he and his companion, Ed. Bridgeman, were not in a very good frame of mind, but were seeking trouble. Their actions and conduct before and at the time of the homicide would indicate that they were not friendly toward the deceased, perhaps on account of some jealousy aroused by the preference which one of the women, Florence Thomason, had shown for him. If the prisoner was drunk, he did not act like he was, nor did he make the impression on the bystanders that he was intoxicated, but, on the contrary, he had come to the spot with his gun and evidently bent upon mischief, and he seemed to do the intended deed with steadiness of purpose, if not with pitiless coolness and deliber-

ation, and apparently without the slightest regard for consequences. He had sense enough not to take the chance of killing any of the others standing near by, as he gave this order to his intended victim, who was brave enough, to defend himself, but utterly helpless and unable to do so: "Fall out of the crowd, John, and God damn you, I will kill you." He then fired his gun with the fatal result. The prisoner did not display the unnatural manner or temper of a man inflamed by liquor, but the calm and determined purpose of one who had normal possession of his mental faculties and knew full well what he was about to do. Furthermore, he had tried before to kill John Hayes, and was prevented from doing so, at the time, by Ed. Bridgeman. This was evidence of his design or definite purpose to kill formed beforehand, and the circumstances immediately attending the act of firing the gun tended to show the deliberation, and supplied, therefore, the other element of murder in the first degree. The jury took this view of the case, under a charge free from error and supported by evidence. But if it were otherwise, we do not think the mere accidental slip of the judge could have misguided the jury in view of the very clear and explicit statement of the law in other parts of the charge. Looking at the instructions as a whole, and we are required so to do, the jury must have understood that it was, after all, the state of the prisoner's mind as a result of intoxication, and not how the latter was caused, which determined the degree of homicide. There may be palliating circumstances in this case not disclosed by the record, but there is nothing which, in law, reduces the homicide from the degree for which the jury rendered their verdict.

No error.

STATE v. MARION MOODY.

(Filed 19 December, 1916.)

Criminal Law—Seduction—Trials—Supporting Evidence—Statutes.

Upon trial under an indictment for seduction under a breach of promise of marriage, Revisal, sec. 3354, requiring supporting evidence to make that of the prosecutrix competent upon the three elements of the crime, it is not necessary that the supporting evidence be sufficient, as substantive evidence, for conviction; and where the good character of the prosecutrix before the act has been testified to by other witnesses, the act itself admitted, and there is testimony that the defendant had paid the prosecutrix exclusive and assiduous attention for years under circumstances evidencing that he was her accepted lover, her testimony as to the promise of marriage is sufficiently supported by the testimony of others to be competent within the meaning of the statute.

CLARK, C. J., concurring.

STATE *v.* MOODY.

CRIMINAL ACTION tried before *Ferguson, J.*, and a jury, at Fall Term, 1916, of JACKSON.

Defendant was convicted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Moore & Moore and Alley & Buchanan for defendant.

WALKER, J. The defendant was indicted for the seduction of an innocent and virtuous woman under a promise of marriage. Revisal, sec. 3354.

The statute provides that the "unsupported testimony" of the woman shall not be sufficient to convict.

There are three essential elements of this crime: first, the seduction; second, the innocence and virtuousness of the woman; third, the promise of marriage inducing consent of the woman to the sexual act. *S. v. Pace,* 159 N. C., 462; *S. v. Cline,* 170 N. C., 751. The prosecutrix testified to the defendant's promise of marriage; that she was persuaded by it to have sexual intercourse with him, and that she was a virtuous and innocent woman, never having committed the act with any other man.

First. As to her virtue and innocence there was supporting testimony, as the State called witnesses who stated that the character of the prosecutrix had always been good prior to this occurrence. We have held this to be sufficient as supporting testimony within the meaning of the statute. *S. v. Mallonee,* 154 N. C., 200; *S. v. Horton,* 100 N. C., 443; *S. v. Cline, supra; S. v. Sharpe,* 132 Mo., 171; *S. v. Deitrick,* 51 Iowa, 469; *S. v. Bryan,* 34 Kan., 72; *Zabriskie v. State,* 43 N. J. L., 644.

Second. The seduction was shown both by the testimony of the prosecutrix and the admission of the defendant and by the circumstances otherwise appearing in the case.

Third. This brings us to a consideration of the main contention of the defendant's counsel, that there is no supporting testimony as to the promise of marriage.

It must be borne in mind that we are not passing upon the weight or strength of the evidence in any of these instances, but only upon the question whether there is any testimony which is supporting in the sense of that word as used in the statute. We are of the opinion that there is, and however unconvincing or inconclusive it may be, it was for the jury to determine its weight.

There was testimony in the case outside of the prosecutor's, that is, her father's and her mother's, that the defendant had been attentive to her for several years, coming to see her constantly for three years. The mother testified: "He had been going with her (Clara Moss) for about three years. He came nearly every Sunday and would stay all day. He

would leave in the evening or at night, and would generally leave about dark or a little before." The prosecutrix had testified that she was about 17 years old when defendant first courted her, which was about one year and eight months before their first sexual act was committed, this being in September, 1913. That she then yielded to the defendant's persuasion when he appealed to her, on the faith of his promise of marriage and as her lover, to submit to his embraces. Her child was born in June, 1914. Defendant's attentions to the prosecutrix lasted about three years and during that period he was frequently a visitor at her home and evinced a decided partiality for her, as the evidence, apart from hers, tended to show. In a case not unlike this one, though the supporting evdience was not so strong as that we have here, the Court held that under the statute of that State the promise of marriage and the carnal connection were the essential facts to be shown (citing cases), and with reference to the kind of proof, which was supporting, within the meaning of the statute, and tended to establish those two essential facts, the court said in *Armstrong v. People,* 70 N. Y., 38, 44: "It is settled by the same authorities that the supporting evidence need be such only as the character of these matters admits of being furnished. The promise of marriage is not an agreement usually made in the presence or with the knowledge of third persons. Hence the supporting evidence possible in most cases is the subsequent admission or declaration of the party making it; or the circumstances which usually accompany the existence of an engagement of marriage, such as exclusive attention to the female on the part of the male, the seeking and keeping her society in preference to that of others of her sex, and all those facts of behavior towards her which before parties to an action were admitted as witnesses in it were given to a jury as proper matter for their consideration on that issue. So, too, the act of illicit connection, and the immediate persuasions and inducements which led to compliance, may not be proved by the evidence of third persons directly to that fact. They are to be inferred from the facts; that the man had the opportunities, more or less frequent and continued, of making the advances and the proposition; and that the relations of the parties were such as that there was likely to be that confidence on the part of the woman in the asseverations of devotion on the part of the man, and that affection towards him personally, which would overcome the reluctance on her part, so long instilled as to have become natural, to surrender her chastity. Circumstances of this kind vary in weight in different cases, and it is for the jury to determine their strength. But when proof is made of the existence of them, in some degree, it cannot be said that there is no supporting evidence. A court cannot then properly direct a verdict, or discharge the defendant in the indictment, on the ground that no case is made for the consideration of the jury. In the case in hand there was

evidence of the existence of both these classes of circumstances, furnished by witnesses other than the prosecutrix." There was a dissenting opinion as to the sufficiency of the evidence to show the seduction, but it did not extend to the proof as to the promise of marriage. To the same effect as *Armstrong v. People* are the following cases: *People v. Gumaer,* 80 Hun., 78 (*s. c.,* 30 N. Y. Suppl., 17); *S. v. Mulholland,* 115 Iowa, 170; *S. v. McCaskey,* 104 Mo., 644, citing *S. v. Hill,* 91 Mo., 423; *S. v. Wycoff,* 113 Iowa, 679; *People v. Hubbard,* 92 Mich., 322; *S. v. Sharp,* 132 Mo., 165. In *S. v. Whatley,* 144 Ala., 68, the Court said: "It was proper to permit the State to show how long the defendant kept company with the witness. He was charged with having seduced her upon a promise of marriage, and their relationship and conduct toward each other was a proper element for the consideration of the jury." It appeared in *S. v. Hill, supra,* that the defendant had been waiting on the prosecutrix three or four years; that he and another had an oyster supper at her home; that she and defendant were in the kitchen together at night, after her parents had retired, and that defendant had been at the house several times previous to these occasions, and had paid her some attention on other occasions. The Court held with reference to these facts: "The prosecuting witness swears positively to a marriage promise made by defendant on the night they were in the kitchen; and we think the foregoing evidence is sufficient by way of corroborating circumstances. It is true, the visits of defendant were not frequent, and this evidence may all be true, and there have been no promise made to marry the girl, but the circumstances are such as usually attend such engagements. Whether they and the testimony of the prosecuting witness outweighed the positive denial of the defendant was a question for the jury to determine." And it was held in *S. v. Reinheimer,* 109 Iowa, 624, that in a prosecution for seduction the fact that the parties kept company and acted as lovers usually do, and other like circumstances, are sufficient confirmation and support of the evidence of the prosecutrix required by the statute. The general principle is thus well stated in *S. v. Timmens,* 4 Minn., 241, 247: "It cannot be intended that by being corroborated the statute means that there shall be proof of these facts sufficient in itself to establish them independently of the testimony of the girl, as that would render the statute practically null. Parties seldom seek publicity in such matters. From their nature they transpire in secret, and it is only by accident that any positive proof can ever be brought to bear upon them except through the parties themselves. The corroboration, therefore, intended by the statute is proof of those circumstances which usually form the concomitants of the main fact sought to be established, which circumstances should be sufficiently strong in themselves, and pertinent in their bearing upon the case, to

satisfy the jury of the truthfulness of the witness in her testimony on the principal facts." The Court held in *S. v. Andre,* 5 Iowa, 389, that regular and frequent visits of the defendant to the female, and his being alone with her at late hours of the night, and other equally significant facts, might be shown in support of her testimony in a prosecution of this kind. It is said in Underhill on Criminal Evidence, sec. 388, that "The conduct and relations of the parties after, as well as before, the date of the alleged seduction may be shown, such evidence being relevant to prove that consent was obtained by promise and inducements, and of what they consisted." Finally, in *S. v. Curran,* 51 Iowa, 112, 118, the Court, referring to this question, held: "The evidence relied upon as corroborative is that the defendant was the prosecutrix's suitor through a long period of time. Such fact, considered independently, would be entirely consistent with the defendant's innocence. He claims, therefore, that it does not tend to connect him with the offense. In our opinion, the position is not well taken. In *Stevenson v. Belknap,* 6 Iowa, 97 (103), the Court said: 'We believe that all authorities concur that seduction is generally made out by a train of circumstances, among which may be enumerated courtship, or continued attention for a length of time.' See, also, *S. v. Wells,* 48 Iowa, 671. Courtship affords not simply the opportunity, but the very means of persuasion by which seduction is effected. The testimony of the prosecutrix is sufficient to establish the fact of seduction. It is competent, though not sufficient, evidence that the defendant was her seducer. The fact that he was her suitor, proven otherwise than by her own testimony, tends to make credible her testimony that her proven seduction was effected by him. The corroboration, while by no means conclusive, must impress every one who has any knowledge of human nature as exceedingly cogent." (See, also, McClean Cr. Law, sec. 1119). But evidence of this character should not be considered as supporting unless the relations and the conduct and demeanor of the parties toward each other are such as to indicate that the man is the accepted lover of the woman, and the jury must find the fact whether, upon such evidence as supporting that of the prosecutrix, the promise of marriage was given and induced the seduction.

The prosecutrix told her mother and father of the promise of marriage, and this, we have held, is corroboration of her as a witness. *S. v. Whitley,* 141 N. C., 823; *S. v. Kincaid,* 142 N. C., 657; *S. v. Raynor,* 145 N. C., 472. It is not by itself supporting testimony, as it emanates from the prosecutrix herself, but it is corroborative as in other cases.

We have carefully examined the charge of the court, and find that it states the law as declared by this Court and as applicable to the case.

No error.

CLARK, C. J., concurring: Concurring fully in the opinion of the Court, I think it, however, well to call attention to the fact that our statute is less of protection to the woman probably than in any other State.

Our statute makes criminal "the seduction of an innocent, virtuous woman under promise of marriage," with a proviso that "the unsupported testimony of the woman shall not be sufficient to convict."

Seduction was declared a crime by a very early English statute, but in very few States is it required that the seduction "shall be under promise of marriage." Clark's Criminal Law (3 Ed.), sec. 128; McClain Cr. Law, secs. 1111, 1112; 35 Cyc., 1329. The proposition often urged, that rape cannot be committed except upon a woman of virtuous character, has been justly repudiated in all the courts. It is not easy to see why it should be required as to the offense of seduction. Such requirement is not made as to the prosecutor in embezzlement, larceny, or any other offense against property, nor as to the party assaulted, whether killed, or in a charge of rape or any other offense against the person.

The further requirement, that "the unsupported testimony of the woman shall not be sufficient to convict," is not required by our laws as to any other offense, and rarely in other jurisdictions. In 35 Cyc., 1360, it is said: "In a prosecution for seduction the testimony of the female alone, without corroboration by other evidence, is sufficient, in the absence of a statute, to warrant a conviction," citing *People v. Wade,* 118 Cal., 672; *Washington v. State,* 124 Ga., 423; *S. v. Stone,* 106 Mo., 1.

In this State the disadvantage to the woman has been carried much further by the judicial construction which requires the woman to be corroborated as to three distinct circumstances, and even throws upon her the burden of proving her character for virtue. In those few States where this last circumstance is subject of proof it is usually required that the defendant shall prove the bad character, and not that she shall prove her good character.

It was of this offense that John Philpot Curran, in *Massy v. Headfort* said: "The Cornish plunderer, intent on spoil, callous to every touch of humanity, shrouded in darkness, holds out false lights to the tempest-tossed vessel and lures her and her pilot to that shore upon which she must be lost forever, the rock unseen, and nothing apparent but the treacherous signal of security and repose, until she is at length dashed upon that hard bosom where her honor and happiness are wrecked forever, sinking before his eyes into an abyss of infamy, or, if any fragment escape, escaping to solace, to gratify, to enrich her vile destroyer." The defendant here had courted his victim assiduously for three years, and then when brought to the bar to answer for his conduct he sum-

moned to his aid all who would defame her character and traduce her virtue. The burden was placed on her to prove her good character by preponderance of evidence over the assaults made upon it by one who for three years had asserted his devotion, and to convince the jury by other evidence than her own, difficult as it is, because the law of North Carolina has asserted that the oath of a woman in such case is unworthy of belief, and her testimony cannot be taken as true unless she is supported by other evidence.

In this State, as yet, women have no share in the government, and it may be that it is not unnatural that discrimination should be shown against them in this matter; but it has not escaped criticism by law writers and courts. There is no disposition in this Court to extend the discrimination, or make convictions more difficult in this than in all offenses. The general rule is, as to all offenses, that a witness is presumed to be of fair character, and that it is for the party who impeaches the credit of a witness to attack the testimony of the witness, taking into consideration his or her interest in the matter and relation to the controversy and the parties to it, without any artificial requirement that the testimony of one witness shall not be sufficient if the jury shall believe it.

STATE AND TOWN OF WILSON v. J. T. WILLIAMS.

(Filed 22 December, 1916.)

Spirituous Liquors—Cider—Manufactured, Etc.—Statutes—Exceptions.

The right to sell property is one of the incidents of ownership and should not be withdrawn or restricted unless clearly required by statute; and construing together the laws relative to prohibition, chapter 71, Extra Session of the Legislature of 1908, excepting the sale of "cider in any quantity by the manufacturer from fruits grown on his own lands within the State," appearing in substantially similar terms in "An act to prohibit the sale of near-beer," etc., ch. 35, Laws 1911, sec. 3, and the exception from the Search and Seizure Laws, ch. 44, Laws 1913, of "wines and ciders in any quantity from fruits grown on the premises of any persons in whose possession they may be," and ch. 97, Laws 1915, passed primarily to regulate the shipment of spirituous liquor, which is silent upon this subject, it is *Held*, that the sale of cider containing 4.7 per cent alcohol does not come within the inhibition of our statutes, and may be sold by the manufacturer from fruits grown on his own premises within the State, or by his agent, when the parties are acting in good faith.

CLARK, C. J., dissenting.

CRIMINAL ACTION charging defendant with selling cider contrary to law, tried before *Allen, J.*, and a jury, at Fall Term, 1916, of WILSON.

The jury rendered a special verdict as follows:

"We, the jury impaneled to try this case, return to the court our verdict: That the defendant J. T. Williams, agent of M. T. Williams, sold for gain, in the town of Wilson, on or about the 15th day of September, 1916, to persons to the jurors unknown, and on divers other occasions, apple cider containing 4.7 per cent of alcohol. The cider so sold was manufactured by M. T. Williams from fruits grown on the land of M. T. Williams in North Carolina. J. T. Williams, in selling such cider, was a bona fide agent of M. T. Williams for such purpose, and it was not sold at the place of manufacture, that is, on the lands of M. T. Williams. If the court is of the opinion that the defendant is guilty upon this verdict, we find the defendant guilty; but if the court is of the opinion that the defendant is not guilty upon this verdict, we find the defendant not guilty."

And on such findings, the court being of opinion that defendant was not guilty of any offense, verdict was entered accordingly, defendant discharged, and the State appealed.

Attorney-General Bickett and Asistant Attorney-General Calvert for the State.

No counsel for defendants.

HOKE, J. The statutes controlling the question in this State have not, thus far, prohibited the sale of "cider in any quantity by the manufacturer from fruits grown on his own lands within the State of North Carolina." This exception, contained in the Laws of 1908, Extra Session, chapter 71, appears in the same or substantially similar terms in chapter 35, Laws 1911, sec. 3, the same being entitled "An act to prohibit the sale of near-beer, beerine, and other like drinks," and chapter 44, Laws 1913, commonly known as the Search and Seizure Laws, excepts from the operative section of the act "wines and ciders in any quantity manufactured from fruits grown on the premises of the person in whose possession they may be." Chapter 97, Laws 1915, was passed primarily to regulate the shipments of spirituous, vinous, or malt liquors, and seems to contain no provision applicable to the facts of this record. It thus appears to be the policy and express purpose of our legislators to except from the operation of the prohibition laws the sale of cider by the manufacturer, when made from fruits grown upon his lands within the State, "and being allowed to sell in any quantity and in any place," it is the evident purpose and meaning of the law that such sales may be effected by any of the ordinary methods by which an owner is allowed to dispose of his property.

This right to sell property, and either by an agent or employee, is one of the incidents of ownership, and should not be withdrawn or

restricted unless the statute clearly requires it. *Nance v. R. R.*, 149 N. C., 366 (2d Ed.); Black on Interpretation of Laws, p. 451.

Even in case of intoxicating liquors, which can only be sold by license duly issued, the license is held to protect the employees and agents of the proprietor selling at the place where the license designates. Black on Intoxicating Liquors, sec. 132, citing *Rungen v. State*, 52 Ind., 320, and other cases. And these excepting provisions, withdrawing cider from the effect and policy of the prohibition laws and, as stated, allowing sales in any quantity and any place, should, by correct construction, operate to allow such sales by the employees and agents of the manufacturer when it is shown, as in this case, that the parties are acting bona fide and the cider is made from fruit grown on the manufacturer's lands.

Whether this exception should continue to prevail because, at a minimum risk, it allows landowners to dispose of their fruit which would otherwise, year by year, rot on their lands and be altogether lost, or whether it should be repealed because it may unduly afford methods of evading the purpose and policy of our prohibition laws, these are matters entirely for legislative consideration, and may not be allowed to affect the construction of the present statutes, which, in our opinion, are clearly designed and framed to enable a manufacturer of cider from his own fruit to dispose of it, and to do so by ordinary methods, in any quantity and at any place.

There is no error in the ruling of the court, and the proceedings below are affirmed.

No error.

CLARK, C. J., dissenting: The general prohibition law of 1908, prohibiting the manufacture or sale of any spirituous, vinous, fermented, or malt liquors, or intoxicating bitters, makes an exception of "the sale of cider in any quantity by the manufacturer from fruits grown on his lands within the State of North Carolina." Laws Special Session 1908, ch. 71, sec. 1.

Experience having proven that this act permitted evasions of the law, the "Near-Beer Act," Laws 1911, ch. 35, sec. 1, provides that "It shall be unlawful for any person or persons, firm or corporation, to sell or dispose of for gain, near-beer, beerine, or other spirituous, vinous, or malt liquors or mixtures, of any kind, and under whatsoever name called, that shall contain alcohol, or cocaine, or morphine, or other opium derivative, except as herein provided."

This contains the same exceptions as the act of 1908 in regard to the sale of cider, "by the manufacturer from fruits grown on his own lands in this State." It is settled that every statute should be "con-

strued according to the intent of the Legislature and so as to repress the evil and advance the remedy." The special verdict finds that this cider contained more than 4 per cent of alcohol. It was not sold by the manufacturer, nor by his servant, but by the defendant, who was an agent or factor. He was not an employee, but an "agent," and presumably he was selling on a commission or at a profit above a certain price. This is not authorized by the statute.

It is apparent that the act of 1908 and all the acts subsequent were intended to treat the sale of alcohol as contrary to the public interest, as a poison of the same nature as cocaine and opium, with which it is associated in the statute. The grant of the privilege to sell cider was intended to be restricted to the manufacturer himself, or at the very furthest by his employee or servant. To permit it to be sold by any "agent" is not in the wording of the statute, and certainly not within its spirit, for this would permit cider containing "more than 4 per cent alcohol," as in this case, to be sold all over North Carolina by "agents" of any manufacturer.

This is contrary to the letter and spirit of the law, which are that the prohibition shall be as effective as possible, which is shown by the fact that whenever this Court has found a defect in the law the next Legislature has always promptly cured the defect. It is also contrary to the general spirit of such legislation which has been shown not only by the almost world-wide restriction of the sale of alcohol and other intoxicants, but by the fact that in twenty-five States and in the great territory of Alaska total prohibition has been voted, and in all the other States (except two) there are large areas of local prohibition, so that 90 per cent of the area of the Union and more than 80 per cent of its population is now under total prohibition. It being the evident intent of legislation to make prohibition more general and entirely effective, is it a reasonable construction to place upon the privilege given a manufacturer to sell cider, "made of his own fruit, on his own land in this State," the construction that an agent, the defendant here, instead of the manufacturer (or his servant) can sell cider containing more than 4 per cent alcohol anywhere in North Carolina?

Is it not more consonant with the rule, that a statute should be construed according to the intent of the Legislature, and to advance the remedy and to repress the evil, to say that the privilege to a manufacturer to sell his own cider made by himself was not intended to go beyond the manufacturer himself, or his servant, or employee under his supervision. It was intended to be a privilege personal to him, and not to be exercised by the defendant or any one else, at any place in North Carolina.

There is ground for giving a personal privilege to one who makes cider of his own fruit grown on his own land, but none whatever to

authorize its sale by any kind of an agent, on any kind of terms, anywhere in the State.

This is an abuse of the privilege, and is not authorized by the statute. Upon the special verdict the defendant was "selling for gain," and he was not "the manufacturer." If it was not intended to restrict the sale to the manufacturer, the act would have permitted a sale of cider without any restriction.

STATE v. JOHN MARTIN.

(Filed 15 November, 1916.)

1. Appeal and Error—In Forma Pauperis—"Good Faith"—Statutes.

The requirement of Revisal, sec. 3278, that to appeal in *forma pauperis* in criminal cases it must appear that "the application is in good faith," is jurisdictional, and upon a failure of compliance therewith the application is fatally defective and the appeal will be dismissed.

2. Same—Motion to Reinstate—Offer to Give Bond.

After an appeal in *forma pauperis* has been dismissed in the Supreme Court for failure to show that the application was made in good faith, Revisal, sec. 3278, it is too late for the appellant to offer to file bond or make a deposit on his motion to reinstate.

MOTION to reinstate appeal.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

John P. Cameron for defendant.

CLARK, C. J. This appeal was taken in *forma pauperis* from *Cline, J.* On motion of the State, the appeal was dismissed because the affidavit for leave to appeal without giving bond did not state, as required by Revisal 3278, that "the application is in good faith." It has been repeatedly held that an order permitting such appeal in a criminal case is fatally defective if the affidavit does not comply with the statute, because the requirement is jurisdictional, and unless the affidavit is sufficient the appeal must be dismissed as a "matter of right, and not of discretion." *S. v. Bramble*, 121 N. C., 603, citing very numerous cases; *S. v. Atkinson*, 141 N. C., 735, and numerous cases since down to *S. v. DeVane*, 166 N. C., 283, besides other cases which have been dismissed in observance of the statute, and in accordance with the uniform precedents, by *per curiam* order.

The defendant now moves to reinstate, offering to file bond, or make a deposit. This would seem to be in direct denial of his affidavit, filed

in this cause, that he could not do either. But independently of that, he should have made this offer when the motion to dismiss was before the Court. It is too late for him to do this after the case has been regularly dismissed under the statute. As was said in *Hamlin v. Tucker*, 72 N. C., 503, we are not called on "to make two bites at a cherry."

There is a very old maxim, *"Leges subveniunt vigilantibus, non dormientibus,"* which means, in plain English, that if a man has a case in court "the best thing he can do is to attend to it." *Pepper v. Clegg*, 132 N. C., 316. The defendant did not do what the statute required in order to give this Court jurisdiction of the appeal, nor when the motion was made to dismiss on that account did he then offer to comply with the statute. He cannot now expect that the Court will go back and take up a case which has already been dismissed in compliance with the statute.

Motion denied.

STATE v. EDGAR FRADY.

(Filed 13 December, 1916.)

1. Criminal Law—Blackmailing — Circumstantial Evidence — Trials — Questions for Jury.

Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount along the road at a certain place at a designated time and at a certain signal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand, and the apprehension of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. Revisal, sec. 3428.

2. Instructions—Circumstantial Evidence—Trials.

The charge of the court as to the weight of circumstantial evidence and the consideration the jury should give it, upon the trial in this case for blackmailing, is approved.

INDICTMENT for blackmailing (section 3428, Revisal) tried at February Term, 1916, of BUNCOMBE; *Harding, J.*

The defendant was convicted and sentenced, and from the judgment rendered appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. Scroop Styles, R. M. Wells for defendant.

PER CURIAM. It appears from the testimony that one D. P. Lance, a merchant in the town of Arden, received a letter through the mail on 21 June, 1915, demanding $300, and asking him to leave that sum on 24 June, at 12 midday between Arden and Calvary Church on the public road going from Arden towards Fletcher. He was instructed to drop the money on the road on hearing certain signals. Lance immediately turned the letter over to the sheriff. On 27 July, Sunday, Mr. Lance's warehouse was burned about 4 o'clock in the morning. There had been no fire in it the day before.

On 4 August Lance received another letter, instructing him to start from Arden on 6 August at 12 o'clock with $400, to go down the road towards Calvary Church, and to drop the money on hearing certain signals. This letter referred to the previous letter, and to the burning of the warehouse, as it stated: "I think I have proved that I meant business, so I am going to give you one more chance." This letter was also turned over to the sheriff. The sheriff organized two posses, who were stationed in hiding along the highway, and Lance walked out at the time and in the direction indicated in the last letter.

The defendant, Martin Rickman, and Myrtle Pressley are charged in the bill. The jury returned a verdict of guilty as to appellant Frady, not guilty as to Pressley, and were unable to agree as to Rickman.

The motion to nonsuit was properly overruled. While the evidence is circumstantial, in our opinion, it has sufficient probative force to justify the judge in submitting the matter to the judgment of the jury. The exception to evidence is without merit. The exception to the charge cannot be sustained. The instructions of the trial judge are full, clear, and correct.

The charge as to the weight of circumstantial evidence and the consideration the jury should give to it is supported by the precedents.

In *S. v. Parker,* 61 N. C., 473, *Chief Justice Pearson* said: "No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed that unless after due consideration of all the evidence they are 'fully satisfied' or 'entirely convinced' or 'satisfied beyond a reasonable doubt' of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a formula for the instruction of the jury by which to 'gauge' the degrees of conviction has resulted in no good."

These words have been quoted with approved in *S. v. Adams,* 138 N. C., 688, and *S. v. Neville,* 157 N. C., 597.

In the *Adams case, supra,* the Court said: "If the judge charges the jury in substance that the law presumes the defendant to be innocent,

and the burden is upon the State to show his guilt, and that upon all of the testimony they must be fully satisfied of his guilt, he has done all that the law requires of him, the manner in which it shall be done being left to his sound discretion, to be exercised in view of the facts and circumstances of the particular case."

The charge is also substantially in accord with the formula approved in *S. v. Flemming,* 130 N. C., 688.

No error.

INDEX

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and, if so, where.

ABANDONMENT. See Carriers of Goods, 29; Contracts, 22; Criminal Law, 18.

ABATEMENT.

Abatement—Death—Damages—Husband and Wife—Hospitals—Negligence—Mental Anguish.—In an action for damages brought by the husband against one operating a hospital, for the alleged wrongful death of his wife, the complaint alleged that owing to the negligent defective construction of the room in which the wife was confined as a patient the rain beat in and water stood, at times, for hours on the floor, one inch deep, and in consequence his wife caught a severe cold, which developed into pneumonia, from which she died, and that the defendant had contracted with the plaintiff to furnish his wife a suitable room, care and medical attention. *Held*, sufficient to sustain a recovery by the husband for the loss of services of his wife during her last sickness to the time of her death, for the loss of the society of his wife occasioned by such sickness, and for the mental anguish he may have sustained on seeing her suffer and die, caused by the defendant's wrong; and that an action for damages of this character does not abate at the death of his wife. *Bailey v. Long*, 661.

ACCEPTANCE. See Accord and Satisfaction, 2.

ACCEPTATION. See Attorney and Client, 4.

ACCIDENT. See Railroads, 7; Insurance, 22.

ACCORD AND SATISFACTION.

1. *Accord and Satisfaction—Compromise—Disputed Account—Consideration—Statutes.*—Where the debtor contracted for goods to be delivered to him at stated intervals, and after a part had been delivered, for which payment had become due, he requested the creditor to cancel the balance of the contract and sent a check in full, and there is no dispute about the amount due for either the part of the goods received or the balance obligated for by the purchaser, by accepting the check the seller had the right to assume that it was in full for only the amount then due him, and it was without consideration as to the balance of the goods then to be furnished, and was not a compromise within the meaning of the Revisal, sec. 859. *Bogert v. Mfg. Co.*, 248.

2. *Accord and Satisfaction—Conditional Acceptance—Contracts.*—The acceptance of an offer of compromise must be in accordance with its terms to be binding between the parties, and where an offer is made

ACCORD AND SATISFACTION—*Continued.*

by a debtor to pay 10 per cent of the amount of a judgment, an acceptance of "10 per cent net" implies a variance between the parties, and is held, in this case, not to be binding. *Walters v. Hedgpeth*, 310.

ACCOUNTING. See Parties, 2.

ACCOUNTS. See Judgments, 24; Executors and Administrators, 3.

ACQUIESCENCE. See Tenants in Common, 1; Contracts, 11.

ACTIONS. See Bills and Notes, 1; Evidence, 2; Mortgages, 6; Railroads, 18, 20; Carriers of Goods, 25; Appeal and Error, 25; Contracts, 12; Register of Deeds, 2; Executors and Administrators, 1; Wills, 28; Usury, 4; Parties, 2.

1. *Actions—Consolidation—Courts—Appeal and Error.*—Two causes of action, alike in their facts and the issues involved, may be consolidated by the trial judge, where it can be done without serious prejudice to the parties, the effect being to save time and unnecessary expense and prevent confusion and conflict in the verdicts; and in this case, it appearing that each member of a partnership has, in separate actions, brought suit for a dissolution thereof and asking for the appointment of a receiver, upon a disagreement among themselves, it is held that the order of the court consolidating the causes was proper. As to whether the exercise by the court of this power was discretionary and unreviewable, *quære*. *Wilder v. Greene*, 94.

2. *Actions—Parties—Principal and Agent—Fraud—Judgment—Estoppel.* Where the seller and his agent in the sale of lands are sued by the purchaser upon the ground of fraud in the negotiations for the purchase, in representing the title to be good and preventing the plaintiff from investigating before buying, and it appears that the deed to the seller had been set aside in an action wherein it was determined that his grantor was without sufficient mental capacity to make it, but the agent was not made a party to that action, it is *Held*, that the agent is not affected by the former judgment and may defend, in the present action, as to the mental capacity, and that his principal was an innocent purchaser for value, etc. *Powell v. Dail*, 261.

3. *Same — Defenses — Deeds and Conveyances—Innocent Purchaser.*— Where the purchaser of lands sues the seller and his agent for fraud in procuring the sale, for that the seller's deed was void for want of mental capacity of his grantor, but the plaintiff claims to be an innocent purchaser for value, without notice, if his contention in this respect is established no actionable wrong has been committed against him; and while he may be concluded by a former judgment declaring his deed void, this does not extend to his agent in making the sale, who was not a party to that action. *Ibid.*

4. *Actions—Forma Pauperis—Orders—Costs—Time Extended—Court's Discretion—Appeal and Error.*—Where suit in *forma pauperis* has been commenced, and thereafter, on defendant's motion, the plaintiff has been ordered by the court to secure the costs by mortgage on his realty, signed by himself and wife, within a certain time, and the plaintiff filed the mortgage signed only by himself, and the

ACTIONS—*Continued.*

defendant subsequently renewed his motion, whereupon the court allowed further time to plaintiff, who did not comply, but tendered the fees for registration of his mortgage, and showed by affidavit that his wife refused to sign it: *Held*, the granting of further time to comply with the order was discretionary with the court, not reviewable on appeal, and the dismissal of the case was final. *Alston v. Holt*, 417.

5. *Actions—Register of Deeds—Fees—Taxpayer—Equity—Suits—Statutes.*—Apart from the provisions of the statute, a taxpayer has the right to prosecute a suit against the register of deeds of the county to enforce payment of taxes collected and wrongfully withheld by him when the county commissioners have refused to institute action to recover them; and when such right of action exists, usually appertaining to the exercise of the equitable jurisdiction of the courts, this jurisdiction is not necessarily withdrawn because the Legislature has provided a legal remedy, unless the statute itself shall so direct. *Waddill v. Masten*, 582.

ADJOURNMENT. See Mandamus, 5.

ADMINISTRATION. See Removal of Causes, 9; Judgments, 24.

ADMISSIONS. See Deeds and Conveyances, 2; Master and Servant, 2; Equity, 2; Wills, 27; Evidence, 13; Homicide, 12, 13.

ADVERSE POSSESSION. See Limitation of Actions, 2, 3, 4, 7, 27; Railroads, 12.

AFTER ACQUIRED PROPERTY. See Vendor and Purchaser, 7; Limitation of Actions, 16.

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AGENCY. See Principal and Agent, 12.

AGREEMENT. See Bills and Notes, 7; Arbitration and Award, 1; Appeal and Error, 46, 50.

ALLEYS. See Limitation of Actions, 5, 6.

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APPEAL AND ERROR. See Actions, 1, 4; Trials, 4; Carriers of Goods, 2, 41; Jurors, 1; Mortgages, 1; Court's Discretion, 1; Parties, 1; Removal of Causes, 2, 6; Limitation of Actions, 2, 20, 22; Instructions, 2, 3, 4, 6, 10, 15, 16, 17, 18, 20; Tenants by Curtesy, 2; Homicide, 18, 19; Pleadings, 5; Wills, 8, 30; Vendor and Purchaser, 3; Railroads, 15; Witnesses, 1; Courts, 6; Deeds and Conveyances, 28; Verdicts, 2; Trusts, 2; Reference, 6, 8, 9, 10; Contracts, 20; Master and Servant, 7; Issues, 1, 2; Insurance, 23; Mandamus, 3, 4; Criminal Law, 3, 7, 23.

1. *Appeal and Error—Objections and Exceptions—Appellant's Brief—Supreme Court Rules.*—All exceptions not discussed in appellant's brief are deemed to be abandoned on appeal. *Lovelace v. R. R.*, 12.

APPEAL AND ERROR—*Continued.*

2. *Appeal and Error—Interlocutory Orders—Necessary Determination.*—While an appeal from this order restraining the enforcement of a stockholder's judgment against a corporation is interlocutory in its nature, it will not be dismissed, it being necessary to determine the question to adjust the debts of the corporation and before further orders could be taken in the cause. *Jennett v. Transportation Co.*, 35.

3. *Appeal and Error—Assignments of Error.*—Exceptions taken for the first time in the assignments for error are too late, and will not be considered in the Supreme Court. *Bloxham v. Timber Cor.*, 37.

4. *Appeal and Error—Record—Issues—Presumptions—Arrest and Bail—Negligence.*—Where the evidence has not been set out in the record of the case on appeal, it will be deemed that it justifies the issues; and where the jury have found, by their answer to an issue not objected to, that the defendant has negligently injured the plaintiff's mule, it will not be inferred that such was "wrongfully, recklessly and wantonly done, after being forbidden by the plaintiff's agent," so as to sustain an order of arrest against the person of the defendant. *Oakley v. Lasater*, 96.

5. *Same—Statutes.*—A judgment that execution issue against the person of the defendant cannot be sustained upon the mere finding that the defendant negligently injured the plaintiff's property, for to justify such execution under our statutes, Revisal, secs. 727 (1), 625, the injury must have been intentionally or maliciously inflicted, *i. e.*, with some element of violence, fraud, or criminality. *Ibid.*

6. *Same—Homestead—Exemptions.*—Where arrest and bail is authorized, Revisal, sec. 727 (1), execution against the person of the judgment debtor may be issued, Revisal, sec. 625, and after judgment he cannot be discharged except by payment, or giving notice and surrender of all property in excess of $50, Revisal, secs. 1920, 1918a, and the effect of the execution against the person is to deprive him of his homestead exemption over and above $50; which does not contemplate an execution against the person when injury to personal property of the plaintiff has been caused solely by the negligent act of the defendant, or by accident. *Ibid.*

7. *Appeal and Error—Instructions—Record.*—Where the charge of the lower court is not set out in the record, it is considered on appeal as having been a correct exposition of the law. *Poe v. Smith*, 67.

8. *Trials—Evidence Stricken Out—Appeal and Error—Objections and Exceptions.*—Where testimony on the trial has been stricken out by the judge at appellant's request, his exception as to its admission is without merit on appeal. *In re Staub's Will*, 138.

9. *Wills—Mental Incapacity—Undue Influence—Unanswered Issue—Appeal and Error—Harmless Error.*—Where a will has been caveated for mental incapacity and undue influence, and under proper evidence and instructions the jury has answered the first in favor of the caveators and left the second unanswered, exceptions to the admissibility of testimony as to undue influence becomes immaterial; but in this case it was proper upon the element of mental incapacity. *Ibid.*

APPEAL AND ERROR—*Continued.*

10. *Appeal and Error—Judgments—State's Lands—Protest—Improper Form—Court's Discretion.*—Where a judgment or order holding that a protest to an entry on State's lands is not in proper form, and that another protest be filed within a certain time, has not been complied with or appealed from, it is within the discretion of the trial judge thereafter to grant or refuse a further extension of the time to file the protest, from the refusal of which an appeal will not lie, in the absence of abuse of this discretion.— *Gold v. Maxwell*, 149.

11. *Appeal and Error—Assignments of Error—Rules of Court.*—The rules of the Supreme Court regulating appeals are necessary for the proper consideration of the public business and will be impartially enforced against all litigants; and where the assignments of error are not comprehensive enough to give a clear idea to the court of the matters to be debated without examining the record, they will not be considered, as, on this appeal, "to the question and answer in the admission of the evidence" of a certain witness, "as contained in the exception 1 on page .... of the record"; and the giving of proper page will not cure its insufficiency. *Rogers v. Jones*, 156.

12. *Appeal and Error—Findings—Inheritance Tax—Valuation of Property.* Findings of fact in the Superior Court will not be disturbed on appeal when there is evidence to sustain them; and the finding in this case that the widow will require for herself and children the full annuity of $5,000, which is given by her husband's will in a sum not to exceed that amount, is determinative of the question on appeal. *In re Inheritance Tax*, 170.

13. *Appeal and Error—Judgments—Motion to Set Aside—Findings—Presumptions.*—Where the trial judge neither finds the facts nor is requested to do so, upon the motion to set aside a judgment, it will be presumed on appeal that they were sufficient to sustain his denial of the motion, and the Supreme Court will not consider affidavits for the purpose of finding the facts. *Gardener v. May*, 192.

14. *Same—Consent Judgments—Burden of Proof.*—Where the court enters a judgment on its record appearing to have been by the consent of the parties, it cannot thereafter be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court wherein it had been entered, that it was obtained by fraud or mutual mistake, or that consent had not in fact been given, the burden being on the party attacking the judgment to show facts which will entitle him to relief. *Ibid.*

15. *Appeal and Error—Instructions—Objections and Exceptions.*—Exceptions to the charge of the court must be duly noted of record, or they will not be considered in the Supreme Court on appeal.—*Rawls v. R. R.*, 211.

16. *Appeal and Error—Unanswered Questions—Objections and Exceptions.*—Where the refusal of the trial judge to permit a witness to answer a question is excepted to, the record must indicate what the answer of the witness would have been, or it will not be considered in the Supreme Court on appeal. *Ibid.*

APPEAL AND ERROR—*Continued.*

17. *Appeal and Error—Harmless Error—Evidence—Declarations.*—Where declarations as to the dividing line between lands in dispute in the action are admitted, over objection, the error, if any, committed by the trial court in this respect becomes harmless when the same witness is permitted to testify that he knew the line, and it was the same as the one pointed out to him. *Holmes v. Carr*, 213.

18. *Appeal and Error—Reference—Interest—Findings—Verdict.*—Where upon trial by jury after reference of the cause the jury has allowed interest on the amount of damages assessed for cutting timber under the size conveyed by the deed, and the referee had allowed the interest, upon his finding, which was not excepted to, a judgment in conformity with the verdict will not be disturbed on appeal. *Bradshaw v. Lumber Co.*, 222.

19. *Appeal and Error—Reference—Findings of Fact.*—The findings of fact under a consent reference, and approved by the trial judge, are conclusive on appeal when there is evidence to support them. *Myrose v. Swain*, 223.

20. *Appeal and Error—Assignments of Error—Rules of Court.*—Assignments of error must be clearly and intelligently stated so that the Court will not have to look at exceptions therein referred to in order that they may be understood; for otherwise they will not be considered on appeal. *Thompson v. R. R.*, 147 N. C., 412, cited and applied. *Ibid.*

21. *Same—Objections and Exceptions—Judgments.*—Where a judgment, based upon findings of fact by a referee, and approved by the court, is assigned for error on appeal, and the facts so found are conclusive, the assignment, so far as it relates to the facts, is scarcely more than formal, the judgment being a conclusion of law thereon. *Ibid.*

22. *Appeal and Error—Trials—Instructions—Issues—Harmless Error.*—Where contributory negligence is pleaded in an action to recover damages for a personal injury, with evidence tending to support it, it is the better practice to submit to the jury a separate issue thereon, especially if the trial is an extended and involved one; but where this does not exist, a proper instruction under the issue of negligence as to the law of contributory negligence will not be held for error, certainly not to the defendant's prejudice, when the burden is placed upon the plaintiff by reference to that issue. *Hall v. Ry. Co.*, 347.

23. *Appeal and Error—Fragmentary Appeals—Trials—Negligence.*—To entitle a plaintiff to take a nonsuit upon an adverse intimation of the trial court, and have the ruling reviewed in this Court on appeal, the ruling of the lower court must be such as would defeat a recovery upon every aspect of the case; and where two elements, only one of which is necessary to a recovery for a personal injury, are presented, one as to the duty of the master to furnish safe appliances and the other as to the negligence of a fellow-servant, a voluntary nonsuit upon an adverse intimation on one of these phases of the case is premature, and an appeal therefrom is fragmentary, and will be dismissed. *Chandler v. Mills*, 366.

APPEAL AND ERROR—*Continued.*

24. *Appeal and Error — Brief — Exceptions — Waiver.*—Where the appellant excepts to the allowance of storage charges awarded to the carrier of goods, and no point is made in the brief as to the time for which they are allowed, it is waived under the rule of the Supreme Court. *Holloman v. R. R.*, 372.

25. *Appeal and Error—Courts—Findings—Presumptions—Actions—Forma Pauperis—Costs—Orders.*—It is presumed on appeal, in the absence of findings by the trial judge appearing of record, that he found facts sufficient to support his judgment dismissing a case for failure of the plaintiff to comply with his order to secure the costs of prosecuting it. *Alston v. Holt*, 417.

26. *Appeal and Error — Objections and Exceptions — Briefs — Oral Argument—Waiver.*—An exception of record merely mentioned in appellant's brief, without discussion, and not urged on the oral argument, is taken as abandoned. *Reynolds v. Express Co.*, 487.

27. *Appeal and Error—Reference—Exceptions Sustained—Evidence.*—The order of the trial judge overruling a finding of fact by the referee is conclusive on appeal when there is evidence to support such order, and there is no exception because of the lack of evidence thereon. *Miller v. Latta*, 498.

28. *Appeal and Error—Assignments of Error—Rules of Court.*—This cause being tried under one issue, without exception taken, the assignment of error that other issues should have been submitted is not in compliance with the rules of Court regulating appeals. *McNairy v. R. R.*, 505.

29. *Appeal and Error—Receivers—Corporations — Parties — Orders—Relevancy.*—Where a corporation and its receiver are both sued in the same action, and on motion to strike out the answer filed by the corporation the judge orders the individual answer of a stranger to the action to be stricken out, and holds that the receiver is the only proper party to defend, it is the duty of the appealing corporation to see that its answer is set out in the record, by application for *certiorari* in the Supreme Court, if necessary, so that the court can see its relevancy; and it not appearing from the order appealed from that the appellant corporation was affected thereby, the appeal will be dismissed at its cost. *Winston v. Gilliam*, 533.

30. *Appeal and Error—Issues—Trials.*—Issues submitted to the jury for their determination of the matters involved arising from the pleadings and evidence are not reviewable on appeal when they are so framed that the parties have opportunity to present thereunder every material phase of their contention. *Ins. Co. v. Woolen Mills*, 534.

31. *Appeal and Error—Nonsuit—Entries—Judgment—Release—Demurrer Fragmentary—Premature Appeal.*—Where defendant denied the negligence, and also set up a release as a defense in an action to recover damages for a personal injury, in the defendant's answer, to which the plaintiff demurred, and there is a statement that the court overruled the demurrer, and also it appeared that the court asked the plaintiff if he desired to answer, with reply that he did not so wish until the matter was settled on appeal, the appeal from such action by the trial judge is both premature and fragmentary, for it should

APPEAL AND ERROR—*Continued.*

be either from an entry of a judgment of nonsuit or reach to the entire merits of the plaintiff's cause of action, which must be determined in the Superior Court before an appeal will lie. And, in this case, as plaintiff could have recovered notwithstanding the ruling of the judge on the demurrer, his appeal was dismissed. *Chambers v. R. R.*, 555.

32. *Appeal and Error—Pleadings—Trials—Nonsuit—Assignments of Error.*—The question of whether the owner of an automobile is responsible for the negligence of its driver while acting as the agent and in the employment of another is not presented by this appeal, there being no allegation thereof in the answer, no motion to nonsuit or presentation thereof by assignment of error. *Cooke v. Jerome*, 626.

33. *Appeal and Error—Costs—Findings—Parol Evidence—Contracts—Objections and Exceptions.*—The Supreme Court will not disturb on appeal the findings of a trial judge, in taxing costs, that a parol agreement construed with a written agreement constituted a contract between the parties, when exception thereto has not been aptly taken. *Smith v. Hopper*, 630.

34. *Appeal and Error—Costs—Findings—Trespass—Stock Law—Impounding Cattle—Demand.*—Where it is found by the trial judge on an appeal from taxing cost of an action that the parties were lessors and lessees of certain lands, with a further agreement that defendant would pasture plaintiff's cow, had breached his contract in this respect by turning the cow out of the pasture and had later impounded her while straying on other of his lands in stock-law territory; that defendant threatened to turn out plaintiff's cow, as stated, unless he came for her, which he refused to do: *Held*, the plaintiff's cow was rightfully in defendant's pasture; this was no act of trespass; the cow was wrongfully impounded; the evidence established a refusal of defendant's demand, and the costs were properly taxed against him. *Ibid.*

35. *Appeal and Error—Motion to Dismiss Action—Final Judgment.*—An appeal from the refusal of a motion to dismiss an action is premature and will not lie, the proper procedure being for the movant to except, and reserve the exception in appealing from an adverse judgment rendered, after a trial or hearing upon the merits of the case, with proper assignment of error. *Bradshaw v. Bank*, 632.

36. *Appeal and Error—Insufficient Assignments—Court's Discretion.*—The Supreme Court on appeal may consider, in its own discretion, assignments of error not set out in sufficient conformity with Rules of Court, 19 (2) and 27. *Taylor v. Hayes*, 663.

37. *Appeal and Error—Reference—Attachment—Nonresidents—Evidence.*—When levies in attachment are sought to be set aside on the ground that the debtor was not a nonresident of this State, as alleged, the findings of the referee that he was, at the time, a nonresident, having changed his place of residence to another State, supported by legal evidence and affirmed by the Superior Court, will not be disturbed on appeal. *Ibid.*

APPEAL AND ERROR—*Continued.*

38. *Appeal and Error—Trials—Instructions—Evidence—Prejudicial Error.*—Exceptions to the admission or refusal to admit evidence upon the trial of a cause, or to the judge's charge, will not be sustained on appeal, and a reversal of the judgment ordered, when such do not affect the real merits of the controversy and no substantial prejudice will result to the appellant. *Ball v. McCormack*, 677.

39. *Appeal and Error—Joint Torts—Default—Final Judgment.*—Where two defendants are sued for damages for a personal injury caused by their alleged joint tort, and judgment by default of an answer is taken against one of them, leaving open the inquiry, and issues as to negligence of the other, and the damages as to both, are duly submitted and answered, and judgment against both entered for the amount, the judgment so rendered is a final one against each and both of the defendants, without the necessity of having submitted a special issue upon the inquiry as to the one who failed to answer, the issue of damages submitted applying to both defendants. *Hollifield v. Telephone Co.*, 714.

40. *Appeal and Error — Unanswered Questions — Prejudice — Harmless Error.*—Where upon the trial of a cause questions asked a witness were ruled out and excepted to, it must appear what the appellant expected to prove by the answers, so that the Court may see in what respect, if any, he has been prejudiced, or the exceptions will not be considered. *Ibid.*

41. *Appeal and Error—Evidence—Expert Witnesses—Personal Injury—Damages—Harmless Error.*—In an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff by the defendant, the statement of a medical expert witness that he could form an opinion as to whether the plaintiff's condition would grow worse is not prejudicial to the defendant, when his testimony is solely directed to the extent of the present injury falling under his observation as attending physician. *Ibid.*

42. *Appeal and Error—Rehearings—Rules of Court.*—In order to obtain a rehearing of a case in the Supreme Court it is necessary for the applicant to observe Rule 52 (amended 170 N. C., 1) and Rule 53 (164 N. C., 557) of the Court, and where he has failed to file the certificates of two disinterested members of the bar, indorsed by two members of the Court, the application will not be considered, except in certain instances where the Court may reconsider the case *ex mero motu*. *Teeter v. Express Co.*, 620.

43. *Appeal and Error—Prejudicial Error.*—Where intervenors claim proceeds of a paid draft, the introduction on the trial of the draft and letter accompanying it are not objectionable when there is no controversy as to the form of the draft and the letter is not prejudicial to appellant's contention. *Sternberg v. Crohon*, 731.

44. *Appeal and Error—Evidence Immaterial—Expressions by Court—Opinion.*—Where a Pullman Company is sued for damages arising from an assault and robbery of a passenger, and the testimony is sufficient to sustain a verdict in plaintiff's favor, the admission in evidence of the contract between the Pullman Company and the railroad, with later expression by the judge, in the absence of the jury, is not reversible error, if erroneous. *Garrett v. R. R.*, 737.

APPEAL AND ERROR—*Continued.*

45. *Appeal and Error—Statutes—Conditions Precedent.*—The statutory requirements as to making up cases on appeal to the Supreme Court and docketing them (Revisal, sec. 591) are conditions precedent which must be complied with, or the appeal will be dismissed. *Lindsey & James v. Knights of Honor*, 818.

46. *Appeal and Error—Case—Service—Extension of Time—Courts—Written Agreement.*—The trial judge has no power to extend the statutory time for service of case or counter-case on appeal, and this can only be done by agreement between counsel, and will be enforced only when put in writing. *Ibid.*

47. *Appeal and Error—Rules of Court—Transcript.*—A transcript of the record proper should be filed by appellant in the Supreme Court to entitle him to move for a *certiorari* under Rule 17; and the filing of the original papers, which should remain in the office of the Superior Court, is insufficient. *Ibid.*

48. *Appeal and Error—Rules of Court—Motions to Dismiss—Transcript Duplicate.*—Where the appellant has filed a certificate of the clerk below that the case had been tried there, giving the names of the parties, and unsuccessfully applied for a *certiorari* in the Supreme Court, it is not necessary to appellee's motion to dismiss, under Rule 17, that he should duplicate the certificate. *Ibid.*

49. *Same—Motion to Reinstate.*—An appellant who has been guilty of gross laches in not complying with the statute and rules of Court regulating appeals is not entitled to have it reinstated after appellee's motion to dismiss or affirm has been granted. *Ibid.*

50. *Same—Endorsement of Service—"Due Time"—Written Agreement.*—Where the appellant has indorsed on his case on appeal for the appellee to sign, "Accepted in due time," which the latter has stricken out before signing, and the case was served after the statutory time without written agreement as to extension of time: *Held*, a motion to reinstate will be denied. *Ibid.*

51. *Appeal and Error—Technical Error—Reversible Error.*—Where the controversy over lands depends on the location of a boundary, and it is not disputed that the parties held title under the descriptions contained in their deeds: *Held*, an expression of opinion of the witness as to certain marks having been made with an axe, when this is inconsequential, and a charge of the court as to the character of the possession necessary to take the title out of the State, if technical, are not reversible error.

52. *Appeal and Error—Costs—Brief—Rule of Court.*—Costs of brief exceeding twenty pages will not be taxed against the unsuccessful party, under the rule of the Supreme Court. *Brown v. Harding*, 835.

53. *Appeal and Error—Case—Service—Objections and Exceptions.*—Technical and immaterial objections made to the service of cases on appeal upon opposing parties are not favored by the Supreme Court; and an appellant may not decide for himself upon the sufficiency of appellee's counter-statement because not served with his own statement attached; the proper procedure being to except to the suffi-

APPEAL AND ERROR—*Continued.*

ciency, have it passed upon by the trial judge while settling the case, and, upon an adverse holding, by exception thereto for the Supreme Court. *Holloman v. Holloman*, 835.

54. *Same—Recordari—Motion to Affirm.*—Where a counter-case on appeal has been served without appellant's statement attached, and the latter, for that reason, has not requested the judge to settle the case, but applies for a writ of *certiorari* in the Supreme Court to bring up from the Superior Court his statement, which appellee had filed with his own statement in the clerk's office, and it appears that each statement had been served on the adverse party in time: *Held*, the motion for *certiorari* will be denied; and if no error in the record proper, filed in the appellee's motion, is found, the judgment below will be affirmed. *Ibid.*

55. *Appeal and Error — Issues — Objections and Exceptions — Harmless Error.*—Where the action to recover damages for the negligent killing of a mule has been submitted upon the three issues of negligence, contributory negligence, and amount of damage, a charge upon the second issue, answered "Yes," if erroneous, is not reversible error as to plaintiff, when the jury have answered the first "No," to which no exception was taken by him. *Wyatt v. Raleigh*, 847.

56. *Appeal and Error—Trials—Distinct Theories.*—A party is not permitted to try his case in the Superior Court on one theory and have it determined in this Court, on appeal, upon an entirely different one. *Webb v. Rosemond*, 848.

57. *Appeal and Error—Objections and Exceptions—Instructions—Special Requests.*—Exception that a charge by the judge was not sufficiently full or explicit, or that it did not cover a phase of the controversy, should be taken to the refusal of the court to give requests for special instructions aptly tendered. *Ibid.*

58. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Objection that the trial judge incorrectly stated appellant's contentions should be made at the time to afford opportunity for correction, or an exception thereto will not be considered on appeal.—*McMillan v. R. R.*, 853.

59. *Appeal and Error—Instructions—Objections and Exceptions—Special Requests.*—Ordinarily the presentation of any special theory of a case omitted by the trial judge in his charge should be by special request, and exception to the refusal of the court to so charge, in order to have it reviewed on appeal. *Ibid.*

60. *Appeal and Error—Objections and Exceptions—Evidence—Questions and Answers.*—Exceptions to questions asked a witness, which were ruled out, will not be considered when it does not appear what the expected answers would have been. *Ibid.*

61. *Appeal and Error—Trials—Evidence, Withdrawn—Objections and Exceptions.*—Where a deed is sought to be set aside for mental incapacity of the grantor at the time, and also for fraud and undue influence of the grantee, and the trial judge has withdrawn from the consideration of the jury the evidence upon the latter phase of the case relating to the alleged fraud, etc., but the jury have an-

APPEAL AND ERROR—*Continued.*

swered the issue as to the validity of the deed in the negative: *Held*, exceptions to the competency of some of the evidence withdrawn becomes immaterial. *Miller v. Garner*, 865.

62. *Appeal and Error—Reversible Error—Murder—Homicide—Ill-will—Declarations—Evidence.*—Evidence, though erroneously admitted on the trial, but probably not affecting the verdict, will not be considered as reversible error; and where the defendant has been convicted of murder in the first degree, his declarations, made from six to twelve months previous thereto, that he disliked the deceased and that he was a mean man, are competent to show the defendant's animus, the weight of which is for the determination of the jury.—*S. v. Merrick*, 870.

63. *Appeal and Error—Instructions—Presumptions.*—Where there is no exception to the charge of the court, and the charge is not sent up in the record, it will be presumed on appeal that they were correctly instructed. *S. v. Walton*, 931.

64. *Appeal and Error—Exceptions—Assignments of Error.*—An assignment of error not based upon exception will not be considered on appeal. *S. v. Foster*, 960.

65. *Appeal and Error—Evidence—Competent in Part—Objections and Exceptions.*—Exception taken to evidence generally, some of which is competent, will not be held for reversible error on appeal, for exception should be taken specifically to the part that is not competent.—*Ibid.*

66. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Objection to an alleged prejudicial misstatement of the contention of a party by the judge in his instructions to the jury must be taken at the time, and exception thereafter taken comes too late, and will not be considered on appeal. *Ibid.*

67. *Appeal and Error—In Forma Pauperis—"Good Faith"—Statutes.*—The requirement of Revisal, sec. 3278, that to appeal in *forma pauperis* in criminal cases it must appear that "the application is in good faith," is jurisdictional, and upon a failure of compliance therewith the application is fatally defective and the appeal will be dismissed.—*S. v. Martin*, 977.

68. *Same—Motion to Reinstate—Offer to Give Bond.*—After an appeal in *forma pauperis* has been dismissed in the Supreme Court for failure to show that the application was made in good faith, Revisal, sec. 3278, it is too late for the appellant to offer to file bond or make a deposit on his motion to reinstate. *Ibid.*

APPLICATION. See Insurance, 6, 12, 16.

APPREHENSIONS. See Criminal Law, 2.

ARBITRATION AND AWARD.

1. *Arbitration and Award—Agreement—Award—Pleas in Bar.*—Averment and proof of an agreement submitting controverted matters to arbitration, when an award is pleaded in bar of an action, is necessary in order to give the award of the arbitrators the binding effect between the parties required. *Ball v. McCormack*, 677.

ARBITRATION AND AWARD—*Continued.*

2. *Arbitration and Award — Contracts — Breach.* — The plaintiff and defendant contracted that the former should acquire title to certain timber lands to be held in trust for the latter and paid for in sawing the lumber, which thereafter the plaintiff breached by rendering performance by the defendant impossible, and then entered into another contract with the defendant wherein the prices to be paid defendant for cutting the timber and the proportionate amount to be paid for the land varied from the first one, and plaintiff also breached this contract: *Held*, the second contract was not an accord and satisfaction, was not pleaded as such, and did not prevent the defendant from recovering damages under the first contract, which the plaintiff had breached. *Fiber Co. v. Hardin*, 767.

3. *Same—Performance—Pleas.*—An accord and satisfaction must be performed in its entirety by one claiming that it bars a recovery of the original right of action. *Ibid.*

ARGUMENTS. See Homicide, 9.

ARREST. See Criminal Law, 8.

ARREST AND BAIL. See Appeal and Error, 4.

ASSAULTS. See Damages, 4; Carriers of Passengers, 9; Trials, 2; Convicts, 1.

1. *Assaults—Threats of Violence.*—A person is guilty of an assault in law when he by a show of violence and force puts another in fear and thereby forces him to commit some act which otherwise he would not have done. *Trogdon v. Terry*, 540.

2. *Same—Abusive Language—Punitive Damages.*—In an action to recover damages for an assault, the defendant wrote an apology or retraxit for the plaintiff to sign in relation to a statement he had written to another, entered the public dining-room where he knew the plaintiff was dining, and, carrying a walking stick on his arm or in his hand, threatened the plaintiff with abusive language, in an attitude to do him personal violence, and caused him to sign the paper against his will. *Held*, sufficient evidence of malice to sustain a verdict awarding, in the discretion of the jury, punitive damages for the assault. *Ibid.*

ASSESSMENTS. See Drainage Districts, 1, 3, 4, 5, 6; Insurance, 23.

ASSESSORS. See Drainage Districts, 2.

ASSIGNMENTS. See Judgments, 16; Mechanics' Liens, 1; Appeal and Error, 36.

ASSIGNMENTS OF ERROR. See Appeal and Error, 3, 11, 20, 28, 32, 64.

ASSUMPTION OF RISKS. See Railroads, 1; Commerce, 2; Instructions, 11.

ATTACHMENTS. See Mechanics' Liens, 1; Appeal and Error, 37.

Attachments—Judgments—Liens—Homestead.—Where there are levies in attachment against the land of a debtor who had, prior to the time,

ATTACHMENT—*Continued.*

become a nonresident of this State, and there has been no lien by judgment thereon entitling him to his homestead, the property may be subjected to the payment of his debts. *Taylor v. Hayes*, 663.

ATTORNEY AND CLIENT. See Judgments, 6, 9.

1. *Attorney and Client—Authority to Act—Ratification.*—Where a defendant in an action in the court of a justice of the peace afterwards, in the Superior Court, on appeal, ratifies, by his conduct, the acts of an attorney who had assumed to appeal for him, it is equivalent to his having given original authority to the attorney. *Gallup v. Rozier*, 283.

2. *Attorney and Client—Nonresident Attorney—Laches—Principal and Agent.*—The employment by a party of a nonresident attorney of this State to represent him in a professional capacity in our courts, who is not licensed to practice here, creates the relation of principal and agent; but if the employment is of a resident attorney, licensed to practice here, though he be a resident practitioner of another county, the relation of attorney and client exists, and the party, not himself in default, is not held responsible for the negligence of his counsel in failing to perform acts exclusively within the line of his professional duties. *Seawell v. Lumber Co.*, 320.

3. *Same—Judgments—Excusable Neglect.*—Where a party to an action employs an attorney practicing in this State to defend an action brought against him in a different county, and upon his suggestion authorizes his attorney to employ local attorneys, which is accordingly done, and the latter promised to notify the leading attorney of the filing of the complaint, and send him a copy when filed, but through their misunderstanding of the fact of their employment, did not do so, and a judgment by default is finally taken; and it appears that the party had repeatedly asked his leading attorney if anything remained to be done by him, and was informed that nothing could be done until the complaint was filed: *Held*, the judgment, on motion, was properly set aside for excusable neglect. *Ibid.*

4. *Attorney and Client—Local Attorney—Offer of Employment—Acceptation—Excusable Neglect.*—A client employed his attorney, licensed to practice law here, to professionally defend an action brought against him in another county, and authorized him to employ local attorneys there. His attorney wrote requesting them to act with him, and asked them to notify him when complaint was filed and send him a copy thereof. They replied, saying they would notify him as to the filing of the complaint, and send him a copy thereof, and they would appear with him "if desired to do so." *Held*, the leading attorney was justified in construing the answering letter as an acceptance of the employment offered; and in making the offer he acted in his capacity of attorney, and not merely as the agent for his client. *Ibid.*

5. *Attorney and Client—Evidence—Confidential Communications.*—Communications which an attorney may not testify to against the interest of his client are those of a confidential nature in relation to his employment, and not such as the attorney knows independently from transacting his client's affairs, as in effecting a compromise of

ATTORNEY AND CLIENT—*Continued.*

a former action; and in order to give such testimony the attorney may withdraw from a pending trial, upon considering that his client's testimony as to such compromise reflected upon his integrity. *Allen v. Shiffman*, 578.

ATTRACTIVE NUISANCES. See Negligence, 12.

AUTOMOBILES. See Negligence, 4, 7; Railroads, 22, 23, 27, 28, 29; Negligence, 8.

Automobiles—Statutes—Regulations—Negligence—Rule of Prudent Man—Evidence—Questions for Jury.—Where the driver of an automobile violates the statute by turning to the right to avoid a motorcycle traveling in the same direction upon a public road, and collides therewith, and action is brought to recover damages therefor, and the evidence is conflicting as to whether the motorcycle was unexpectedly turned out in the wrong direction, resulting in the injury, the question of proximate cause depends upon whether the driver of the automobile acted with reasonable prudence under the circumstances, to avoid the injury, or whether the collision was caused by the wrongful and unexpected act of the one on the motorcycle. The instructions of the trial judge, in this case, are approved. Gregory's Sup. Revisal, sec. 2728a. *Cooke v. Jerome*, 626.

AVERMENT. See Removal of Causes, 11.

AWARD. See Arbitration and Award, 1; Sale, 1.

BALLOTS.

Ballots—Unmarked Ballots—Intent of Voter—Sufficiency.—The purpose of the ballot is to designate the choice of the voter, and it is sufficient for its validity for it to be voted unmarked when the name of but one candidate appears thereon. *Britt v. Board of Canvassers*, 797.

BANKRUPTCY. See Corporations, 2; Limitation of Actions, 22.

1. *Bankruptcy — Corporations — Officers—Embezzlement—Duty of Trustee.*—It is the duty of a trustee in bankruptcy to collect all of the assets of the bankrupt corporation, whether due by contract or withheld by embezzlement of one of its officers. *Floyd v. Layton*, 64.

2. *Same—Funds Apportioned.*—Upon a recovery by the trustee of a bankrupt corporation of moneys embezzled by its officer, the bankruptcy court will, by proper decree, apportion the net proceeds among the creditors and stockholders. *Ibid.*

3. *Bankruptcy— Corporations—Embezzlement—Judgments—Demurrer.*—The trustee in bankruptcy of a corporation represents the stockholders in an action against its officer to recover funds embezzled by him, and objection by defendant that a judgment in favor of the stockholders would not be released by a discharge in bankruptcy is not a good ground for demurrer. *Ibid.*

4. *Bankruptcy — Homestead — Conveyances — Judgments — Executions—Statutes.*—Title to exempt property does not pass to the trustee in bankruptcy, and where the debtor's homestead has been laid off and the lien of a judgment has attached thereto more than four months

BANKRUPTCY—*Continued.*

before the filing of the petition in the bankrupt court, and the judgment debtor has proved his claim as unsecured, the homestead again laid off in proceedings in the bankrupt court, after the discharge of the bankrupt, the judgment creditor, under whose judgment the homestead was first laid off, may issue execution against the lands after the same has been conveyed by the homesteader. Revisal, sec. 686. *Blum v. Ellis*, 73, N. C., 293, cited and distinguished. *Walters v. Hedgepeth*, 316.

5. *Bankruptcy—Homestead—Title — Bankrupt's Property — Discharge.*— A judgment debtor has no property in a homestead laid off to him under a judgment, but merely an exemption from sale, and the land is practically the property of the judgment creditor, to the extent of his lien. Hence, a homestead laid off under our laws is not subject to the jurisdiction of the bankrupt court, and a lien of judgment thereon is not affected by the discharge of the bankrupt therein. *Ibid.*

6. *Bankruptcy — Homestead — State Decision.*—The bankrupt court is bound by the construction put upon our exemption laws by the Supreme Court. *Ibid.*

7. *Bankruptcy—Homestead—Unsecured Claims — Judgments—Credits.*— Where a judgment creditor, holding a valid lien upon the debtor's homestead, laid off under his judgment, thereafter proves his claim as unsecured against his debtor in the bankrupt court, any sum he may receive under a distribution of the assets will be credited upon his judgment, and will reduce the amount thereof to that extent. *Ibid.*

8. *Bankruptcy—Trustee—Limitation of Actions.*—The trustee in bankruptcy is subrogated to the rights of the creditors as to the plea of the statute of limitations; and where the bankrupt may sustain his plea against the creditors, he may also sustain it as to the trustee. *Garland v. Arrowood*, 591.

BANKS AND BANKING. See Bills and Notes, 5, 9; Instructions, 13.

1. *Banks and Banking — Collection — Drafts — Lost in the Mail—Negligence—Bills and Notes.*—Where a bank sues its correspondent bank for the amount of a deposit therein, and the defendant sets up, as a counterclaim, the negligence of the plaintiff in not notifying it of a draft, the amount of which would offset the amount claimed in the action, and it appears that the plaintiff mailed the draft to the defendant without hearing from it and without inquiry for a month, and that the defendant had not received it: *Held*, the omission of the plaintiff to make due inquiry after not hearing from the defendant was negligence *per se*. *Bank v. Trust Co.*, 344.

2. *Banks and Banking—Collection—Drafts—Payee Bank—Negligence—Bills and Notes.*—It is negligence *per se* for a bank to send a draft or check for collection to the payee bank. *Ibid.*

3. *Banks and Banking—Collection—Drafts—Negligence—Counterclaim—Burden of Proof—Trials—Questions for Jury.*—While a forwarding bank may be negligent in not making due inquiry of its correspondent bank, etc., as to a draft sent the latter for collection, but was

BANKS AND BANKING—*Continued.*

lost in the mail, the burden of proof is on the correspondent bank to show, in order to recover the amount set up as a counterclaim in plaintiff's action, that it has sustained damages arising from such negligence, which raises an issue for the determination of the jury. *Ibid.*

4. *Banks and Banking—Bills and Notes—Place of Payment—Deposits—Order to Pay—Payment.*—Where the bank of deposit of the maker of a note is the one specified as the place of its payment, and also the one to which the note is sent at maturity for collection, the maker's written order on the note to the bank to pay it from his deposits is sufficient; and where the bank accepts this order and retains the note without entry on its books for twelve days, then its doors are closed and a receiver appointed, the payee of the note is held responsible for the acts of its agency for collection, and a plea of payment is good. In this case the maker's deposits were barely sufficient at the time, but more than sufficient on the day following and then continuously so. *Peaslee v. Dixon*, 411.

5. *Banks and Banking—Bills and Notes—Place of Payment—Order to Pay—Statutes.*—A note payable at the bank of the maker's deposit is of itself, an order on the bank to pay the note at maturity for the account of the maker. Revisal, sec. 2237. *Ibid.*

BIAS. See Evidence, 11.

BILLS AND NOTES. See Banks and Banking, 1, 2, 4, 5; Instructions, 13; Criminal Law, 11.

1. *Bills and Notes—Illegal Consideration—Lotteries—Gift Enterprises—Statutes—Actions.*—Notes given in pursuance of a contract prohibited by Revisal, sec. 3726, are for an illegal consideration, and collection thereof is not enforcible in our courts. *Mfg. Co. v. Benjamin*, 53.

2. *Bills and Notes—Trials—Evidence—Prima Facie Case—Defects—Burden of Proof.*—Where a holder of a promissory note sues thereon, he makes out a *prima facie* case which will entitle him to a verdict, by introducing the note and proving same and the indorsement thereon, if he is not the payee; but where defects and irregularities are set up by the defendant sufficient to avoid the note, with evidence tending to prove them, the burden is upon the plaintiff to show that he acquired the note before its maturity and without notice as a holder in due course; and if this is so found by the jury, he is entitled to a verdict, though the defendant has established, with the burden on him that the note was, in fact, defective. *Bank v. Clark*, 268.

3. *Same—Issues—Judgments.*—Where in an action by an indorsee of a promissory note the defendant pleads defects therein, and offers evidence that its validity depends upon a loan to be secured by the original payee, which was not done, an issue answered in defendant's favor, that plaintiff was not a purchaser for value, without notice, before maturity, is not sufficient to sustain the judgment, the requisites as to the burden of proof being lacking in the case. *Ibid.*

4. *Bills and Notes — Negotiable Instruments — Prima Facie Evidence — Due Course—Statutes.*—Where there is neither allegation nor evi-

BILLS AND NOTES—*Continued.*

dence that a negotiable instrument sued on is defective (Revisal, sec. 2204), and the plaintiff claims as a holder in due course, his introduction of the instrument duly indorsed makes out a *prima facie* case under the statute, Revisal, sec. 2201, that he was a purchaser for value, in good faith, before maturity, and without notice of any defect in the title of the person negotiating it. *Worth v. Feed Co.*, 335.

5. *Same—Banks and Banking—Principal and Agent.*—Where a bank discounts a paper and places the amount, less the discount, to the credit of its depositor, the indorser, with his right to check on it, but the bank reserves the right to charge back the amount if the note is not paid, by express agreement or one implied from the course of dealings, the bank is an agent for collection and not a purchaser of the paper in due course. *Ibid.*

6. *Same—Impeaching Evidence—Contradictory Evidence—Questions for Jury.*—Where the bank, claiming as an indorsee of a negotiable paper in due course, has made out a *prima facie* case by introducing the paper in evidence, and the testimony of its witnesses tends to show an arrangement with its indorsers that it was to be charged back to his balance in case of nonpayment, which had always been sufficient; and, to the contrary, that no such agreement had been made, expressed or implied, but that the indorser had no liability therefor, except as such: *Held*, that while the plaintiff should not be permitted to impeach the testimony of its own witness, it could show the fact to be otherwise than he had testified; and having made out a *prima facie case*, the question was for the jury to find the fact of the agreement upon the conflicting evidence. *Ibid.*

7. *Bills and Notes—Negotiable Instruments — Deposits—Agreement—Intent—Evidence.*—Where a bank takes a negotiable paper by indorsement from its depositor, who had always sufficient funds there to protect its payment, and gives him credit for the amount, with the right to check on it, the transaction is evidence that the bank purchased for value; and when the evidence is conflicting as to an agreement between them that the bank should charge the item back upon *nonpayment*, it is for the jury to to determine the intent of the parties, upon which they may consider the course of dealings, the rate of discount, the state of the account, and other relevant circumstances. *Latham v. Spragins*, 162 N. C., 408, cited and distinguished. *Ibid.*

8. *Bills and Notes—Negotiable Instruments—Indorsement—Presumptive Evidence—Trials—Questions for Jury.*—Where the holder of a negotiable draft introduces it in evidence and proves the indorsement to him, he makes out a prima facie case, which entitles him to go to the jury in his action thereon. *Moon v. Simpson*, 576.

9. *Same—Banks and Banking—Purchaser for Value.*—A bank intervened in attachment proceedings and claimed a draft, the subject thereof, as a holder in due course by indorsement from the defendant, its depositor; and there being no evidence that the intervenor held the draft for collection, or that the proceeds were the property of the defendant, but that he indorsed it to the bank, and received the money thereon, it is *Held*, that there is no evidence of a defect in intervenor's title thereto. Revisal, 2204. *Ibid.*

BILLS OF LADING. See Carriers of Goods, 6, 7, 9, 17.

BLACKMAILING. See Criminal Law, 25.

BLANK SPACE. See Wills, 26.

BLASTING. See Injunction, 1, 2.

BOND. See Criminal Law, 1; Appeal and Error, 68.

BOND ISSUES. See Taxation, 9, 13; Constitutional Law, 2.

BOUNDARIES. See Deeds and Conveyances, 1, 2, 15; Instructions, 1; Limitation of Actions, 10.

BREACH. See Carriers of Goods, 39; Arbitration and Award, 2; Reference, 8; Contracts, 24.

BRIEF. See Appeal and Error, 1, 24, 26, 52.

BURDEN OF PROOF. See Carriers of Goods, 6, 37; Deeds and Conveyances, 10, 12, 28; Instructions, 1, 6, 11; Wills, 4, 19, 25, 27; Judgments, 6; Appeal and Error, 14; Negligence, 5; Timber Deeds, 1; Limitation of Actions, 11, 21; Bills and Notes, 2; Vendor and Purchaser, 2, 4; Banks and Banking, 3; Partnership, 1; Release, 2; Insurance, 8, 15; Usury, 2; Conversion, 1; Trials, 1; Master and Servant, 9; Executors and Administrators, 5; Evidence, 16; Homicide, 13, 17.

BY-LAWS. See Insurance, 10.

CALLS. See Deeds and Conveyances, 15.

CANVASSERS. See Mandamus, 5; Elections 8, 9.

CARMACK AMENDMENT. See Carriers of Goods, 4.

CARRIERS. See Torts, 3.

CARRIERS OF GOODS. See Courts, 4; Negligence, 9.

1. *Carriers of Goods—Delay in Shipment—Damages—Evidence—Hearsay.* Where damages are sought in an action against a railroad company for injury to a shipment of tobacco by water, caused by an unreasonable delay in its shipment, evidence offered in defendant's behalf that tobacco dealers told the agent, after the injury was done, there was nothing to do but ship it, has no bearing upon the defendant's liability, and was incompetent for this and for the further reason that it was hearsay. *Lovelace v. R. R.*, 12.

2. *Carriers of Goods—Instructions—Special Requests—Appeal and Error.* In this action to recover damages against a railroad company for an unreasonable delay in shipping tobacco, the defendant's objection to the charge of the court that the defendant would be liable if the tobacco had been delivered to it on the day preceding that of the damage, is not sustained by the charge, and if it desired more specific instructions it should have presented requests therefor. *Ibid.*

3. *Carriers of Goods—Delivery to Carrier—Title—Damages—Party Aggrieved.*—Ordinarily the title to a shipment of goods by common carrier passes to the consignee upon their acceptance by the carrier, and

CARRIERS OF GOODS—*Continued.*

he may sue for damages thereto in transit, but when it is shown that the consignee refused to accept the damaged goods, and that the sale has been canceled by consent the consignor may maintain his action against the carrier for damages. *Aydlett v. R. R.*, 47.

4. *Carriers of Goods—Interstate Commerce—Connecting Lines—Intermediate Carrier—Damages — Parties — Carmack Amendment.*—Where a second carrier in a connecting line of carriers of a shipment of a carload of goods has caused damages thereto by loading them improperly an action may be maintained against it to recover the damages thus caused, and it may not avoid liability under the Carmack Amendment to the Interstate Commerce Act on the ground it was not the initial carrier. *Ibid.*

5. *Carriers of Goods — Connecting Lines — Contractual Notice—Intermediate Carrier—Principal and Agent.*—Where the second carrier in the connected line of shipment of a carload of goods causes damage to the shipment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applied to the facts of this case. *Ibid.*

6. *Carriers of Goods—Bills of Lading—Written Demand—Limiting Liability—Reasonableness—Burden of Proof—Trials.*—A stipulation in a bill of lading denying the carrier's liabiilty for damages unless written notice of such claims be filed within a specified period is in derogation of the common law, and while it will be upheld if reasonable, the burden of proof is on the carrier to show that it is. *Phillips v. R. R.*, 86.

7. *Carriers of Goods—Bills of Lading—Stipulations—Interstate Commerce—Federal Courts—Reasonableness.*—Where the stipulation in a bill of lading for an interstate shipment of goods, as to the liability of the carrier for damages if written demand has not been made on it for such damages within a specified time, is the subject of the controversy, the question is one governed by the Federal law, and under this, as well as under our State decisions, it is required that to be valid such stipulations must be reasonable. *Ibid.*

8. *Same—Ten Days—Perishable Goods.*—A stipulation in an interstate car-load shipment of perishable goods, such as dewberries, exempting the carrier from liability to the shipper caused by its negligence, unless written claim for damages shall have been filed with its agent at the delivering point within ten days after its delivery, is unreasonable and unenforcible, according to our decisions, and will be so held in the absence of an authoritative ruling of the highest Federal court to the contrary. The effect of the adoption by the carrier of the bill of lading recommended by the Interstate Commerce Commission, containing the four months stipulation, discussed by WALKER, J. *Ibid.*

9. *Carriers of Goods — Bills of Lading — Written Claim — Requisites.*—Where a stipulation in a bill of lading requiring written notice to be given the carrier's agent within a stated time, to enforce a demand

CARRIERS OF GOODS—*Continued.*

for damages to the shipment, is reasonable, it is only necessary that the written claim shall be a plain and intelligible statement of the demand, and not that it be expressed in any particular form. *Ibid.*

10. *Carriers of Goods — Consignment — Party Aggrieved.* — A shipper of goods on consignment may, as the party thereby aggrieved, maintain an action against the carrier for damages caused thereto by its negligence. *Ibid.*

11. *Carriers of Goods—Railroads—Shipment Refused—Demurrage.*—A carrier of goods, under the requirements of the Interstate Commerce Commission, must collect freight charges according to established rates, and exhaust all legal remedies to collect such charges, and incidental undercharges, in order to prevent undue discrimination; and where a consignee refuses to pay a charge for the shipment accordingly rendered, and to accept the goods, he is responsible for such freight charges at the suit of the carrier, and for proper demurrage and storage charges reasonably incident and attributable to the defendant's wrong. *R. R. v. Iron Works*, 188.

12. *Same—Sales of Goods.*—Where a consignee of goods wrongfully refuses, at the time of notification of their arrival, to receive such goods on account of proper charge made for their transportation, *semble*, no demurrage charges are collectible by the carrier, but only reasonable storage charges, until, in the exercise of its rights under the law, it could properly dispose of the goods and thereby be relieved of further charge concerning them. *Ibid.*

13. *Same—Minimizing Damages—Interstate Commerce—State Statutes.*—A carrier at common law was required to resort to the courts to enforce its lien for freight charges, and our statutes, Revisal, secs. 2637, 2638, give this right to the carrier, when the goods are nonperishable, after six months; and being a part and in furtherance of the remedy afforded by the law in such cases, requiring an injured party to do what business prudence requires to minimize the loss, it applies to interstate as well as intrastate shipments, in the absence of any interfering regulation by Congress or of the Interstate Commerce Commission. *Ibid.*

14. *Same—Enforcing Liens.*—Where a consignee promptly refuses to accept a shipment on the ground of excessive freight charges, which are shown to be correct, the carrier is not required to assume the risk of enforcing its lien at once by sale in order to avoid the accumulation of storage charges, for it is required to store and properly care for the goods as warehousemen. *Ibid.*

15. *Same—Duty of Carrier*—Where a consignee of goods wrongfully refuses to receive them, the carrier is not required to take the risk of immediately enforcing his statutory lien for the freight charges, by sale *inter partes*, for he is entitled to proceed in an orderly way to enforce its right. *Ibid.*

16. *Carriers of Goods—Refusal by Consignee—Duty of Carrier—Consignor —Notification.—Semble*, the carrier should notify the consignor that the consignee had refused the shipment; but the question becomes immaterial when the freight charges of reshipment exceed the value of the goods. *Ibid.*

CARRIERS OF GOODS—*Continued.*

17. *Carriers of Goods—Contracts of Shipment—Bills of Lading—Evidence.* While a bill of lading is the usual evidence of a contract of shipment between a consignor of goods and a common carrier by rail, and the carrier is usually required to issue one on demand, it is not essential to such contract that a bill of lading therefor should have been issued by the carrier. *Davis v. R. R.*, 209.

18. *Same—Interstate Commerce Acts—Amendment.*—The act of Congress amending section 20, Interstate Commerce Act, 34 U. S. Statutes, ch. 3591, sec. 7, requiring the issuance of a bill of lading by the carrier to the consignor of a shipment, is not inhibitive in its terms or purpose; and the statute, being enacted chiefly for the purpose of imposing on the initial carrier responsibility for the entire carriage of an interstate shipment, does not relieve the carrier from liability under a contract of shipment entered into without it. *Ibid.*

19. *Carriers of Goods—Penalty Statutes—Consignee—Party Aggrieved—Railroads.*—Where under agreement with his principal the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment (Revisal, sec. 2642), he is the party aggrieved, within the meaning of the statute, Revisal, sec. 400, and may maintain his action to recover the excess, and also the penalty when settlement has not been made within sixty days, Revisal, secs. 2643, 2644, and he has complied with the provisions of the statute as to filing written demand supported by the original freight bill and the original or duplicate bill of lading, etc., Revisal, sec. 2643. *Tilley v. R. R.*, 363.

20. *Same—Written Demand.*—Where the carrier has demanded and received an unlawful freight charge for a shipment, and the party aggrieved has made written demand of the carrier for payment of the overcharge, required by the statute, it is not necessary for him, in order to maintain an action for the penalty imposed upon the carrier failing to settle in sixty days, that the written demand specify the penalty, or that demand therefor was made in the justice's court or alleged in the complaint filed on appeal therefrom. Revisal, sec. 2643. *Ibid.*

21. *Same—Freight Overcharge—Amount Demanded.*—The carrier should know the amount of freight it is lawfully permitted to charge for a shipment of goods, and in an action to recover the overcharge, with the penalty for its failure to repay it in sixty days, it is not necessary that the plaintiff's demand state, or exactly state, the correct charges allowed the carrier by law, in order to permit a recovery of the penalty. Revisal, sec. 2644. *Ibid.*

22. *Carriers of Goods—Notice of Arrival—Mail—Evidence—Actual Notice Railroads.*—Where there is evidence that the carrier mailed a postal card to the consignee of a shipment of goods, giving due notice of the arrival, in accordance with the rules of the North Carolina Corporation Commission, and that it was properly addressed and put into the postoffice, it is presumed to have been received, in the absence of evidence that it was not, and is sufficient to take the question to the jury. *Semble*, actual notice of the arrival of the goods dispenses with the formal written notice. *Holloman v. R. R.*, 372.

CARRIERS OF GOODS—*Continued.*

23. *Carriers of Goods—Notice of Arrival—Written Notice—Parol Evidence.* The written notice required by the North Carolina Corporation Commission to be given by the carrier to the consignee of goods is a matter collateral to the issue of whether the latter is responsible to the former for storage charges accrued, and admits of parol evidence of its contents. *Ibid.*

24. *Carriers of Goods—Damaged Condition—Accepting Goods—Worthless Condition.*—Where goods transported by the carrier are claimed by the consignee to have arrived at their destination in bad condition, it is the latter's duty to receive the goods and sue for damages unless they are rendered practically worthless. *Ibid.*

25. *Same—Action—Estoppel.*—Where the consignee of goods has refused to receive them because of their damaged condition unless the carrier would accept a receipt to that effect, and sues for the damages, and then for possession of the goods, after a judgment adjudicating the amount of the damages, but leaving open the question of title and right of the defendant to storage charges, he is estopped to claim that the goods were in a condition practically worthless at the time he refused to accept them. *Ibid.*

26. *Carriers of Goods—Damaged Condition—Storage Charges—Claim Rejected—Inconsistent Defenses.*—Where the consignee has refused to accept a shipment of goods because of their alleged damaged condition, and contends that the carrier agreed to keep them, without charge, pending an adjustment, and it is shown that the carrier wrote him a letter positively declining to allow the damages claimed by him, whereupon he had brought suit to recover them: *Held*, if any such agreement had been entered into, it terminated upon the refusal of the carrier to consider the claim for damages; it was also inconsistent with the plaintiff's action therefor, and the carrier is entitled to recover its proper charges for storage. *Ibid.*

27. *Carriers of Goods—Storage Charges—Services Rendered—Consideration.*—Storage charges are allowed the carrier for the service rendered in taking care of the goods, the inconvenience to the warehousemen, and the liability for their safe custody if they do not exercise proper care. *Ibid.*

28. *Carriers of Goods—Storage Charges—Liens.*—A carrier has a lien upon the goods for its proper storage charges therefor, and may hold them until the charges are paid or properly tendered. *Ibid.*

29. *Carriers of Goods—Express Companies—Live Stock—Valuation—Abandonment of Contract—Damages.*—Where an express company has contracted to transport a high breed of mare to its destination, wherein the consignor has agreed to a valuation not to exceed $100 for a less rate, and it is alleged and shown that for a part of the trip the car containing the mare had been placed in an ordinary freight train, in consequence of which it was badly damaged, and that a messenger had not been sent with the mare in the car in accordance with its custom in such transpotrations: *Held*, the restrictions as to valuation contained in the contract can apply only where the express company has itself complied therewith, and it being shown that the mare was injured in consequence of the de-

CARRIERS OF GOODS—*Continued.*

fendant's violation of the contract, which for the time being is construed as an abandonment by it of its terms, the entire damage is recoverable, though greatly in excess of the value agreed upon. *Reynolds v. Express Co.*, 487.

30. *Same—Commerce—Interstate Commerce Commission.*—Where an express company, in violation of its contract of carriage, transports a valuable mare in a car, and injury is inflicted upon it by reason of the fact that the car was hauled in a freight train a part of the distance, the fact that it was stipulated in the contract of carriage that the value of the mare should not exceed $100, upon consideration of a less rate, which was approved by the Interstate Commerce Commission, does not preclude a recovery of damages in a greater sum; for the contract of carriage, as approved, contemplates the restriction of recovery as to injuries inflicted by the express company while transporting the mare according to the method required of it under the terms of the contract, and not to those arising from a temporary abandonment thereof. *Ibid.*

31. *Carriers of Goods—Express Companies—Contracts—Stipulations Unreasonable—Written Demand.*—A stipulation in an express company's contract of carriage of live stock, requiring that written demand for damages to the shipment be made in thirty days, is unreasonable as to the time, and unenforcible. *Ibid.*

32. *Carriers of Goods—Express Companies—Written Demand—Knowledge—Waiver.*—The written demand for damages to a shipment of live stock stipulated in the contract therefor may be waived by the knowledge of the injury by the agents of the carrier and their conduct respecting it. *Ibid.*

33. *Carriers of Goods—Damaged Shipments—Refusal of Shipments.*—Damages to a shipment of goods by a railroad company, caused by the carrier's negligence, does not justify the owner in refusing to accept them on that account, unless the damages are sufficient to render the goods practically worthless; for he is required ordinarily to accept the goods and sue for damages upon the refusal of the carrier to pay them. *Whittington v. R. R.*, 501.

34. *Same—Pleadings—Damages.*—Where an owner of a shipment of goods has refused to accept them from the carrier on account of their damaged condition, his refusal will not prevent his recovering for the damages sustained, if he has properly pleaded them. His evidence is sufficient to sustain a recovery, and the liability of the defendant is not thereby increased. *Ibid.*

35. *Carriers of Goods—Damaged Shipment—Measure of Damages.*—The measure of damages to a shipment of goods by a railroad company is the difference in value between the value thereof in their damaged condition at destination and what their value would have been had they been properly transported, or handled, by the carrier. *Ibid.*

36. *Carriers of Goods—Consignor—Owner—Trials—Evidence.*—It is competent for the consignor of goods to show by parol that he is the owner thereof, and recover damages from the common carrier caused by its negligence. *Ibid.*

CARRIERS OF GOODS—*Continued.*

37. *Carriers of Goods—Live Stock—Viciousness — Negligence — Burden of Proof.*—While a carrier is not answerable in damages to a shipment of live stock caused by the natural viciousness of the animals, it must establish to the satisfaction of the jury that the damages were thus caused, and not as a result of its own negligence, when the shipment was under its care. *Teeter v. Express Co.*, 616.

38. *Carriers of Goods—Express Companies—Railroads—Live Stock—Contracts—Tort-Feasors, Joint.*—Where an express company violates its contract of carriage of a live stock carload shipment in not allowing an attendant to ride free in the same car, owing to crowded condiions therein, and the attendant attempts to ride in a passenger coach of the same train under this contract, but is ejected by the conductor thereon: in his action against the railroad and express company, it is *Held*, that the two defendants were not joint tort-feasors, and that whatever rights the plaintiff may have had arose *ex contractu* with the express company, which was not responsible for the act of the railroad company in ejecting him. *Ibid.*

39. *Carriers of Goods—Express Companies Live Stock—Attendants—Contracts—Breach—Damages Minimized.*—Where an express company contracts for free transportation of an attendant on a carload of live stock shipment, which it does not perform, and the attendant is ejected by the conductor on the passenger train drawing the car, while attempting to ride under his contract in the passenger coach, it becomes the attendant's duty to purchase a passenger ticket and make claim against the express company for the amount, in diminution of his damages, and not permit himself to be ejected from the train to his humiliation, and hold the express company responsible therefor. *Ibid.*

40. *Carriers of Goods—Street Railways—Negligence — Trespassers—High Degree of Care.*—Pedestrians and drivers of vehicles upon the streets of a town are not trespassers and have equal rights with street cars operated thereon; and a motorman in running such cars owes a higher degree of care in avoiding injuring them when upon the track than is required of a locomotive engineer under like circumstances. *Ingle v. Power Co.*, 751.

41. *Carriers of Goods—Trials—Instructions—Evidence—Nonsuit—Appeal and Error.*—In this action to recover of a railroad company damages to a shipment of shoes while in the carrier's possession, and caused by a storm-tide, the sufficiency of the evidence to establish the defendant's liability for failure to recover the shoes does not arise on defendant's appeal, it not having made a motion to nonsuit or requested special instructions thereon.

CARRIERS OF PASSENGERS. See Torts, 2.

1. *Carriers of Passengers — Ejection from Train — Through Trains — Change of Trains—Damages.*—The ticket agent of a railroad company should inform the purchaser of a ticket for a through train whether or not this train will stop at the passenger's destination; and where a female passenger on such train, traveling with her child, has been informed by the ticket agent that the train will stop at her destination, and while on the train she was, for the first time, informed by

CARRIERS OF PASSENGERS—*Continued.*

the conductor that she will have to get off at a nearer station and take a local train, in consequence of which she was not met by her husband, as they had prearranged, and suffers inconvenience and annoyance by reason of the enforced change for the local train: *Held*, the ejection from the train was wrongful, making the company liable for the passenger's actual but not punitive damages. *White v. R. R.*, 31.

2. *Carriers of Passengers—Safety of Passengers—Negligence—Insurers.*—While a railroad company, as a common carrier, is held to a high degree of care to protect its passengers, and its conductors and station agents are made special policemen by statute to better enable it to perform this duty, it is not held liable as insurers for injuries to their passengers, which, in the exercise of such care, their conductors, employees, agents, etc., could not have reasonably foreseen and prevented. *Mills v. R. R.*, 266.

3. *Same—Trials—Evidence—Nonsuit.*—Where a passenger, while intoxicated on a passenger train, assaults another passenger while the conductor is in another coach attending to his duties, and though in an intoxicated condition the aggressor had given no indication to the conductor that he was quarrelsome or unruly, but, to the contrary, had been courteous and polite to him, offering to pay him for some of his eggs that he had stumbled over in the baggage car, and had peaceably left this car at the conductor's request; and the conductor had no intimation that this passenger was either intoxicated or likely to commit the assault; and, thereafter, as soon as he heard of the assault, arrested the aggressor, who went peaceably to destination, where he turned him over to the police of the city: *Held*, no evidence of actionable negligence which would render the company liable in damages for assault. *Ibid.*

4. *Carriers of Passengers—Mileage Exchange—Tickets—Railroads.*—It is the duty of a conductor on a passenger train to accept the mileage of a person traveling thereon when the railroad company has not afforded him time to get it exchanged for a ticket at its station. *McNary v. R. R.*, 505.

5. *Same—Ejection from Train—Statutes—Usual Stops—Flag Stations.*—A place along a railroad company's track is not a usual stopping place within the meaning of Revisal, sec. 2629, forbidding the company to put off passengers except "at usual stopping place or dwelling," when it is merely a flag station, with only a side-track, without shelter, and the nearest dwelling three-quarters of a mile away; and where one traveling on the train has been put off at such place at 9 o'clock in the night for failure to exchange his mileage for a ticket, and was informed by the conductor that it was "a rather poor place to spend the night," it does not preclude his recovery, for the company's violation of the statute, that he again boarded the train and complied with the conductor's demand in paying the additional charge required of those who have no ticket. *Ibid.*

6. *Same — Excessive Force — Punitive Damages — Trials — Evidence — Mental Anguish.*—Where a traveler is ejected from a passenger train in violation of his rights, at night, at a place without shelter, and the evidence tends to show that the conductor, with the assistance of

CARRIERS OF PASSENGERS—*Continued.*

the flagman, used violence in taking him from the seat in the presence of the passengers; that the conductor's actions evinced anger; that the traveler again boarded the train after being ejected, whereupon the conductor told him that he would kick him off if he did not pay the cash fare, in consequence of which the traveler paid the price and remained on the train: *Held*, evidence of unnecessary force on the part of the conductor, and sufficient to sustain a verdict awarding exemplary damages, and damages for humiliation and injury to feelings. *Ibid.*

7. *Carriers of Passengers—Ejection from Train—Trials—Questions for Jury.*—The question whether the conductor of a train used unnecessary force in ejecting a passenger from the train is one for the jury upon conflicting evidence. *Ibid.*

8. *Carriers of Passengers—Wrongful Ejection from Train—Cash Fare—Damages.*—Where a conductor refuses to pull the mileage of a pasger, demands the cash fare, and, upon refusal of the passenger to pay, wrongfully ejects him, it is no defense to the company to avoid the payment of actual or exemplary damages that, upon the payment of the small amount of the cash fare, the passenger could have avoided the entire injury. *Ibid.*

9. *Carriers of Passengers—Pullman Company—Duty to Passengers—Assault.*—Though the Pullman Company is not, technically speaking, regarded as a common carrier or its coach in a passenger train in the sense of an inn, it nevertheless owes a duty to its passengers to reasonably protect them from assault and robbery by its own employees and by others. *Larrett v. R. R.*, 737.

10. *Same—Evidence—Demurrer.*—Where the evidence is conflicting, but with evidence in plaintiff's behalf tending to show that she was boarding a Pullman car with her railroad and Pullman ticket in the presence of its conductor, who was assisting her, and was assaulted and robbed by an unknown person, which the conductor could readily have prevented, the evidence should be construed in the light most favorable to the plaintiff, and a demurrer thereto should be overruled. *Ibid.*

11. *Carriers of Passengers—Street Railways—Negligence—Rules of Company—Ordinance—Statutes—Railroads.*—It is negligence *per se* for a motorman on a street car to run the car on the streets of a town without giving the signals or warnings required by the company's rule, and to look back over his shoulder in violations of such rules; and in running at an excessive speed in violation of a town ordinance; and for the company to have failed to provide the car with a proper fender, as required by the statute. *Ingle v. Power Co.*, 751.

CASE. See Appeal and Error, 46, 53.

CAVEAT. See Removal of Causes, 4; Wills, 7, 9, 23, 25, 27, 28; Instructions, 8

CAVEAT EMPTOR. See Deeds and Conveyances, 27.

CHARACTER. See Homicide, 12.

CHARGES. See Carriers of Goods, 26, 27, 28.

CHILDREN. See Wills, 5, 12.

CIDER. See Spirituous Liquors, 1.

CITIES AND TOWNS. See Municipal Corporations, 5, 7.

CLAIM AND DELIVERY. See Equity, 3.

CLASSIFICATION. See Insurance, 23.

CLOUD ON TITLE. See Equity, 1.

CODICILS. See Wills, 10.

COLLATERAL ATTACK. See Drainage Districts, 1; Removal of Causes, 3; Wills, 7.

COLLATERAL REPRESENTATION. See Descent and Distribution, 1.

COLLECTION. See Banks and Banking, 1, 2, 3.

COLLISIONS. See Railroads, 27; Criminal Law, 22.

COLOR. See Deeds and Conveyances, 4, 5.

COLOR OF TITLE. See Deeds and Conveyances, 30, 31; Limitation of Actions, 28.

COMMERCE. See Carriers of Goods, 4, 7, 30; Taxation, 18.

1. *Commerce—Railroads—Federal Employers' Liability Act—Federal Decisions—State Courts.*—One employed by a railroad company as hostler for locomotives for its interstate trains is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, and where he is injured on the company's yard in going home from his work thereon, in his action to recover damages alleged to have been inflicted by the negligence of defendant's employees on its yards, brought in the State courts, the Federal decisions control, and not those of the State court. *Hinson v. R. R.*, 646.

2. *Same — Assumption of Risks — Trials — Evidence—Nonsuit.*—An employee of a railroad company in interstate commerce attempted at night to go between connected cars on a "lay off" track, on defendant's yard, uncoupled to a locomotive, though there was afforded him a safe way around the train, and while beneath the drawheads and stretching forward his leg to get out on the other side a locomotive ran upon the cars from another track, without signal or warning, caused the wheel of the car to run over his leg, which was afterwards amputated in consequence thereof. The employee looked to see if there was danger before attempting to cross, and assumed there was none, and there was evidence that employees of the road frequently crossed there in this manner. There was no evidence that the engineer on the locomotive knew of the employee's presence or of his peril. *Held*, under the Federal authorities, controlling upon the facts of this case, the employee assumed the risk, and his own negligence barred his recovery in his action for damages. *Ibid.*

COMMINGLING OF GOODS. See Vendor and Purchaser, 1.

COMMISSIONERS. See Instructions, 14.

COMMON DESIGN. See Homicide, 15.

COMPENSATION. Constitutional Law, 1; Railroads, 16; Telegraphs, 1

COMPROMISE. See Accord and Satisfaction, 1.

CONCEALED WEAPONS. See Criminal Law, 2.

CONCLUSIONS. See Homicide, 9.

CONDEMNATION. See Constitutional Law, 1; Railroads, 5.

CONDITIONAL SALES. See Limitation of Actions, 17.

CONDITIONS. See School Districts, 1; Insurance, 3, 4.

CONDITIONS PRECEDENT. See Appeal and Error, 45.

CONDITIONS SUBSEQUENT. See Deeds and Conveyances, 32.

CONFIDENTIAL COMMUNICATIONS. See Attorney and Client, 5.

CONFIRMATION. See Drainage Districts, 2.

CONGRESSMEN. See Courts, 9; Elections, 8.

CONNECTING LINES. See Carriers of Goods, 4, 5.

CONSENT. See Judgments, 5; Criminal Law, 10.

CONSENT JUDGMENTS. See Appeal and Error, 14.

CONSIDERATION. See Accord and Satisfaction, 1; Corporations, 3; Carriers of Goods, 27; Release, 1, 3; Deeds and Conveyances, 18, 21, 26; Equity, 3; Contracts, 25.

CONSIGNEE. See Carriers of Goods, 16, 19.

CONSIGNMENT. See Carriers of Goods, 10.

CONSIGNOR. See Carrier of Goods, 16, 36.

CONSPIRACY. See Removal of Causes, 13.

CONSTITUTION. See Insurance, 10.

CONSTITUTION, STATE.

ART.

I, Secs. 12, 13. Recorder's court, without jurisdiction of felony, may not dispose of juvenile delinquents under the statute providing for their reclamation when guilty of such offense. *S. v. Newell*, 933.

V, Sec. 1. The requirements of these and Art. VI, secs. 1 and 4, must be met by the voters for a special school tax. *Ingram v. Johnson*, 676.

V, Secs. 1, 2, 6. This limitation is for ordinary expenses of State and County government, and so far as relates to the poll (sec. 2), applies to the support of the poor; that under section 6 not to exceed

CONSTITUTION—*Continued.*

ART.

double the State tax, except for special purposes, with special legislative approval, does not deprive the person failing to pay, of his right to vote. *Moose. v. Comrs.*, 419.

VI, Secs. 1 and 4. The requirements of these and of Art. V, sec. 1, must be met by the voters for a special school tax. *Ingram v. Johnson*, 676.

VII, Sec. 7. Public school houses are not a necessary county expense, and a vendor of land cannot compel specific performance when bonds are required to be issued, of which the electors had refused to approve. *Stephens v. Charlotte*, 564.

CONSTITUTIONAL LAW. See Lotteries, 2; Drainage Districts, 1; Deeds and Conveyances, 13; Taxation, 6, 8, 10, 18; Railroads, 16; Statutes, 2; Roads and Highways, 1, 2; Courts, 9; Elections, 7, 8; Municipal Corporations, 6; Criminal Law, 4, 10, 13, 15.

1. *Constitutional Law — Condemnation — Public Use — Compensation.*— Under our State Constitution private property can only be taken by condemnation for a public use, and upon just compensation. *Cobb v. R. R.* 58.

2. *Constitutional Law—Municipal Corporations—Public Schools—Necessaries—School Buildings—Approval by Ballot—Bond Issues.*—A public schoolhouse is not a necessary municipal expense within the meaning of Article VII, sec. 7, of the Constitution, and where the municipal authorities have agreed to purchase property for this purpose, and the vendor seeks specific performance to recover the deferred payment of the purchase price, a defense that it would require the issuance of bonds, which the electors had refused to approve by their ballots, is a complete one, and the decisions heretofore rendered, that a tax for public school buildings is not for necessary municipal expenses, are not affected by the subsequent enactment of compulsory school laws. *Stephens v. Charlotte*, 565.

3. *Same—Compulsory Education—School Terms.*—In the absence of the approval by ballot of the voters, the requirements of our compulsory school law and the constitutional provision requiring a four-months term of public schools must be complied with by the use of such buildings as the funds available will command, either by purchasing and building or renting for the purpose out of the current funds. *Ibid.*

CONTENTIONS. See Instructions, 4, 15, 16, 17; Appeal and Error, 58, 66.

CONTINGENT INTERESTS. See Deeds and Conveyances, 34, 35, 36.

CONTINGENT LIMITATIONS. See Wills, 13.

CONTINGENT REMAINDERS. See Estates, 4.

CONTINUANCE. Criminal Law, 16.

CONTINUITY. See Limitation of Actions, 2, 3.

CONTRACTS. See Deeds and Conveyances, 11. 22; Landlord and Tenant, 1; Principal and Agent, 1, 5; Easements, 1; Insurance, 1, 5, 8, 9, 10, 12, 18;

CONTRACTS—*Continued.*

Carriers of Goods, 17, 29, 31, 38, 39; Corporations, 3; Accord and Satisfaction, 2; Evidence, 9; Wills, 15, 30; Release, 1, 3; Usury, 1; Equity. 3; Appeal and Error, 33; Torts, 3; Arbitration and Award, 2; Reference, 8.

1. *Contracts, Written—Clearly Expressed—Parol Evidence.*—Where the terms of a written contract are therein clearly and unambiguously expressed, and there is no allegation or evidence of fraud or mutual mistake, they will be enforced as they are written, and parol testimony, contradictory thereof, is inadmissible. *Potato Co. v. Jenette*, 1.

2. *Same—Prior Negotiations.*—Evidence of negotiations leading up to the making of a contract which the parties have afterwards put in writing is incompetent to contradict the clearly and unambiguously expressed terms of the written contract, for the previous negotiations merge therein. *Ibid.*

3. *Same—Common Understanding.*—The common understanding between the parties is gathered from their written contract, and where this has been clearly and unambiguously expressed it is incompetent to show, in contradiction, what one of them understood the contract to be. *Ibid.*

4. *Contracts, Written—Equity—Correction—Parol Evidence—Pleadings.*—The question whether parol evidence is competent in equity to correct a written contract in accordance with the true agreement of the parties does not arise in the absence of allegation and evidence of fraud or mutual mistake of the parties. It is competent to reform a deed, but not to vary or contradict it. *Ibid.*

5. *Contracts, Written—Enlargement—Parol Evidence—Trials—Issues.*—In vendor's action upon his contract to furnish the purchaser with the best potatoes of a certain kind he shipped his customers "from Aroostook County in the State of Maine" it is reversible error for the court to submit to the jury an issue upon the purchaser's liability controlling the question whether the potatoes furnished were the best raised in and shipped by any one from that county in the same year, for this enlarged the obligations of the vendor beyond those stated in the contract. There was no issue in this case as to whether the potatoes were worthless or unfit for the purposes for which they were sold. *Ibid.*

6. *Contracts, Written—Vendor and Purchaser—Parol Evidence—Trials.*—In an action on notes for $118 for a manure spreader, title reserved to vendor until payment made, with provision as to sale for nonpayment, and waiver of presentment, protest, etc., parol evidence was competent to show that as a bonus a knife sharpener was verbally agreed to be sent, but it was incompetent to prove a verbal agreement that if it was not sent the note was invalid. It was proper for the trial judge to deduct $3.50, the admitted price of the knife sharpener, from the purchase price of the manure spreader, and render judgment in plaintiff's favor for the difference. *Harvester Co. v. Parham*, 389.

7. *Contracts—Mutual Agreement—Misrepresentations.*—The mutual consent of the parties is an essential element of every contract, and where one of the parties misrepresnts or conceals a material and

CONTRACTS—*Continued.*

important fact from the other upon which the minds of both must necessarily agree, the contract thus made is unenforcible. *Freeman v. Croom*, 524.

8. *Same—Mortgages — Registration — Innocent Purchasers.* — Under our registration laws an unregistered mortgage is not good as against purchasers for value, etc., and is, in effect, in such instances, to be regarded as no mortgage; and where a vendor of an automobile takes a mortgage thereon which he does not have registered until after the purchaser has sold or exchanged it for another, and then demands the automobile under his mortgage, representing that it is valid, and an agreement is made on this representation that he should be delivered possession of the automobile upon paying for certain repairs made thereon; in his action to enforce this agreement, it is *Held*, that the minds of the contracting parties had not mutually agreed because of the plaintiff's misrepresentation or suppression of the material fact that the mortgage had been registered, concerning which the defendant was ignorant at the time, and under the evidence of this case an issue of fact was raised for the determination of the jury. *Ibid.*

9. *Contracts, Voidable—Infants.*—A contract made with an infant is voidable, and he may ratify or disaffirm it at his election, upon his attaining his majority. *Chandler v. Jones*, 569.

10. *Same—Benefits Retained—Credits—Purchase Price.*—When an infant has received money under a contract he has made, and it is consumed or wasted during his minority, he may recover the same; but if it has been used for his benefit and invested in property which he has in hand, he cannot retain the property without allowing a just credit for the money received by him. *Ibid.*

11. *Same—Majority—Acquiescence—Ratification.*—Where money has been paid to an infant under a contract made with him during his minority which he has invested in lands, his continuing to hold and enjoy the property after reaching his majority is evidence of his ratification of the contract, which has been held to be presumed after three years. *Ibid.*

12. *Same—Feme Covert—Disability Removed—Statutes.*—A minor contracted for the sale of her lands and became a *feme covert* before reaching her majority, with agreement that upon payment of a certain sum the lands would go to the purchaser's wife for life, and at her death to him. The purchaser paid the *feme* grantor and her husband the purchase price, with which they paid off a mortgage on her lands. *Held*, whether the mortgaged lands were those of the wife or not, she was advantaged or benefited by the payment at least to the extent of her dower right, and she is held to have ratified her contract by her acquiescence twenty-three years after receiving the payment, nineteen years after attaining her majority, and more than three years after the statute had removed her disability as a married woman. *Ibid.*

13. *Same—Acts of Disaffirmance—Actions—Estates Outstanding.*—An infant contracted with a husband to convey her lands for a certain consideration, a life estate to the wife with remainder to her husband,

CONTRACTS—*Continued.*

the purchaser, and received the agreed price therefor. *Held*, after coming of age the party could have evinced her disaffirmance of her contract by the return of the purchase money or some other unequivocal act, though she may not be permitted to sue for the land during the continuance of the outstanding life estate; and the failure of the infant to take such action after coming of age may be evidence of the confirmation of the contract. *Ibid.*

14. *Contracts—Quantum Meruit—Marriage—Fraud—Husband and Wife.*—Where one having a living lawful wife induces another woman to go through the marriage ceremony with him in the innocent belief that she is becoming his wife, and by keeping her in ignorance of the fact of his marriage she lives with him, lends him money, and performs valuable services for him without expecting remuneration or compensation, she is entitled to recover from his estate, by reason of the fraud practiced upon her by him, upon a *quantum meruit*, the value thereof over and above the benefits she may have received in clothes, maintenance, etc. *Sanders v. Ragan*, 612.

15. *Contracts—Implied—Wrongdoer—Indebitatus Assumpsit.*—An action of *indebitatus assumpsit* is dependent largely upon equitable principles and in the absence of special contract, and unless in contravention of public policy, it will usually lie wherever one has been enriched or his estate enhanced at the expense of another under circumstances that in equity and good conscience call for an accounting by the wrong-doer. *Ibid.*

16. *Contracts — Implied — Tort — Waiver—Indebitatus Assumpsit.*—When one's property has been wrongfully converted by fraud or deceit, the owner is allowed to waive the tort and sue on an implied contract under the equity of *indebitatus assumpsit. Ibid.*

17. *Contracts — Independent Contractor — Owner — Indemnity—Parties—Damages.*—Where the owner is not relieved by independent contract from liability to his contractor's employees for personal injuries received while engaged in doing the work, and the contractor enters into a contract with a liability company to indemnify the owner against such damages, running in the name of the contractor but for the benefit of the owner, with the full knowledge and consent of the indemnity company, the owner who has compromised an action against it which was covered by the policy, and has paid the loss, may maintain an action against the indemnity company to recover the amount so paid. *R. R. v. Accident Corporation*, 636.

18. *Contracts—Independent Contractor—Partnership—Indemnity.*—Where a member of a firm of contractors takes out a policy of indemnity for the benefit of the owner in his name, instead of that of the firm, in an action against the indemnity company to recover for a loss covered by the policy: *Held*, each partner is responsible for a partnership loss, and is entitled to the indemnity, and it is immaterial as to the indemnity company whether the policy sued on was taken out in the name of one of the partners or in the name of the firm. *Ibid.*

19. *Contracts—Independent Contractor—Indemnity—Parties—Misjoinder —Demurrer.*—In an action by a contractor and owner against an in-

CONTRACTS—*Continued.*

demnity company to recover a loss, covered by the policy, the owner had sustained, a demurrer by the defendant for misjoinder of parties plaintiff is bad, for there can be but one recovery and it cannot be prejudicial. *Gorrell v. Water Co.*, 124 N. C., 328, cited and approved. *Ibid.*

20. *Contracts—Compliance—Verdicts—Quantum Meruit—Appeal and Error.*—In this action to recover upon a contract for furnishing and installing a heater in defendant's residence, the jury having found by the amount of their verdict as fixed by the contract price that plaintiff had performed his part thereof, it is *Held*, that a recovery upon a *quantum meruit*, while evidently considered, was excluded by the verdict, and *Steamboat Co. v. Transportation Co.*, 166 N. C., 582, and other like cases, were not applicable on appeal. *Ball v. McCormack*, 677.

21. *Contracts, Breach—Leases—Landlord and Tenant—Improvements—Damages.*—Where a party negotiating for the lease of a store is let into possession and makes changes therein for the business he contemplates conducting, and thereafter voluntarily vacates the premises and sues the lessor for damages for an alleged breach of contract in accordance with the agreement theretofore entered into by parol: *Held*, the repairs having been made by the plaintiff, having no estate or interest in the premises, he can only recover the amount the defendant's estate was enhanced in value by reason of his improvements and expenditures, though made upon a reasonable expectation that the written lease would be executed. *Smithdeal v. McAdoo*, 700.

22. *Same—Negotiations—Abandonment—Statute of Frauds.*—Where a storehouse has been leased for three years by parol, upon an agreement that a written lease would be accordingly executed, and the lessee has been let into possession and made repairs, and pending a dispute as to the terms of the payment of rent, leases another store, without the lessor's knowledge and when he was prepared to accede to the lessee's demand, and to execute the written lease accordingly: *Held*, the parol contract was enforcible by the lessee, not required to be in writing by the statute, Revisal, sec. 976, and being in possession of the leased premises, without thought of molestation by the lessor, his voluntary relinquishment of his right will prevent his recovery for expenditures he has placed on the property, and other damages he alleges he has sustained in his action for breach of contract. *Ibid.*

23. *Contracts—Married Woman—Separate Property—Statutes—Judgments.*—The plaintiff and his wife were controlling owners of a private corporation to whom defendant sold goods, with plaintiff and his wife as guarantors of payment under their letter of credit, given and accepted in good faith. *Held*, it was not necessary that the *feme* plaintiff should specifically have charged her separate property in order to enforce a judgment rendered according to the terms of the guarantee. Ch. 109, Laws 1911. *Thrash v. Ould*, 728.

24. *Contracts—Breach—Damages—Flume—Trials—Evidence.*—Where the value of a flume is an element of defendant's damages in an action upon contract, evidence of its cost five years before the plaintiff took possession, without evidence of the materials used in its construction, extent of deterioration, etc., is insufficient as to its value at the time of plaintiff's possession. *Fiber Co. v. Harding*, 767.

CONTRACTS—*Continued.*

25. *Contracts—Services Rendered Deceased—Promised Consideration—Executors and Administrators—Quantum Valebat.*—Evidence that the plaintiffs cared for the deceased and his aged and blind wife for a number of years; that both were helpless, requiring constant nursing and attention, given and received in expectation of compensation, is sufficient to sustain the verdict in plaintiff's favor in this case, as to the reasonable value of such services. *Debruhl v. Trust Co.*, 839.

26. *Contracts, Written—Parol Evidence.*—Parol evidence that at the time of the execution of a promissory note the parties agreed that the due date would be at a different time from that therein stated is inadmissible, as varying the terms of the writing. *Copeland v. Howard*, 842.

27. *Contracts—Statute of Frauds—Orders to Pay Moneys—Wages—Parol Evidence—Waiver.*—An order to pay laborer's wages for sawing logs is not required by the statute of frauds to be in writing; but where the statute is applicable, the admission of parol evidence, without objection, will be deemed a waiver of rights thereunder. *Webb v. Rosemond*, 848.

CONTRADICTION. See Witnesses, 1.

CONTRIBUTORY NEGLIGENCE. See Instructions, 11.

CONVENIENCE. See Removal of Causes, 2.

CONVERSION. See Limitation of Actions, 24.

Conversion—Mortgages, Chattel—Description—Registration—Title—Burden of Proof.—In an action for the wrongful conversion of a bay mare claimed by the plaintiff under a senior and by the defendant under a junior mortgage, the plaintiff must recover upon the strength of his own title, with the burden on him to establish it; and where the evidence is conflicting as to whether the mortgagor had more than one mare which would fit the description in plaintiff's mortgage, and also whether this mortgage had been recorded in the county of the mortgagor's residence, a charge by the court which made the plaintiff's right to recover depend only on the sufficiency of the description is reversible error to the defendant's prejudice. Revisal, sec. 982. *Foy v. Hurley*, 575.

CONVEYANCES. See Homestead, 1; Bankruptcy, 4.

CONVICTS. See Trials, 3.

1. *Convicts—Assault—Excessive Punishment.*—Where a guard is charged with an asault upon a convict, and it is shown that his superior officer instructed him to take the convict over the hill away from the rest of the prisoners and give him five or six licks for refractory conduct; but that the guard used a leather strap 2½ inches wide, 2½ feet long, and ¼ inch thick, upon the prisoner's bare back with other prisoners holding his head, legs, and feet, in the presence of the "whole crowd," and administered "fifteen or twenty licks," it is *Held*, that the guard exceeded his authority, and the punishment inflicted was excessive and unnecessarily humiliating. *S. v. Mincher*, 895.

CONVICTS—*Continued.*

2. *Convicts — County Commissioners — Rules — Punishments.*—It is the duty of the county commissioners to prescribe rules regulating punishment to be given refractory prisoners, stating the kind and quantum of punishment, to what breach of discipline applicable, and by whom to be inflicted, which duty they cannot delegate; and where this has not been done, their order that the road superintendent be authorized to use such means as he may deem necessary to enforce obedience cannot be construed to authorize the infliction of corporal punishment. *S. v. Nipper* cited and applied. *Ibid.*

CORPORATION COMMISSION See Railroads, 5.

CORPORATIONS. See Bankruptcy, 1, 3; Partnerships, 1; Appeal and Error, 29; Evidence, 13; Liens, 1, 2.

1. *Corporations—Insolvency—Agreement of Stockholders—Individual Action.*—Where the stockholders of a corporation agree among themselves to contribute pro rata to pay off the corporation's debts to enable it to continue in business, they may maintain their suit and enjoin one of them from enforcing the collection of a debt owed him by the corporation, contrary to his agreement to contribute, without making demand upon the corporation to do so. *Jennett v. Transportation Co.*, 35.

2. *Corporations—Bankruptcy—Embezzlement of Officer—Joinder—Parties —Causes of Action.*—Where a stockholder of a corporation has brought action against the president thereof to recover the value of his stock for his alleged embezzlement of the corporate assets, and joins the corporation therein for the purpose of appointing a receiver therefor, and the corporation thereafter has been adjudged a bankrupt under the Federal law, and a receiver appointed, the corporation has become only a nominal party, and it is not a misjoinder either of parties or causes of action, or objectionable, for the court, in its discretion, to permit the receiver to make himself a party plaintiff under the same allegation of embezzlement, to seek to recover the assets alleged to have been embezzled by the president to the extent of the capital stock of the corporation and for the benefit of all of its stockholders. *Floyd v. Layton*, 64.

3. *Corporations—Subscriptions—Consideration—Written Contracts — Parol Evidence.*—A subscription to shares of stock in a proposed corporation is upon a sufficient consideration; and when the corporation has accordingly been formed and becomes insolvent, the subscriber, at the suit of the receiver, may not vary its written terms by parol evidence tending to show that at the time, it was agreed that he would not be required to pay it. *Boushall v. Stronach*, 273.

4. *Corporations—Subscriptions — Secret Limitations — Good Faith.*—One may not avoid liability on his subscription to stock in a proposed corporation on the ground of a secret agreement that his subscription was given only for the purpose of inducing others to subscribe, and that he should not incur any liability thereunder, for this would be in violation of the law requiring good faith and fair dealing among subscribers, and a secret limitation of liability for the benefit of one to the disadvantage of the others of them and to the corporation's creditors. *Ibid.*

CORPORATIONS—*Continued.*

5. *Corporations—Gross Mismanagement—Directors' Liability.*—Where the directors of a corporation appoint a committee to act with and in supervision of the manager in the conduct of the corporate affairs, and the directors have met only three times during the corporate existence of about two years, first to organize, second to declare a 10 per cent dividend, and the third to appoint a receiver, the dividend declared when its liabilities exceeded its assets, and largely with borrowed money: *Held*, the directors are individually liable in damages to creditors of the corporation thus managed, whether the directors had actual knowledge of the insolvent condition or not, by reason of their negligence, fraud, or deceit. *Anthony v. Jeffress*, 378.

6. *Same—Good Faith.*—Good faith alone will not relieve the directors of a corporation from liability to its creditors for damages caused them by their gross mismanagement and neglect of its affairs. *Ibid.*

CORRECTION. See Contracts, 4; Deeds and Conveyances, 10, 28.

CORROBORATION. See Homicide, 5.

COSTS. See Actions, 4; Appeal and Error, 25, 33, 34, 52; Nonsuit, 2; Wills, 30; Taxation, 19.

COUNTERCLAIM. See Banks and Banking, 3; Usury, 3, 4.

COUNTIES. See Elections, 1, 3, 5, 6; Taxation, 8, 10, 11, 12; Register of Deeds, 1.

COUNTS. See Criminal Law, 20.

COUNTY COMMISSIONERS. See Taxation, 5; Roads and Highways, 4; Convicts, 2.

County Commissioners—Roads and Highways—Mandamus.—A mandamus will lie against the board of county commissioners to compel them to perform their official duty to act upon the petition of owners of land to have their damages, arising from the construction, etc., of the public roads, assessed according to the method prescribed. *Worley v. Comrs.*, 815.

COURTS. See Drainage Districts, 4, 6; School Districts, 1; Elections, 3, 8; Actions, 1; Municipal Corporations, 1; Taxation, 2; Reference, 2, 4; Removal of Causes, 5; Wills, 7; Roads and Highways, 3; Appeal and Error, 25, 46; Verdicts, 1; Education, 1; Torts, 2; Commerce, 1; Mandamus, 2; Office, 1; Criminal Law, 2, 3, 14; Trials, 2.

1. *Courts — Jurisdiction — Amount Demanded—Good Faith—Carrier of Goods—Freight—Demurrage Charges.*—Where a carrier has brought its action in good faith against the consignee of a shipment for the freight and demurrage charges thereon in excess of $200, and is only permitted to recover in a less amount for the freight and storage charges, the jurisdiction of the court is determined by the amount demanded, and that of the Superior Court obtains. *R. R. v. Iron Works*, 188.

2. *Courts—Evidence—Intimation of Opinion—Statutes.*—Where it is material in a controversy over lands to establish the place where a

COURTS—*Continued.*

certain swamp joins a certain named run, the evidence being conflicting, and a surveyor, theretofore appointed, had testified and his map put in evidence, tending to sustain the contention of one of the parties, it is reversible error for the trial judge to instruct the jury that they must be guided in their judgment, not from the map, but from the testimony of the surveyor and other witnesses, such being an intimation of opinion by the court upon the weight of the evidence forbidden by the statute. Revisal, sec. 535. *Swain v. Clemmons*, 277.

3. *Courts—Justices of the Peace—Appeal—Separate Transcripts—Cases Consolidated—Notice—Statutes.*—Where there are two separate and distinct actions brought by the same plaintiff against one defendant, in a justice's court, and judgment by default is rendered in both of them, on notice of appeal aptly given, etc., it is the duty of the magistrate to send up two transcripts, one in each case wherein he rendered judgment (Revisal, sec. 1493); and where he, of his own motion, without notice, consolidates them and sends up the transcript accordingly, notice of appeal given by the defendant of the consolidated cases, without motion in the Superior Court to amend the return or to compel the magistrate to comply with the statute, is not sufficient, and the case should be dismissed in the Superior Court. *Drainage Comrs. v. Kirby*, 415.

4. *Courts—Judicial Notice—Express Companies—Carriers of Goods.*—In proper instances the Court may take judicial notice of the fact that express companies are agencies organized for a higher price than that of ordinary carriage, to provide greater security and dispatch in the delivery of freight. *Reynolds v. Express Co.*, 487.

5. *Courts—Pleadings—Amendments.*—In an action alleging damages by reason of false representations and breach of guarantee in the contract of the sale of an engine, it is within the sound discretion of the trial judge to withdraw a juror and permit an amendment alleging fraud in the transaction, when ample time and opportunity has been given the defendant to answer and procure his evidence, and meet the allegation of fraud. *Dockery v. Fairbanks*, 529.

6. *Same—Subsequent Term—Orders—Variance—Appeal and Error—Objections and Exceptions.*—When the plaintiff has been allowed by the court to amend his complaint, a judge holding a subsequent term of the court may strike out the amendment if contrary to the former order; but, if otherwise, he may not pass upon the authority of the former judge to allow it, for this has to be done by exception at the time, and on appeal in the Supreme Court. *Ibid.*

7. *Courts—Terms—Expiration—Limitation — Judgments—Procedure.*—A judgment by default signed on Sunday by the presiding judge on the street, after leaving the bench without adjourning court, but permitting the term to expire by limitation, is irregular and voidable if not absolutely void; and the action of a judge holding a subsequent term, in setting it aside upon finding meritorious defense, will not be disturbed on appeal. *May v. Ins. Co.*, 795.

8. *Courts — Terms — Expiration — Limitations — Motions—Recess—Procedure.*—After leaving the bench for a term of the Superior Court

COURTS—*Continued.*

to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless they are such as are cognizable at chambers. The judicial procedure for recesses of court and adjournment pointed out by BROWN, J. *Ibid.*

9. *Courts—Title to Office—Congressmen—Constitutional Law.*—The State courts are without jurisdiction to try the title to office of Congressman, the Constitution of the United States referring this power exclusively to Congress (Art. 1, sec. 5). *Butt v. Board of Canvassers*, 797.

10. *Same—Mandamus—Injunction.*—The State Board of Elections ascertains and declares the result of an election for Congressman and certifies the result to the Secretary of State, who issues a certificate of election, on which the Governor issues a commission, the certificate of election and commission establishing a prima facie right to the office; and a process sued out in the State courts by a contestant against the board of canvassers, purporting on its face to be a writ of mandamus to compel the board to make proper returns of the election, without making other parties, will be considered by the court as a mandamus, and not a mandatory injunction involving the determination of the title to the office. *Ibid.*

11. *Court's Discretion—Evidence—Motion to Strike Out.*—A motion to strike out testimony given on the trial without objection, is in the discretion of the trial judge, and not reviewable on appeal. *S. v. Merrick*, 870.

12. *Court's Discretion—Witnesses—Infant's Testimony—Infant's Evidence.* Objection to the competency of evidence because of infancy and incapacity of the witness should be by motion made to the trial judge to pass upon it, and its sufficiency will be assumed on appeal, nothing else appearing, if this has not been done. *Ibid.*

13. *Court's Discretion—Verdict—Motion to Set Aside.*—A motion to set aside a verdict rests in the discretion of the trial judge, and is not appealable. *Ibid.*

14. *Courts—Instructions—Trials—Expression of Opinion—Statutes.*—Upon a trial for murder, where the evidence is conflicting, a requested instruction in defendant's behalf that if the jury found a certain phase of the evidence as a fact it should raise a reasonable doubt in their minds as to his guilt, would be improper as an expression of opinion by the judge, prohibited by the statute. *S. v. Johnson*, 920.

15. *Courts—Recorders' Courts—Misdemeanor — Jurisdiction — Statutes.*—Pell's Revisal, sec. 3434b, makes it a misdemeanor, and not a felony, for one to draw a check, etc., upon a bank, etc., without funds there, etc., punishable by fine or imprisonment or both in the discretion of the court; and the offense is cognizable in the recorder's court of the district of Denton, Davidson County. *S. v. Hyman*, 164 N. C., 411, where the statutory offense was a common-law felony, and by the terms of the statute punishable by imprisonment in the State Prison, cited and distinguished. *S. v. Freeman*, 925.

COURT'S DISCRETION. See Appeal and Error, 10, 36; Wills, 8; Judgments, 18; Actions, 4; Verdicts, 2; Criminal Law, 16.

Court's Discretion—Recalling Witness—Appeal and Error.—Permitting or

COURT'S DISCRETION—*Continued.*

refusing a party to recall a witness who has testified is in the discretion of the trial judge, and not appealable. *S. v. Davidson*, 944.

COVERTURE. See Limitation of Actions, 7.

CREDITS. See Bankruptcy, 7; Equity, 2.

CRIMINAL INTENT. See Railroads, 26.

CRIMINAL LAW. See Indictment, 2.

1. *Criminal Law—Principal and Surety—Appearance Bond—Liability of Surety.*—The sureties on an appearance bond upon the usual conditions thereof, that the defendant will appear at court "and not depart the same without leave," obligate themselves that the defendant appear according to the precept of the court until discharged, and they remain liable thereon until the defendant is placed in custody, or gives a new bond, or is discharged on acquittal or by order of the court; and where an increase of such bond has been requested, and denied, and without further order the court adjourns, on the failure of defendant to appear at the next succeeding term judgment will be given against the sureties. *S. v. Eure*, 874.

2. *Criminal Law—Concealed Weapons — Apprehensions — Aggravation—Courts—Sentence—Statute.*—Carrying concealed weapons in reasonable apprehension of deadly assaults is not justification of a violation of the statutory offense, but in aggravation thereof, and may be considered by the trial judge in imposing the sentence, according to the discretion given him therein by Revisal, sec. 3708. *S. v. Woodlief*, 885.

3. *Criminal Law—Sentence — Court's Discretion — Review — Appeal and Error.*—Where a statute leaves the punishment for its violation within the sound discretion of the trial court, the sentence imposed by him will not be reviewed by this Court on appeal where its exercise has not been grossly or palpably abused. *Ibid.*

4. *Same—Constitutional Law—Cruel and Unusual Punishments.*—Where a defendant, indicted for carrying a concealed weapon and an assault therewith, submits as to the first count and is acquitted by the jury on the second one, the trial judge, in whose discretion the sentence is left by the statute, Revisal, sec. 3708, may consider the evidence on the second count, in pronouncing judgment, and determining the extent of the sentence he will impose; and under the circumstances of this case it is *Held*, that a sentence imprisoning the defendant for thirty days is not open to the objection that it is "cruel and unusual." As to the jurisdiction of this Court to review the exercise of discretion by the trial judge in imposing the sentence in this case, *quære? Ibid.*

5. *Criminal Law—Removing Fence — Possession — Defense—Title—Statutes.*—Where the State, upon trial under an indictment for unlawfully and willfully removing a fence, Revisal, sec. 3673, shows actual possession in the prosecutor, the defendant cannot exculpate himself by showing title to the land upon which the fence was situated. *S. v. Taylor*, 892.

6. *Criminal Law—Removing Fence—Evidence—Possession—Indictment—Trials.*—Evidence is sufficient to convict under an indictment for un-

CRIMINAL LAW—*Continued.*

lawfully and willfully removing a fence (Revisal, sec. 3673) which tends to show that the prosecutor had been in possession for twenty-three years and that the defendant moved the fence without his knowledge or consent; and the indictment is sufficient as to the prosecutor's possession which charges that he owned the property and the fence inclosed the yard around his dwelling. *Ibid.*

7. *Criminal Law—Housebreaking—Evidence—Appeal and Error.*—Where an indictment charges the defendant with breaking in a building and stealing a certain sum of money therefrom, it is reversible error for the court to admit testimony, over the defendant's objection, that other buildings had been broken into and other thefts therein committed, when there is no evidence that the defendant committed any of the other crimes or had anything to do with them. *S. v. Fowler*, 905.

8. *Criminal Law—Warrant—Arrest—Reasonable Suspicion.*—Police officers of a town, charged with the duty of preventing breaches of the peace and arresting violators of the law, when acting upon reasonable suspicion thereof, and when necesary in case of a felony, may make an arrest without a warrant, and take the person so arrested, within a reasonable time, or as soon as they can conveniently do so, before some magistrate authorized to hear the charge against him and commit him to bail *Ibid.*

9. *Same—Articles in Possession — Evidence — Legal Possession.*—It was made to appear upon affidavit and found as a fact by the trial judge that numerous houses had been unlawfully broken into in a certain community, and that the police officers of a town arrested the defendant at the depot at 4 o'clock a. m. with his confederate, who on seeing the uniformed officers, and being hailed by them, tried unsuccessfully to make their escape; that the officers suspected these men of having committed a felony, arrested them without a warrant, and upon one of them refusing to take his hand from his pocket, seized him and found therein a pistol of large caliber, the scabbard of the pistol in another, and a chisel in still another pocket; that he was charged with carrying concealed weapon, and these articles kept by the order of the chief of police and solicitor to be used as evidence, and the prisoner was finally convicted of housebreaking: *Held*, the articles retained were in the legal possession of these officers, and the prisoner's motion to repossess them was properly denied. *Ibid.*

10. *Criminal Law — Constitutional Law — Search — Seizure of Articles—Possession of Premises—Consent—Legal Possession.*—Where after arrest and upon investigation of a crime the officers of the law go to the residence of the accused and find his sisters in possession, request to search the premises for incriminatory evidence, obtain permission, and find certain articles which have a bearing as evidence upon the defendant's guilt, which are claimed by his sisters as their own, and voluntarily surrendered by them to the officers, these acts complained of by the prisoner are not an unconstitutional seizure of his property or search of his premises, but the articles came lawfully into the possession of the officers of the law, and defendant's motion to repossess them was properly disallowed. *Ibid.*

CRIMINAL LAW—*Continued.*

11. *Criminal Law — Bills and Notes — No Funds — Statutes — Value.*—A check for $107, given to the carrier to pay freight charges for the transportation of goods, accepted by it as cash, followed by the delivery of the goods, is for value, within the meaning of Revisal (Pell's), 3434b, making it a misdemeanor for a person to obtain money, etc., or anything else of value by means of a check upon any bank, etc., when it is not indebted to the drawer, etc. *S. v. Freeman,* 925.

12. *Criminal Law—Fornication and Adultery—Declarations of Woman—Evidence—Trials.*—Upon trial under an indictment for fornication and adultery, a statement made by the female defendant to the officer filling in a birth certificate of a two or three months old child, that the male defendant was its father, made within easy hearing distance within the room with him, which he did not deny, but left the room, is competent evidence against him; and if doubtful that he heard such statement, it is a question for the jury under instruction that they do not consider it unless satisfied that the male defendant heard it. *S. v. Walton,* 931.

13. *Criminal Law—Juvenile Delinquents—Statutes—Interpretation—Constitutional Law.*—Chapter 122, Laws 1915, entitled "An act to provide for the reclamation and training of juvenile delinquents," etc., applying to all children in the State under 18 years of age who come within the descriptive terms of the law as set forth in subsections *a* and *b* of section 1, is a police regulation in the specified instances when the well-being of the child and the interest of the public require that it should for a time be withdrawn from an environment that threatens, and cared for and trained and controlled with a view of making it a law-abiding citizen; and to this extent it is constitutional and valid. *S. v. Newell,* 933.

14. *Criminal Law—Juvenile Delinquents—Statutes—Courts—Jurisdiction.* The statute relating to the reclamation of juvenile "delinquents" classifies them as those who are violators of State and municipal laws and those who are not, and where such delinquents are to be dealt with as violators of the criminal law in a given case, and on that ground alone, the offense must first be established by some court having jurisdiction thereof, and the orders disposing of the child under the statute may only be justified and upheld as an incident to conviction in the proper court. *Ibid.*

15. *Same — Recorder's Courts — Jurisdiction — Statutes—Interpretation—Misdemeanors—Constitutional Law.*—The crime of larceny is a felony punishable in the State's Prison, Revisal, sec. 3506, and a recorder's court, not having jurisdiction thereof, may not make orders disposing of a juvenile "delinquent" under the statute providing for reclamation of such, whether the offense be termed therein a misdemeanor or otherwise, Const., Art. 1, secs. 12 and 13; and when such has been attempted, it will be disregarded upon conviction of this offense in the Superior Court having jurisdiction. *Ibid.*

16. *Criminal Law—Executive Pardon—Trials—Continuance—State's Witness—Court's Discretion.*—Under the provisions of our Constitution, a pardon by the Executive is allowed only after a conviction, and

CRIMINAL LAW—*Continued.*

where two defendants are separately indicted for participating in the same offense, and one of them has turned State's witness upon the trial of the other, and his case is thereafter called for trial, he may not insist, as a matter of right, that it be postponed to enable him to apply for executive clemency, and the request for continuance is referred to the discretion of the trial judge. *Ibid.*

17. *Criminal Law—Ill-feeling—Evidence.*—Upon trial for an assault upon a woman with intent, etc., evidence of difficulties between the families of the prosecutrix and defendant is too indefinite and is inadmissible in defendant's behalf, not tending to prove ill-feeling on the part of the prosecutrix. *S. v. Davidson*, 944.

18. *Criminal Law—Abandonment—Evidence of Wife—Fact of Marriage—Statutes.*—The wife is competent to prove the fact of marriage under an indictment against her husband for abandonment, Revisal, sec. 1635; and construing this section with section 1636, it is held that by allowing, under the latter section, the wife to prove such fact under indictments for bigamy, and in actions or proceedings for divorce on account of adultery, it was not the legislative intent that such testimony be excluded upon trial for abandonment, and that these two sections are not in conflict with each other. *S. v. Chester*, 946.

19. *Criminal Law—Principal and Agent—Embezzlement—Misapplication of Funds—Indictment—Statutes.*—A sales agent for automobiles was indicted for embezzling moneys he had received for his principal from a sale to a certain person, and it appeared that he had in fact paid his principal for this sale, but from funds he had received for his principal from a sale to another person, with the misappropriation of which the indictment did not specifically charge him: *Held*, the agent's direction that the funds received from the other machine be applied to payment of the machine named in the indictment was a wrongful misapplication of funds within the meaning of Revisal, sec. 3406, the facts being peculiarly within the knowledge of the agent and unknown to his principal, and the facts disclose that he had been guilty of two acts of embezzlement instead of one; and a conviction of the offense as charged was proper. *S. v. Klingman*, 947.

20. *Criminal Law—Indictment—Several Counts—General Verdict.*—A general verdict of guilty in a criminal action covers all counts in a bill of indictment, and if good as to any count, it will be upheld when the offenses charged are of the same grade and punishable alike. *Ibid.*

21. *Criminal Law—Criminal Negligence—Evidence—Homicide.*—In order to hold one a criminal for a negligent act of omission or commission, the act complained of must be a higher degree of negligence than is required to establish negligent default on a mere civil issue, and in order to a conviction of involuntary manslaughter, attributable to a negligent omission of duty, when engaged in a lawful act, it must be shown that a homicide was not improbable, under all the facts existent at the time and which should reasonably have an influence and effect on the person charged. *S. v. Tankersley*, 955.

CRIMINAL LAW—*Continued.*

22. *Same—Locomotive Engineer — Collision—Signals.*—Three northbound trains were ordered to pass at a certain station at night, the first to proceed to the station and stop on a parallel track, the second 1,200 feet south of the station, an irregular stopping place, and near a cross-over switch by means of which it could have taken an available siding, but which was permitted to remain on the main track for seven minutes until collided with by the third, a fast passenger train required to make its schedule, which it was then making. South of the location of the second train the track curved 2½ or 3 degrees for a distance of about 600 feet, and at its southern termination was an electric signal, with another such signal about 1,000 feet further south, both operated at the railroad yards beyond, and with which the prevailing conditions of the track should have been shown, but the first showed track was clear and the second that the main-line track switch was set for a side-track and that the engineer can proceed to the station "prepared to stop within the limits of his vision." There was nothing to indicate to the engineer of the third train that the second one was ahead on the main-line track, and that he should stop his train; and the employees on the second train failed to comply with the company's rules to place torpedoes behind them on the track or send a man back with a lantern to warn approaching trains. *Held*, the evidence was insufficient to convict the defendant engineer on the third train of manslaughter, in the absence of evidence that he was aware that a train was ahead of him on the track at the time, or that a homicide would reasonably be expected to follow from anything that he did or failed to do. *Ibid.*

23. *Criminal Law—Homicide — Nonsuit — Appeal and Error—Judgment—Verdict.*—Upon motion to nonsuit upon the evidence on a trial for a homicide, now allowed by statute, when it appears that the evidence is insufficient for conviction, the action will be dismissed, and, under the statute, the judgment thereof has the same force and effect as a verdict of not guilty. *Ibid.*

24. *Criminal Law—Seduction—Trials—Supporting Evidence—Statutes.*—Upon trial under an indictment for seduction under a breach of promise of marriage, Revisal, sec. 3354, requiring supporting evidence to make that of the prosecutrix competent upon the three elements of the crime, it is not necessary that the supporting evidence be sufficient, as substantive evidence, for conviction; and where the good character of the prosecutrix before the act has been testified to by other witnesses, the act itself admitted, and there is testimony that the defendant had paid he prosecurix exclusive and assiduous attention for years under circumstances evidencing that he was her accepted lover, her testimony as to the promise of marriage is sufficiently supported by the testimony of others to be competent within the meaning of the statue. *S. v. Moody*, 967.

25. *Criminal Law—Blackmailing—Circumsantial Evidence—Trials—Questions for Jury.*—Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount along the road at a certain place at a designated time and at a certain signal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand,

CRIMINAL LAW—*Continued.*

and the apprehension of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. Revisal, sec. 3428. *S. v. Frady*, 978.

CROSS ACTION. See Usury, 3.

CROSSINGS. See Negligence, 8; Railroads, 28, 29.

CURTESY. See Tenants by Curtesy, 1, 2, 3.

CUSTODY. See Habeas Corpus, 1.

DAMAGED SHIPMENTS. See Carriers of Goods, 33, 35.

DAMAGES. See Carriers of Goods, 1, 3, 4, 13, 29, 34, 35; Carriers of Passengers, 1, 8; Pleadings, 1; Telephone Companies, 1, 2, 3; Water and Water-courses, 1; Easements, 3; Limitation of Actions, 14; Deeds and Conveyances, 17; Railroads, 17, 20; Statutes, 2; Roads and Highways, 2, 4; Torts, 1, 3; Abatement, 1; Negligence, 11, 15; Contracts, 21, 24; Appeal and Error, 41; Principal and Agent, 8; Reference, 8; Telegraphs, 1, 3, 4.

1. *Damages, Compensatory—Definition.*—Compensatory damages, when allowable, are not restricted to the pecuniary loss caused by the defendant's wrong, but may embrace just compensation, in the opinion of the jury, for the injury, including actual loss in time and money, the physical inconvenience, mental suffering, and humiliation endured which could properly be considered as a reasonable and probable result of the wrong. *Hodges v. Hall*, 29.

2. *Damages, Punitive—Definition.*—Where punitive damages are allowable, they are awarded in addition to compensatory damages for a willful and malicious wrong done to the plaintiff, under circumstances of aggravation, rudeness, or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights. *Ibid.*

3. *Same—Trials—Questions for Jury.*—Where the evidence properly presents the question of punitive damages for a wrongful act done to the plaintiff, the award of such damages, and the amount thereof, under a proper charge, is for the jury, and can never be directed by the court as a matter of law. *Ibid.*

4. *Same — Instructions — Malice — Assault.*—An instruction to the jury which, in effect, tells them to award the plaintiff punitive damages should they find that the defendant assaulted him with malice or in a spirit of revenge, considering evidence of provocation by way of reducing the amount, is reversible error, being an instruction, as a matter of law, to award punitive damages if they found the assault was malicious, and not leaving it to the jury to determine. Ibid.

5. *Damages — Retention of Goods.* — Where the plaintiff has the lawful right of possession of property wrongfully withheld from him by the defendant claiming it as a fixture upon realty he has purchased at

DAMAGES—*Continued.*

a sale, he may recover in his action the property or its value, with damages for its deterioration and detention. *Dry-Kiln Co. v. Ellington*, 481.

DAMAGES MINIMIZED. See Carriers of Goods, 39.

DANGEROUS INSTRUMENTALITIES. See Master and Servant, 3.

DANGEROUS PLACES. See Railroads, 2, 3.

DANGEROUS WORK. See Principal and Agent, 5; Master and Servant, 8, 11.

DEADLY WEAPONS. See Homicide, 7, 13.

DEATH. See Abatement, 1.

DECLARATIONS. See Deeds and Conveyances, 6; Evidence, 2, 13; Principal and Agent, 4, 10; Appeal and Error, 17, 62; Criminal Law, 12.

DEEDS AND CONVEYANCES. See Instructions, 1, 3, 6; Limitation of Actions, 1, 10, 12, 28; Mortgages, 2, 9; Easements, 1; Railroads, 11, 18, 20; Timber Deeds, 1; Actions, 3; Trusts and Trustees, 1, 2; Equity, 2; Estates, 4; Wills, 30; Parties, 2.

1. *Deeds and Conveyances—Evidence—Adverse Posesssion—Boundaries.*—In an action to recover land and for trespass plaintiffs introduced a grant to show title out of the State, and relied upon adverse possession under color of a deed in their chain of title. The land was known as the "desert or H. tract," and the controversy depended upon the establishment of its eastern boundary. There was evidence in plaintiffs' behalf that the line had been run, and so regarded, in accordance with their contention, and they offered in evidence certain deeds to defendant and its immediate grantor, referring to maps of the land produced at the trial by defendant, upon notice, the descriptions in which tended to corroborate plaintiffs' contentions. *Held*, the deeds and maps were competent as evidence in plaintiffs' behalf; and especially as they had been introduced and relied on by the defendant in its action against another party materially involving the location of the same line. *Alsworth v. Cedar Works*, 17.

2. *Deeds and Conveyances—Evidence—Boundaries—Admissions Against Interest.*—Where the description of the closing calls in a deed leaves the boundary line indefinite or uncertain, the acts or conduct of a party, or an owner of the land, in his chain of title, against his interest, are properly received in evidence, when pertinent to the inquiry. *Ibid.*

3. *Same—Res Inter Alios Acta.*—The introduction of deeds to lands made to the defendant's grantor, which tend to show a boundary line in dispute as claimed by plaintiffs is not objectionable evidence as *res inter alios acta*. *Ibid.*

4. *Deeds and Conveyances—Color—Adverse Possession—Other Deeds.*—Where the plaintiff relies on adverse possession of the lands in controversy under a deed as color of title, the exclusion by the court of other deeds to the same land made by a sheriff is immaterial. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

5. *Deeds and Conveyances — Color — Adverse Possession — Outstanding Title.*—Where the plaintiff claims the land in dispute under color of title, and continuous adverse possession, from his grantor, his having obtained another or superior outstanding paper title will not of itself, and as a matter of law, be held to break the continuity of the possession. *Ibid.*

6. *Deeds and Conveyances—Declarations Against Interest—Evidence—Pleadings.*—Where a boundary line of lands is in controversy it is competent for the plaintiff to introduce a complaint filed by the defendant in an action against a stranger which describes the line in accordance with plaintiffs' contention in the present action, upon the same location of which the defendant's success in his action depended. *Ibid.*

7. *Deeds and Conveyances—Adverse Possession—Constructive Possession —Entire Tract.*—Where the plaintiff claims title to lands by adverse possession under color of title, and thereafter has subdivided the tract into smaller lots for convenience in selling the same, his possession of a part of the entire tract will be deemed to extend to the outer boundaries of his deed, when the controversy is not between the plaintiff and purchasers of the lots subdivided, but between him and a claimant of the entire tract. *Ibid.*

8. *Deeds and Conveyances— Evidence— Surveyor's Notes.*— Where the plaintiff, in his action to recover lands, relied upon a grant from the State as sufficient paper as well as color of title, the notes of a surveyor, since deceased, made by him while on the land surveying it for the purpose of taking out the grant, are competent evidence when relevant to the question of the correct location of a boundary line in dispute between the parties to the action. *Ray v. Castle*, where the surveyor's notes were not shown to have been "original and contemporaneous," cited and distinguished. *Stewart v. Stephenson*, 81.

9. *Deeds and Conveyances—Fraud — False Representations — Evidence—Values.*—Where a deed is sought to be impeached on the ground that it had been procured by false and fraudulent representations made to the purchaser of the land, that it had been sold to another party at a profit, and that the purchaser would immediately make a profit from the transaction, evidence that an unaccepted bid had theretofore been made at a much less sum at a foreclosure sale under a mortgage is not material, and its exclusion by the trial court is not erroneous. *Poe v. Smith*, 67.

10. *Deeds and Conveyances — Fraud — Burden of Proof — Correction.* — Where a deed is sought to be set aside for fraud in its procurement, the burden of proof is not on the plaintiff to show the fraud by clear, strong, and convicing proof, as where a deed is sought to be corrected or reformed, but only by the preponderance of the evidence. *Ibid.*

11. *Deeds and Conveyances—Contracts—Pleadings—Statute of Frauds.*— Where the plaintiff alleges that the defendant induced him to purchase a tract of land for $5,500 by false and fraudulent representations that he had sold it to another for $7,000, and would repay him $6,100 in this deal, and that he is able, ready, and willing to comply with his contract to convey the land upon receiving the purchase

DEEDS AND CONVEYANCES—*Continued.*

price, $6,100, agreed upon, and demands a recovery thereof: *Held*, the action is upon the contract to convey the land, and not for the profits thereof, and the contract is governed by the statute of frauds, requiring that the contract be in writing, etc. *Brown v. Hobbs*, 147 N. C., 73, cited and distinguished. *Ibid.*

12. *Deeds and Conveyances—Delivery—Intent—Control of Grantor—Presumptions—Burden of Proof.*—An instruction as to the valid delivery of a deed, that should the jury find that the grantor intended to part with the deed to his wife, the grantee, under the evidence in this case, and lose legal control over it, he had no right to take it back, and that upon its registration, whether before or after the grantor's death, the burden shifted to the other side to rebut the presumption of a valid delivery, is held to be a correct charge. *Rogers v. Jones*, 156.

13. *Deeds and Conveyances—Probate—Statutes—Constitutional Law.*—Revisal, sec. 952, providing a method and form for the execution of a deed by husband and wife is constitutional and valid. *Graves v. Johnson*, 176.

14. *Same—Husband and Wife—Husband's Acknowledgment — Wife — Separate Examination—Probate.*—A deed from a husband and wife to the former's land must be executed in the form and according to the method prescribed by Revisal, sec. 592, and where a mortgage of the husband's lands has been acknowledged and properly probated as to the wife, with her separate examination taken in the statutory form, it is not sufficient to pass any of her interest or estate therein unless the acknowledgment thereof of her husband has also been duly taken and the deed regularly probated as to both in accordance with the statute. *Ibid.*

15. *Deeds and Conveyances—Calls—Natural Boundaries—Stone Markings—Evidence—Questions for Jury—Trials.*—While a stone marked and securely embedded in the ground for the purpose of a survey and deed to lands is not strictly regarded as a natural boundary, it is an artificial monument of boundary, and when identified and properly placed may be controlling against calls of lesser dignity; and where under such conditions and for such purposes a stone marked with the grantee's initials has been securely placed as at the end of a call, "to a point beyond a 4-mile post to a stake marked 'S. N.,'" but has been removed, it is for the jury to determine, upon competent evidence, its former location with reference to the call in the deed, and, when so located, it will control the distance stated in the conveyance. *Nelson v. Lineker*, 280.

16. *Deeds and Conveyances—Timber—Realty—Title.*—A valid conveyance of trees standing and growing upon lands can be made for the purpose of cutting and removing them therefrom within a fixed time; and until so cut the trees are to be considered realty. The title to those not cut within the time fixed by the deed reverts to the grantor, and does not pass by the deed. *Williams v. Lumber Co.*, 299.

17. *Same — Grantee — Description — Trespass—Damages—Participation—Waiver.*—Where a purchaser has acquired by deed the timber of a certain size, standing upon lands which he may cut and remove in a

DEEDS AND CONVEYANCES—*Continued.*

stated period of time, and has his deeds recorded, and thereafter conveys to another the timber owned by him on the lands, and refers for description to his own deeds, his grantee can acquire no further right to the trees than he has acquired under his own deed; and he is not responsible for damages caused by his grantee in entering upon the lands and cutting trees of less size than those conveyed, etc., unless he has in some way participated therein or knowingly received a part of the profits from the trespass, or in some recognized way ratified the act. *Ibid.*

18. *Deeds and Conveyances—Timber—Consideration — Payment — Future Ascertainment.*—It is not necessary to a valid conveyance of timber standing or growing upon lands that a certain sum be fixed for the total purchase price to be paid, or that it be paid in whole or in part at the time of the conveyance, or notes for the purchase price should then be given; for it is sufficient if the price can readily and definitely be ascertained in the future by some fixed statement, as where the consideration for the deed is specified to be "$2 per thousand feet, log measure." *Ibid.*

19. *Deeds and Conveyances — Timber — Second Conveyances — Trespass—Trials—Instructions—Ratification.*—Where the purchaser of standing timber upon lands, who has acquired the same under the usual form of deed, requiring it to be cut and removed within a stated period, specifying the size, has conveyed his right therein to another, and he is sued for damages for trespass committed by his grantee in going upon the lands and cutting and removing the timber of less size than that conveyed, it is reversible error for the trial judge to charge the jury that if the defendant's grantee, through its agents and servants, committed the trespass alleged, and paid the defendant rent for the undersized trees, the defendant would be liable, there being no evidence or contention that the defendant received any part of the money for the undersized trees knowingly or had participated in the acts of trespass, or had given some authority apart from the deed for the unauthorized act, or had ratified it. *Ibid.*

20. *Deeds and Conveyances—Interpretation—Vague Description—Habendum—General Description.*—Words descriptive of lands sought to be conveyed in a deed are regarded as inserted for a purpose, and should be given a meaning that would aid the description; and where the writing manifests an intent to convey a tract of certain acreage, and the specific description in the conveying part of the instrument is too indefinite, it will not control a general description, following the habendum, which refers to another and recorded deed, from which the lands may definitely be ascertained. *Quelch v. Futch*, 316.

21. *Deeds and Conveyances—Consideration—Parol Evidence.*—While parol testimony is competent to contradict the consideration recited in a conveyance of land, it may not change, alter, or contradict the conveyance itself, in the absence of fraud, mistake, or undue influence. *Walters v. Walters*, 328.

22. *Deeds and Conveyances—Written Contracts—Mortgages—Foreclosure—Date of Payment—Interpretation.*—Where a contract for the sale of lands reserves title in the vendor and provides for the payment

DEEDS AND CONVEYANCES—*Continued.*

of an annual sum of money, with accrued interest on the entire debt, for a period of ten years, and obligates to convey the property on tender of payment within six months thereafter, etc., the contract will be specifically enforced as made, without right of the vendor to foreclose within the period of ten years and six months, though he may recover judgments for the specified payments within that time as they fall due, and enforce payment out of the purchaser's other property, subject to his exemptions. *Walker v. Burrell*, 386.

23. *Same—Intermediate Payments—Possession—Judgments—Exemptions.*—Where under the vendor's contract for the sale of lands he may not foreclose for a long period of time, but has payments becoming due, from time to time, in the meanwhile, upon default of these intermediate payments, he may obtain judgment for them, and enter into the present possession of the lands when reasonably required for his protection and the proper enforcement of his claim, and conserve the same by appropriate remedies, unless the purchaser presently pays the amount of his obligations already matured and enters into a sufficient and satisfactory bond to pay his future obligations as they fall due under the terms of the contract. *Ibid.*

24. *Deeds and Conveyances—Fraud—Evidence—Trials.*—Evidence in this case is held sufficient to set aside a deed for fraud in its procurement which tends to show that the defendant induced the plaintiff to exchange lots in the city wherein he resided and conducted a small business for timbered lands situated 13 miles therefrom in the country, with which and the value of such lands he was ignorant, by the defendant's misrepresentations as to its value, upon which he relied, without looking at the land; that defendant was conversant with the values of timbered lands, and with that of the lands in question, and thereby procured the plaintiff's land at a grossly inadequate price. *Miller v. Mateer*, 401.

25. *Same—Misrepresentations.*—Where there is evidence of false representations sufficient to set aside a deed for fraud in its procurement, among other things, that the defendant paid $19,000 for the land, it is competent to introduce in evidence the deed to the defendant, reciting a consideration of $3,000, and also the value of the adjoining lands, to contradict the defendant's representation thereof made to plaintiff, who was unfamiliar therewith, upon the question of fraud in inducing plaintiff to make the trade. *Ibid.*

26. *Same—Recited Consideration.*—The consideration recited in a conveyance of land is not contractual or an estoppel between the parties, and may be shown in evidence when relevant to the inquiry as to whether the grantee in the deed made fraudulent representations thereof in inducing another to purchase the lands. *Ibid.*

27. *Deeds and Conveyances—Fraud—Misrepresentations—Caveat Emptor.* One who knowingly makes false and material representations in procuring a deed to lands, and relied upon by the other party, and which induced him to make the transaction, cannot escape responsibility upon the ground that the other party was negligent in relying upon them, if in making the representations he resorted to conduct which was reasonably calculated to induce the other party to forego making the inquiry. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

28. *Deeds and Conveyances—Correction—Fraud—Burden of Proof—Quantum of Proof—Instructions—Appeal and Error.*—A party seeking to correct a written deed by reason of the mutual mistake of the parties or a mistake induced by the fraud of the other, must establish his case by clear, strong, and convincing proof; but to set aside a deed for fraud, undue influence, and the like, the proof required is by the greater weight of evidence, as in ordinary civil issues; and where a suit is brought to reform a deed, absolute in terms, to show that the parties intended it for a mortgage of lands, upon separate issues both as to its correction and procurement by fraud or undue influence, a charge by the court applying to both these issues, that the plaintiff was only required to establish his position by the greater weight of the evidence, is reversible error to the defendant's prejudice. *Johnson v. Johnson*, 531.

29. *Deeds and Conveyances—Heirs of the Body—Statutes—Fee Simple—Intent.*—A conveyance of land to A. and "her heirs by the body of R. (her husband) and assigns forever" was a fee at common law, but under our statute, Revisal, sec. 1578, it is converted into a fee simple absolute unaffected by the fact that there were children of the marriage living at the time of the execution of the conveyance; and in this case, construing the instrument as a whole, it evidences the intent of the grantor that it should be so interpreted. *Revis v. Murphy*, 579.

30. *Deeds and Conveyances — Unrecorded Deeds — Color of Title — Purchasers for Value.*—Where both parties to an action to recover lands claim by deeds from an heir at law of the deceased owner, one of which had been recorded and the other not, the unrecorded deed is color of title when the grantee in the recorded one does not show that he was a purchaser for value. *Kluttz v. Kluttz*, 622.

31. *Deeds and Conveyances—Unrecorded Deeds—Color of Title—Possession—Trials—Evidence—Questions for Jury—Dower.*—Where in an action to recover lands the plaintiff claims under a recorded deed from the heir at law of a deceased owner, and defendant under an unrecorded deed from him as color of title; and there is evidence that the defendant had married the widow of the deceased owner, entitled to dower in the lands, and in that capacity had lived thereon and cultivated them; and the evidence is conflicting as to whether his possession was under his deed or by virtue of his wife's right of dower, and as to his unequivocal act showing that he claimed in his own right: *Held*, the question of the sufficiency of his possession was for the jury, and the fact that he permitted the grantee under the registered deed to remain in possession for twelve or fourteen years without objection, and that his deed remained unregistered for twenty years, were circumstances to be considered by the jury as tending to prove that he did not claim ownership thereunder. *Ibid.*

32. *Deeds and Conveyances—Possession and Support—Conditions Subsequent—Waiver.*—A conveyance of land with provision that the grantors should retain possession thereof during their natural lives and that the grantees should support them for that period of time operates by way of condition subsequent, and the right of forfeiture by

DEEDS AND CONVEYANCES—*Continued.*

reason of the condition to support having been broken, until entry or proper claim made, is not regarded as an estate in the grantors, but only a right of action to be enforced by proper procedure, and may be destroyed or waived by the persons entitled to performance of the condition, either by formal deed of release or by the conduct of the grantors. *Huntley v. McBrayer*, 642.

33. *Same—Equity—Limitation of Actions.*—A husband and wife conveyed his lands to two of their sons upon condition subsequent that they retain possession and receive support from the grantees for life. The husband died, and the wife joined one of the grantees in a conveyance of the lands in fee simple with warranty and covenants of title to another, from whom the defendant purchased. In a suit by the heirs at law of the husband to recover the lands upon allegation that grantees failed in the performance of the condition subsequent for the support of the wife, who is still living, it is *Held*, equity will interfere to prevent an insistence on such claim; and the deed for full value, with covenants assuring title, will operate as a release of the wife's claim to support and relieve the estate of liability to forfeiture on that account. The statute of limitations does not apply to the facts of this case. *Ibid.*

34. *Deeds and Conveyances—Interpretation—Estates—Contingent Interests—Vested Interests—Death of Life Tenant.*—A conveyance of land to the wife for life, with remainder over after the expiration of her life estate to the children of her present marriage, now or that are hereafter born thereof, and the lawful descendants of said children, etc., "that are living at her death," does not convey a vested interest to the remaindermen at the time of its execution; but a contingent one, to be vested in such as are alive at the designated time and then fill the description. *James v. Hooker*, 780.

35. *Deeds and Conveyances — Estates — Contingent Interests—"Descendants"—Descent and Distribution.*—A life estate to the wife in lands with remainder, to take effect at her death, to the children of the marriage, "and the lawful descendants of said children," etc.: *Held*, the words "descendants of said children," refer, nothing else appearing, to those upon whom the law would cast the property by descent, including the lineal issue of the deceased life tenant, and not her grandchildren, whose parents were alive at the time of the falling in of her estate. *Ibid.*

36. *Deeds and Conveyances—Estates—Contingent Interests—Estoppel—Rebutter.*—Where a conveyance of lands is upon contingent remainder to the children of the life tenant living at the time of her death, and theretofore some of them have attempted to convey their interests by deeds, as vested, and thereafter fulfill the conditions imposed by being alive at her death, the happening of the contingency passes the estate of the grantors by way of estoppel and rebutter. *Ibid.*

DEFAULT. See Mortgages, 4.

DEFEASIBLE FEE. See Wills, 5, 13.

DEFENSES. See Carriers of Goods, 26; Judgments, 20; Criminal Law, 5.

DEFINITION. See Damages, 1, 2; Vendor and Purchaser, 5.

DELAY. See Carriers of Goods, 1.

DELIVERY. See Insurance, 4; Deeds and Conveyances, 12.

DEMAND. See Carriers of Goods, 6.

DEMURRAGE. See Carriers of Goods, 11; Courts, 1.

DEMURRER. See Bankruptcy, 3; Taxation, 7; Appeal and Error, 31; Contracts, 19; Pleadings, 6, 7, 8; Carriers of Passengers, 10; Malicious Prosecution, 1.

DEPOSITIONS. See Evidence, 14.

DEPOSITS. See Banks and Banking, 4.

DESCENT AND DISTRIBUTION. See Judgments, 23; Mortgages, 9; Deeds and Conveyances, 35.

Descent and Distribution—Personalty—Collateral Representation—Statutes.—Our present statute of distributions, Revisal, sec. 132, Rule 3, changes the former rule under the Revised Code of 1854 so as to allow representation among collateral relations as to personalty to the same extent as in the descent of real property, and where the aunts and uncles of the deceased must take, the children of those who have died may take the part of the personalty their parents would have taken if living. *Moore v. Rankin*, 599.

DESCRIPTION. See Deeds and Conveyances, 17; Conversion, 1.

DEVISES. See Wills, 17.

DIRECTORS. See Partnership, 1.

DIRECTORS' LIABILITY. See Corporations, 5.

DISABILITY. See Contracts, 12; Insurance, 22.

DISCHARGE. See Bankruptcy, 5.

DISCRETION. See Education, 1; Courts, 11, 12, 13.

DISCRETIONARY POWERS. See Removal of Causes, 2.

DISCRIMINATION. See Municipal Corporations, 6.

DISQUALIFICATIONS. See Taxation, 11.

DISTRIBUTION. See Estates, 5; Mechanics' Liens, 5.

DIVISION. See Bankruptcy, 6.

DOCKETED. See Judgments, 13.

DONEES OF POWER. See Tenants in Common, 3.

DORMANT JUDGMENTS. See Judgments, 14.

DOWER. See Deeds and Conveyances, 31; Mortgages, 9.

DRAINAGE COMMISSIONERS. See Water and Water-courses, 2.

DRAINAGE DISTRICTS. See Water and Water-courses, 1.

1. *Drainage Districts—Constitutional Law—Assessments—Irregularities —Collateral Attack.*—An assessment made under the provisions of our drainage laws is constitutional and valid, and when it does not appear to be void on its face, it may not be collaterally attacked by a defendant owner of lands embraced in the district, in an action to enforce its payment. *Canal Co. v. Whitley*, 100.

2. *Drainage Districts—Appointment of Assessors—Report—Confirmation.* It is immaterial whether the owner of lands in a drainage district, formed under our statutes had notice of meeting at which a committee had been appointed to assess the lands in the district and determine the amount of each assessment, when the assessment has been accordingly made, and duly ratified and confirmed at a subsequent meeting regularly called and held in accordance with the statute, of which he had notice. *Ibid.*

3. *Drainage Districts—Assessments—Proceedings — Irregularities — Presumptions—Procedure.*—Objection to an irregularity in making an assessment against the owners of land in a statutory drainage district, which does not avoid the assessment on its face, should be made to the properly constituted authorities of the corporation, and its collection will not be enjoined or set aside on account of defects or omissions of statutory requirements which do not affect the substantial justice of the assessment itself or render it void *ab initio*, the presumption being in favor of the regularity of the proceedings. *Ibid.*

4. *Drainage Districts — Assessments — Liens—Courts—Jurisdiction.*—An assessment made upon owners of land within a statutory drainage district constitutes a lien upon the lands therein and is enforcible by proceedings *in rem* in a court having equitable jurisdiction, in the absence of other provision of the statute; and judgment against the person of the defendant may not be had, as in actions arising *ex contractu;* therefore, a justice of the peace has no jurisdiction over actions to enforce the payment of such assessments, and they will be dismissed upon motion to nonsuit when brought in that court. *Ibid.*

5. *Drainage Districts—Assessments — Levy — Homestead.*—An owner of lands in a statutory drainage district may not claim his homestead exemption therein against an assessment levied thereon in accordance with the provisions of the statute. *Ibid.*

6. *Drainage Districts—Assessments—Docketing—Enforcement — Levy — Courts—Supervision.*—Assessments upon lands within a drainage district made in accordance with the statute become liens on the lands when properly certified by the officers of the corporation and docketed in the office of the Superior Court of the proper county; and executions may issue directing that such lands be sold to pay the assessments and the costs. Laws 1909, sec. 21; Pell's Revisal, secs. 3996, 4003. *Semble*, the courts will review by writ of *certiorari* the action of the drainage corporation in making illegal assessments and enjoin such assessments that are absolutely void upon their face. *Ibid.*

DUE PROCESS. See Statutes, 2; Roads and Highways, 2.

DUPLICATE. See Appeal and Error, 48.

DUTY OF TRUSTEE. See Bankruptcy, 1.

EASEMENTS. See Railroads, 6, 20; Telegraphs, 1, 2, 3, 4; Limitation of Actions, 26.

1. *Easements—Appurtenant—Railroads—Deeds and Conveyances—Contracts—Interpretation.*—Where the owner of lands grants to other private and adjoining owners the privilege to cross his lands with one railroad siding at a certain location, "not to be used by or for them or their tenants or any other owner of said lot, after thirteen years from date"; that the privilege was given to reach the grantee's lot with a side-track, and they were not to place cars on the grantor's lot: *Held*, an easement in gross did not pass by the conveyance, but a right of way appurtenant to the business lot of the grantees and the tenants and occupants under them, and thereunder a railroad company cannot acquire from the private grantees a right of use of the easement for the general public, or extend the roadway to points beyond to handle the business of its other patrons or customers. *Hales v. R. R.*, 104.

2. *Same—Injunction.*—Where the owner of lands has granted the privilege of a spur-track across his lands appurtenant to the lands of adjoining private owners, and the railroad company has attempted to acquire this privilege and extend it to other of its customers in the town: *Held*, the right to the extended easement may be acquired by the excessive user, and the trespass being a continuing one, may be enjoined, on the ground that damages at law are inadequate, and to prevent a multiplicity of suits and vexatious litigation. *Jones v. Lassiter*, 169 N. C., 250, cited and distinguished. *Ibid.*

3. *Same—Damages.*—Where a railroad company is attempting an excessive use of a spur-track permitted over the lands of the owner appurtenant to the private owners of adjoining lands, under their contract alone, and had not entered upon the lands under its statutory right of condemnation, the principle that the owner granting the privilege has only his right of action for damages arising from the excessive user has no application. *Ibid.*

4. *Same—Statutes.*—Section 1097 of the Revisal, subsec. 5, authorizing railroad companies, under certain conditions, to establish side-tracks for the accommodation of private industries, has no application where it is shown that the railroad company has acquired, from a private owner, the right to a spur-track over the lands of an adjoining owner, and appurtenant to his own land, and is using it in connection with its other patrons, not contemplated by the grant under which it claims the right. *Ibid.*

EDUCATION. See Constitutional Laws, 3.

Education—School Districts—Schools Within Three Miles—Old Sites—Commissioners' Discretion—Courts—Statutes.—Revisal, sec. 4129, requiring the county board of education to divide the townships into convenient school districts, as compact in form as practicable, having regard for the convenience and necessities of each race, no new

EDUCATION—*Continued.*

school to be established in any township within less than 3 miles by the nearest route of some other school already established, does not apply to the rebuilding of schoolhouses on old sites erected before the passage of the act, or interfere with the sound discretion of the commissioners in that respect, and in this case the exercise of this discretion in rebuilding a school a half mile from the old site, and within three miles of the primary department of another school more recently established, will not be interefered with. *Pemberton v. Board of Education*, 552.

EJECTION. See Carriers of Passengers, 1.

EJECTIONS FROM TRAINS. See Carriers of Passengers, 5, 7, 8.

ELECTIONS. See Mandamus, 5; Office, 1.

1. *Elections—Primary Laws—County Boards—Second Primary—Written Notice—Statutes.*—Applying the rule of construction that every part of a statute should be given effect when possible, it is *Held*, that section 24 of the State Primary Law, ch. 101, Laws of 1915, providing, among other things, that the successful candidates for certain offices, in this case for member of General Assembly, shall receive a majority of the votes cast, when construed in connection with the proviso of the same section, that the one receiving the next highest vote, under a majority, shall file a request, in writing, with the appropriate board of elections for a second primary, entitles the one receiving the highest number of votes to be the candidate of the party to the office upon the failure of the one receiving the next highest vote to comply with the provision within the time stated, *i. e.*, within five days after the result of the primary has been officially declared. *Johnson v. Board of Elections*, 162.

2. *Same—Results Declared.*—Laws 1915, ch. 101, sec. 21½ requires that the county board of elections shall tabulate the returns made by the judges and registrars, etc., so as to show the total number of votes cast for each candidate, etc., and with reference to county officers, when thus compiled on blanks, the returns shall be made out in duplicate, one copy filed with the clerk of the Superior Court, one retained by the board, which shall forthwith declare the result: *Held*, when this has been properly done, and the result posted at the courthouse door of the county, the result of the election is sufficiently declared, and the contestant receiving the next highest vote, less than a majority, must file his written request for a second primary within five days thereafter, in accordance with the proviso of section 24 of the State Primary law. *Ibid.*

3. *Elections—Primary Laws—County Boards—Statutory Rights—Courts—Jurisdiction.*—While ordinarily courts may not control political parties in the selection of their candidates for office, this principle does not apply where the Legislature, in the exercise of its powers, has taken control of the subject, and enacted a statute conferring on successful contestants in a legalized primary certain specified and clearly defined legal rights, and enjoining upon an official board ministerial duties reasonably designed to make these rights effective. *Ibid.*

ELECTIONS—*Continued.*

4. *Same—Mandamus—Board of Elections—Ministerial Duties.*—Where a candidate for membership in the General Assembly who has received the next highest vote in a legalized primary, but less than a majority of the votes cast, has failed to comply with the proviso of section 24, chapter 101, Laws 1915, in giving the written notice to the board of elections for a second primary within the time prescribed, and after duly declaring the result of the election (sec. 21½), the board then orders the second primary, the ministerial duty of recognizing the one receiving the highest vote as the candidate and putting his name on the ticket as such will be enforced by mandamus. *Ibid.*

5. *Elections—Primary Laws—County Boards—Ministerial Duties—Offices—Title—Quo Warranto.—Quo warranto* lies when the office in question is presently filled by an incumbent *de jure* or *de facto*, and not where the object of the proceeding is to compel the performance by a board of elections of its ministerial duty of recognizing, and properly putting upon the ticket, one who under the provisions of the primary law is entitled to be placed thereon as the rightful nominee of a party. *Ibid.*

6. *Elections—Primary Laws—County Board of Elections—Advice from State Board of Elections.*—It appearing in these proceedings that the county board of elections has wrongfully denied the right of the plaintiff, under our primary law, to have his name placed upon the ticket as the choice of his party: *Held*, the fact that it acted therein under the advice of the State Board of Elections is without controlling significance. *Ibid.*

7. *Elections—Suffrage—Electors — Special Tax — Constitutional Law.*—Where the validity of a levy for a special school tax depends upon whether certain persons who had voted in favor thereof had paid their taxes for the previous year according to the requirements of Article VI, secs. 1 and 4, and Article V, sec. 1, of the Constitution, it is *Held*, that the constitutional requirements must be met in order that they may exercise the privilege of voting, though they are permitted to wait until May 1st to pay them, if they so choose. *Ingram v. Johnson*, 676.

8. *Elections—Courts—Board of Canvassers—Judicial Duties—Congressmen — Constitutional Law.* — The county board of canvassers are vested with statutory authority to judicially pass upon all facts relative to the election and to judicially determine and declare the the results, etc., Revisal, sec. 4350; and with the exercise of this discretion the courts will not interfere, except by *quo warranto*, which is prohibited by the Federal Constitution relating to the election of Congressmen. Art. I, sec. 5. *Britt v. Board of Canvassers*, 797.

9. *Elections—Board of Canvassers—Supplemental Returns—Invalidity—Reconvening Board.*—Additional or supplemental returns made up by the county board of canvassers after the registrar and pollholders had fully performed their duties and adjourned, and without calling them together for reconsideration as a body, should not be given effect by the courts. *Ibid.*

ELECTORS. See Elections, 7; Taxation, 11.

EMBEZZLEMENT. See Bankruptcy, 1, 3; Corporations, 2; Criminal Law, 19.

EMINENT DOMAIN. See Roads and Highways, 1.

EMPLOYEES. See Principal and Agent, 7.

EMPLOYER AND EMPLOYEE. See Negligence, 13; Master and Servant, 8.

ENDORSEMENT. See Bills and Notes, 8.

ENGINEERS. See Railroads, 25; Criminal Law, 22.

ENTIRETIES. See Estates, 1; Mortgages, 8.

ENTRIES. See Appeal and Error, 31.

EQUALIZATION. See Taxation, 6.

EQUITY. See Contracts, 4; Deeds and Conveyances, 33; Mortgages, 9; Mandamus, 4; Actions, 5; Executors and Administrators, 1.

1. *Equity—Judgments—Levy—Cloud on Title.*—The sale of lands under an execution upon a judgment will be restrained if the deed to be made by an officer selling the land will not pass title, and will only throw a cloud upon the title of the plaintiff. *Harris v. Distributing Co.*, 14.

2. *Equity—Deeds and Conveyances—Fraud — Admissions — Credits—Procedure.*—In an action by A. and B. to set aside a conveyance by A. to defendant for fraud, it appears that the consideration for the deed was an exchange of town lots for country lands, in which the jury found fraud, and by admission A. was the potential owner of B.'s lot, and this lot was a part of the consideration to A. in making the transaction, which, under the verdict of the jury, was set aside for fraud: *Held*, it was not necessary to the adjustment of the equities in the case by the court that fraud be found in the procurement of B.'s deed, which was not attacked on that ground; and the jury having found that B. was not entitled to recover, and the value of B.'s lot and the price plaintiff had paid thereon being admitted, a judgment for this difference in A.'s favor was proper, less certain credits due to defendant; which, upon proper notice in the Superior Court, will be made a charge upon the defendant's land; and there being no findings as to the amount of defendant's credits allowed in the judgment, leave is given him to give notice in the Superior Court to have the true account ascertained upon evidence. *Miller v. Mateer*, 401.

3. *Equity—Marshaling—Mortgages — Contracts — Consideration — Claim and Delivery.*—D. held an unrecorded chattel mortgage, subject to a prior registered one which included the same property and, in addition, a horse. Defendant subsequently purchased the horse and swapped it with plaintiff for a mare. D. acquired the first mortgage, and sold the property, inclusive of the horse, under the mortgages. Recognizing the doctrine of marshaling of assets, had the horse remained in the mortgagor's possession it is held that defendant should have invoked it prior to the sale, when he was present and made no objection, and may not do so for the first time in plaintiff's action of claim and delivery to recover his mare for a failure of consider-

EQUITY—*Continued.*

ation in the transaction, and the plaintiff is entitled to the possession thereof. *Harrington v. Furr*, 610.

4. *Equity—Marshaling—Right of Party.*—The equity of marshaling is not a lien but a right to be administered, and is not determined solely by the time the succesive securities were taken, but at the time it is invoked. *Ibid.*

ESTATES. See Tenants in Common, 4; Wills, 5; Judgments, 7; Contracts, 12; Deeds and Conveyances, 34, 35, 36.

1. *Estates—Entireties—Husband and Wife—Execution.*—Where an estate is held by a husband and wife by entireties, it is not subject to execution for the debts of either of them as long as they both shall live. *Harris v. Distributing Co.*, 14.

2. *Same—Trusts—Power of Appointment.*—The owner of lands conveyed them to his wife, and thereafter they both conveyed to a trustee to hold the same for their only use and benefit during their natural lives and, upon the death of either, for the sole benefit of the other during his or her life, unless the husband disposed thereof by will; and at the request of both grantors the trustee should convey to another person designated by them. *Held*, the lands in the hands of the trustee were held by entireties, and not subject to levy under a judgment against the husband, and his power of appointment did not enlarge his estate or alter the result. *Ibid.*

3. *Estates—Life Tenants—Waste—Cutting Timber—Improvements.*—The cutting of standing timber on lands used for erecting buildings and making other improvements thereon, or such as had reached its highest development and begun to deteriorate, and similar acts which tend to increase rather than diminish the value of the inheritance, are not acts of waste when done by the life tenant, that will deprive him of his estate, under the modern doctrine now obtaining here. *Fleming v. Sexton*, 250.

4. *Estates — Contingent Remainders — Vesting of Interests — Donor's Death—Trusts—Deeds and Conveyances—Interpretation.*—The general rule, applying to deeds in trust as well as wills, that when a testator, after a prior limitation of his property, makes, in present terms, a disposition of the same in remainder to his own heirs or right heirs, these heirs, nothing else appearing, are to be ascertained and determined on as of the time of his death, favored by the courts because it has the tendency to hasten the time when the ulterior limitation takes on a transmissible quality, is not a rule of substantive law which the courts are imperatively required to follow, but a rule of interpretation adopted to ascertain correctly the intent of the donor, and may be departed from where a different meaning is disclosed from a proper perusal of the entire instrument. *Jenkins v Lambeth*, 466.

5. *Same—Right Heirs—Distribution.*—The donor conveyed, in 1875, certain of his lands in trust for the sole and separate use of his wife for life, upon her death for the use and benefit of their children or the representative thereof living at the death of the donor; but should the wife die before the donor, her husband, without leaving

ESTATES—*Continued.*

such children or representatives thereof, then the trustee to convey the lands to the donor, his heirs and assigns, in fee; and should the wife die after her husband, the donor, leaving no such child or representative, then the trustee shall convey the lands in fee to the right heirs of the donor, whosoever they may be, their heirs and assigns. The donor predeceased his wife, who is still living without child or representative thereof, and she and the "right heirs" of the donor are the only persons interested. Construing the entire instrument as of its date to effectuate the evident intent of the donor, it is *Held*, the distribution of the estate was postponed until the death of the wife, the life tenant at which time only can the designated heirs or true owners be ascertained and determined. *Ibid.*

6. *Estates Tail—Statutes—Fee Simple.*—An estate granted to B. "and to the heirs of her own body," etc., "it being expressly understood that the hereinafter described premises are to descend at her demise to the heirs of her body," etc., with tenendum, "to have and to hold the above particularly described premises to the said party of the second part and to her heirs forever," conveys an estate in fee tail to B. which our statute converts into a fee simple absolute. Revisal, sec. 1578. *Blake v. Shields*, 628.

7. *Estates—Remainders—Restraint on Alienation—Wills—Interpretation.* A devise of a life estate to the wife of the testator with remainder to be divided among their children in designated portions, etc., without "power to sell or in any way encumber any part or parcel of the land," and if such should be attempted, then to "his or her lawful heirs": *Held*, a devise to the remaindermen in fee, subject to the life estate. The attempted restraint upon alienation is void. *Short v. Gurley*, 866.

ESTOPPEL. See Tenants in Common, 1; Judgments, 2, 4, 21, 24; Actions, 2; Carriers of Goods, 25; Partition, 1, 2; Pleadings, 7; Deeds and Conveyances, 36.

Estoppel—Pleas in Bar—Trials—Questions of Law—Jury.—Where a plea in bar, bad upon its face, is interposed by an administratrix in an action against her requiring an accounting in which the only question contested is a matter of law upon an undisputed fact, a trial by jury thereof is properly denied. *Marler v. Golden*, 823.

EVIDENCE. See Carriers of Goods, 1, 17, 36, 41; Contracts, 1, 4, 5, 6, 24, 26, 27; Deeds and Conveyances, 1, 2, 6, 8, 9, 15, 24; Master and Servant, 1, 5, 11; Mortgages, 2, 5; Negligence, 1, 2, 6, 8, 14, 15; Principal and and Agent, 3, 4, 6, 7, 9; Railroads, 2, 7, 9, 12, 14, 15, 21, 24, 27, 28, 29; Wills, 1, 2, 3, 18, 19, 20, 23, 24, 26; Insurance, 5, 6, 8, 11; Limitation of Actions, 5, 8, 13, 28; Verdicts, 2; Judgments, 3; Appeal and Error, 17, 27, 33, 37, 38, 41, 44, 60, 62, 65; Judicial Sales, 1; Reference, 2, 4, 6, 8, 10; Tenants by Curtesy, 1, 3; Carriers of Passengers, 3, 6, 10; Bills and Notes, 2, 4, 6, 7; Corporations, 3; Courts, 2, 11, 12; Vendor and Purchaser, 4; Release, 2, 3; Nonsuit, 1; Instructions, 8, 9, 19, 21; Attorney and Client, 5; Deeds and Conveyances, 31; Automobiles, 1; Commerce, 2; Sales, 2; Trials, 1, 3; Pleadings, 7; Executors and Administrators, 4, 5; Homicide, 2, 3, 4, 5, 6, 7, 10, 11, 12, 14, 16, 19; Criminal Law, 6, 7, 9, 12, 17, 18, 21, 24, 25; Indictment, 1; Witnesses, 1.

EVIDENCE—*Continued.*

1. *Evidence—Negligence—Sudden Peril—Rule of Prudent Man.*—Where the negligent act complained of in an action for damages for a personal injury has been done by the plaintiff's coemployee, under circumstance of peril to himself, the law requires of such employee that he exercise only that degree of care which a man of ordinary prudence would have exercised under the same circumstances, making proper allowance for his excitement, terror, or acts done for self-preservation. *Bloxham v. Lumber Co.*, 37.

2. *Evidence—Pleadings—Former Action—Parties—Declarations.*—Allegations made in the pleadings filed by a party in a former action are admissible in the present one as evidence of his declarations, though the parties are not the same, when they are material and otherwise competent. *Ibid.*

3. *Evidence—Letters—Trials—Questions for Jury.*—In this case it is held that a material and relevant statement made by the defendant was properly admitted in evidence, subject to contradiction by direct or circumstantial evidence. It was for the jury to determine, in the present state of the evidence, whether there had been any substantial change in the relations of some of the defendants to the property and the business in which the plaintiff was employed at the time of injury which relieved them from liability. *Ibid.*

4. *Evidence—Res Ipsa Loquitur.*—Where the plaintiff in his action to recover damages for a personal injury alleged to have been negligently inflicted on him by the defendant shows damages proximately resulting from the defendant's act, which act, with the exercise of due care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, under the doctrine of *res ipsa loquitur*, which requires the defendant to go forward with his proof or take the chances of an adverse verdict. *Dunn v. Lumber Co.*, 129.

5. *Same—Evidence.*—Where the plaintiff was employed at the defendant's mill, and was directed to operate the logs on the saw carriage, and there is evidence tending to show that while he was holding with both hands the lever to keep the log in place for the saw a part of the machinery, called a hammer-dog, fell upon the saw, breaking it into fragments, and caused the injury; that the saw and machinery operating it were not properly running; that a certain other piece of the machinery becoming loose could have jostled the hammer-dog so that it would fall with the effect stated, it is sufficient to raise the presumption of the defendant's negligence, under the doctrine of *res ipsa loquitur*, and take the case to the jury. *Ibid.*

6. *Same—Master and Servant—Instructions.*—Where the evidence permits, and the court has charged the jury, upon the doctrine of *res ipsa loquitur* arising in an action for damages, and has further instructed them that they must find that the defendant had not acted with reasonable care or had failed in its duty to inspect the machinery, and upon the entire evidence of both the plaintiff and defendant, the further instruction goes beyond the strict application of the doctrine in defendant's favor, of which it cannot complain. *Ibid.*

7. *Evidence—Principal and Agent—Insurance — Records — Corroborative Evidence.*—Where the agent of an insurance company has testified

EVIDENCE—*Continued.*

as to certain facts in connection with the delivery of a policy contract sued on, it is competent to introduce the record of the transaction made by him, in corroboration of his testimony. *Johnson v. Ins. Co.*, 142.

8. *Evidence—Impeaching—Substantive—Trials.*—Questions and answers of the defendant railroad company's witness in this case, asked on cross-examination, for the purpose of impeaching his testimony in the defendant's behalf, and showing his bias, are held competent for those purposes, though incompetent as substantive evidence. *Meares v. Lumber Co.*, 289.

9. *Evidence — Incorporation — Contracts* — Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. *Elevator Co. v. Hotel Co.*, 319.

10. *Evidence—Vendor and Purchaser—Delivery—Trials.*—Where there is evidence of a contract between plaintiff and defendant railroad company for the sale of cross-ties; that plaintiff placed certain of these ties where the defendant customarily received them from plaintiff and others; that these were seen being loaded upon the cars at this place by persons appearing to be defendant's employees, it is *Held*, sufficient upon the question of delivery and acceptance by the defendant of the ties to be submitted to the jury. *Murray v. R. R.*, 331.

11. *Evidence—Impeachment—Witnesses—Contradictory Statements—Bias.*—When the necessary ground for impeaching the testimony of a witness is laid on cross-examintion, it is competent to show by another witness contradictory statements he had previously made, and which tended to show his temper, disposition, and conduct in relation to the case. *Scales v. Lewellyn*, 494.

12. *Evidence—Nonsuit—Defendant's Evidence.*—Upon a motion to nonsuit, the defendant's evidence will not be considered. *Brown v. R. R.*, 604.

13. *Evidence—Declarations—Admissions—Corporations—Officers — Principal and Agent.*—The officers of a bank in its action to recover the proceeds of a paid draft as a holder in due course are merely agents thereof, and their statements made in reference to the transaction, after its occurrence, are not competent as admissions made by the bank. *Sternberg v. Crohon*, 731.

14. *Evidence—Depositions—Selected Portions.*—Selected portions of a deposition are incompetent as evidence of a fact in controversy. *Boney v. Boney*, 161 N. C., 521, cited and approved. *Ibid.*

15. *Evidence—Negligence—Issues—Last Clear Chance.*—An issue as to the last clear chance is properly submitted to the jury under evidence tending to show that plaintiff's intestate was struck and killed while attempting to cross the defendant's track carrying a basket of peaches for delivery to his customer; that the motorman was looking back over his shoulder and otherwise should have seen the plaintiff, but approached at an excessive speed, without signals or warnings and under circumstances tending to show he could have avoided the impact in the exercise of reasonable care. *Ingle v. Power Co.*, 751.

EVIDENCE—*Continued.*

16. *Evidence—Burden of Proof—Trials—Instructions.*—In this action to hold the drawer of an order primarily responsible to the plaintiff, a third person who had cashed them, the burden of proof was properly placed on the plaintiff, under the instructions given. *Webb v. Rosemond*, 848.

EVIDENCE WITHDRAWN. See Appeal and Error, 61.

EXCEPTIONS. See Reference, 1; Timber Deeds, 1; Appeal and Error, 24, 27, 64; Spirituous Liquors, 1.

EXCUSABLE NEGLECT. See Judgments, 1, 9, 11, 12, 20; Attorney and Client, 3, 4.

EXECUTIONS. See Estates, 1; Limitation of Actions, 6; Homestead, 1; Bankruptcy, 4; Judgments, 14, 15, 16; Wills, 24.

EXECUTIVE PARDON. See Criminal Law, 16.

EXECUTORS. See Removal of Causes, 7, 9; Wills, 29; Trusts, 2.

EXECUTORS AND ADMINISTRATORS. See Removal of Causes, 1; Tenants in Common, 3; Judgments, 7; Wills, 9; Limitation of Actions, 29; Contracts, 25.

1. *Executors and Administrators—Settlement—Actions at Law—Statutes—Equity.*—Revisal, sec. 150, provides a remedy at law for an administrator who has filed a final account for settlement, by his thereafter filing a petition against the parties interested in the due administration of the estate, in the Superior Court at term, for an accounting and settlement; and wherein such matters have neither been shown nor funds for distribution, there is nothing for the decree to operate upon, and the petition should be dismissed, reserving to the petitioner his remedy at law under the terms of the statute. *Moore v. Rankin*, 599.

2. *Executors and Administrators—Negligence—Wrongful Death—Entire Damages—Parent and Child—Statutes.*—The right of action to recover damages for a wrongful death exists exclusively by statute, and is given only to the administrator, who may recover the entire damage in his action; and the question as to the parent's recovery for the negligent killing of a minor child is one between the parent and the administrator. Revisal, secs. 59, 60. *Gurley v. Power Co.*, 690.

3. *Executors and Administrators—Accounts—Taxes on Lands.*—A payment of taxes on the lands of the deceased by his administratrix is not a proper credit to be allowed him in his account. *Marler v. Golden*, 823.

4. *Executors and Administrators — Judgments — Evidence.* — Judgments against the administratrix in this case are held evidence of the indebtedness and very conclusive under the decision of *Brown v. Harding*, 170 N. C., 253. *Ibid.*

5. *Executors and Administrators—Evidence—Receipts—Burden of Proof—Disbursements.*—Where in an action against an administratrix the amount of her receipts are shown, the burden is on her to show proper disbursements. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

6. *Executors and Administrators—Parent and Child—Wrongful Death—Parties.*—An action to recover for the wrongful death of a son must be brought by the executor or administrator of the deceased, and not by his father. *Hope v. Peterson*, 869.

EXEMPTIONS. See Appeal and Error, 6; Deeds and Conveyances, 23.

EXPRESS COMPANIES. See Courts, 4; Carriers of Goods, 29, 31, 32, 38, 39.

EXTINGUISHMENT. See Water and Water-courses, 4.

FALSE REPRESENTATIONS. See Deeds and Conveyances, 9; Insurance, 6, 12.

FATHER. See Habeas Corpus, 1.

FEDERAL COURTS. See Carriers of Goods, 7; Removal of Causes, 3.

FEDERAL EMPLOYERS' LIABILITY ACT. See Commerce, 1.

FEES. See Statutes, 6; Register of Deeds, 1, 2.

FELLOW-SERVANT. See Railroads, 1.

FEME COVERT. See Contracts, 12.

FENCES. See Criminal Law, 5, 6.

FILING CLAIMS. See Mechanics' Liens, 3.

FINDINGS. See Appeal and Error, 12, 13, 18, 19, 25, 33, 34; Judgments, 6; References, 6, 7, 8, 10; Mandamus, 3, 4; Jurors, 1.

FIRES. See Railroads, 13, 15.

FLAG STATIONS. See Carriers of Passengers, 5.

FLYING SWITCHES. See Railroads, 8.

FORECLOSURE. See Mortgages, 3, 10.

FOREIGN CORPORATIONS. See Taxation, 14.

FORMA PAUPERIS. See Actions, 4; Appeal and Error, 25.

FORNICATION AND ADULTERY. See Criminal Law, 12.

FRATERNAL ORDERS. See Insurance, 10.

FRAUD. See Deeds and Conveyances, 9, 10, 24, 27, 28; Mortgages, 1, 2; Limitation of Actions, 11, 12, 13, 22; Actions, 2; Release, 1, 3; Equity, 2; Contracts, 14; Pleadings, 8.

FRAUDULENT JOINDER. See Removal of Causes, 12.

FREEHOLDERS. See School Districts, 4.

GIFT ENTERPRISES. See Bills and Notes, 1; Lotteries, 1.

GOOD FAITH. See Corporations, 4, 6.

GROSS EARNINGS. See Taxation, 15.

HABEAS CORPUS.

Habeas Corpus—Custody of Child—Rights of Father.—In proceedings in *habeas corpus* by the father for the care and custody of his motherless infant child, the father is entitled thereto as a matter of right, unless it appears that he is an unfit or unsuitable person to whom to intrust its welfare; and when it is made to appear that he is financially able to take care of the child and will suitably provide for its physical, mental, and moral welfare, it is error for the judge hearing the matter to deny the prayer of his writ and award the custody to the two grandmothers of the child, alternately, though they are of most excellent character and suitable for the charge. *In re Fain*, 790.

HABENDUM. See Deeds and Conveyances, 20.

HARMLESS ERROR. See Appeal and Error, 9, 17, 40, 41; Instructions, 2, 20; Homicide, 18.

HEARSAY. See Carriers of Goods, 1.

HEIRS. See Wills, 11.

HEIRS AT LAW. See Wills, 29.

HEIRS OF THE BODY. See Deeds and Conveyances, 29.

HOMESTEAD. See Appeal and Error, 6; Drainage Districts, 5; Bankruptcy, 4, 5, 6, 7; Attachments, 1.

Homestead—Conveyance — Limitation of Actions — Judgments — Executions.—The laying off of a homestead under a docketed judgment suspends the statute of limitations during the continuance of the homestead, and when it has been laid off since the enactment of the statute it is taken by the homesteader subject to its provisions, and upon conveyance thereof is subject to execution under the judgment. Revisal, sec. 686. *Walters v. Hedgpeth*, 310.

HOMICIDE. See Appeal and Error, 62; Criminal Law, 21, 23; Instructions, 20.

1. *Homicide—Murder—Instructions—Passion—Malice.*—A charge on this trial for murder, as to whether the defendant was actuated and committed the act in the heat of passion, *i. e.*, in anger under circumstances to dethrone his reason, or whether in calm deliberation with malice aforethought, etc., is held full and explicit. *S. v. Merrick*, 870.

2. *Same—Evidence—Trials — Questions for Jury—"Cooling Time."*—Exception to the charge in this case of murder, as to whether the anger or heat of passion of the prisoner was assumed as a pretext to vent his malice or to satisfy his spleen, being based upon competent testimony and left to the jury, as sensible men, to determine, for what it was worth, with its weight and cogency depending upon the length of "cooling time," is held to be without merit. *Ibid.*

3. *Homicide—Murder—Circumstantial Evidence — Motive.*—Where there is no direct proof that the prisoner on trial for murder committed the crime with which he is charged, and recourse is had to circumstantial evidence, the question of motive is properly considered in the chain of proof. *S. v. Bridgers*, 879.

HOMICIDE—*Continued.*

4. *Same—Identification—Trials—Evidence—Questions for Jury.*—Upon a trial for murder there was evidence tending to show that the deceased, a married woman, was the paramour of the prisoner; that he was the last seen with her when she was going to her husband's home, and was afterwards seen no more alive, but was discovered murdered near the place he had been with her; that he was jealous of her husband and threatened her life, and to take from her feet shoes he had given her, should she go back to him; that he told a witness of the deceased if she were found dead the witness would know who killed her; that he said, after her disappearance, that he knew where she was, but would not say for fear the witness would tell; that when the body was found, shoes that the prisoner had given her had been taken from her feet in accordance with his previous threat, etc. *Held*, sufficient to identify the prisoner as the murderer and sustain a verdict of murder in the second degree. *Ibid.*

5. *Homicide — Murder — Evidence—Premeditation—Continuity—Corroboration.*—Upon evidence tending to show that the prisoner worked under the deceased at a mill, was discharged by him, fancied he had a grievance against him, had made threats against his life the day of and the day preceding the homicide; that he went into the mill where the deceased was resting at the noon hour and killed him, without provocation, with a borrowed pistol, etc., testimony of a witness that he had written the prisoner's brother, at his dictation, saying he was in trouble, had been discharged, and asking his brother to get money from his father and come at once, is competent in corroboration, as tending to show continuity of design and the prisoner's purpose to kill. *S. v. Johnson*, 920.

6. *Homicide—Murder—Premeditation—Evidence — Circumstances.*—Upon a trial for murder, premeditation and deliberation may be established by circumstantial evidence. *Ibid.*

7. *Homicide—Trials—Instructions—Deadly Weapon—Presumptions—Evidence—Questions for Jury.*—Where a homicide is proven or admitted to have been done with a deadly weapon, a pistol, with evidence tending to show preparation, it is for the jury to determine, upon the evidence, whether the act was done with deliberation or premeditation; and an instruction tendered by the prisoner, that the jury should not find a verdict of murder in the first degree, would be erroneous. *Ibid.*

8. *Homicide—Trials—Instructions—Inference.*—A requested instruction based upon inferences from the evidence should embrace all the evidence necessary for the jury to reach a correct conclusion as to the facts sought to be established, and where a material phase thereof has been omitted, the request is erroneous. *Ibid.*

9. *Homicide—Second Degree—Submission—Arguments to Jury—Conclusion.*—Where the defendant upon trial for a homicide admits of record the killing with a deadly weapon, and the solicitor states he will not ask for conviction of murder in the first degree, the fact that the defendant assumes the burden of showing matter in mitigation or excuse does not entitle him as a matter of right to open and

HOMICIDE—*Continued.*

conclude the argument to the jury, for this rests within the discretion of the trial judge. *S. v. Burton*, 939.

10. *Homicide—Threats—General Malice—Evidence—Trials.*—Where upon the trial for a homicide the evidence discloses that at night the defendant was annoyed by boys knocking on the door to his store and dwelling and running away, threats made by the defendant before the homicide that he would kill one of them the next time are competent evidence, as tending to show general malice, where he has carried the threat into execution. *Ibid.*

11. *Homicide—Evidence—Age—Trials.*—Where there is evidence tending to convict the defendant of killing one among a number of boys who had been annoying him at night, testimony as to the age of the boy who was killed is competent when merely a part of the history and circumstances of the case identifying the deceased. *Ibid.*

12. *Homicide—Evidence—Character—Admissions.*—Upon a trial for a homicide after the defendant had admitted killing another, for which he had been tried, testimony of a witness that as an officer of the law he had served the warrant for that offense is not prejudicial, or a variance of the rule that only testimony as to general character is permissible. *Ibid.*

13. *Homicide—Deadly Weapon—Admission—Burden of Proof.*—Where the killing is admitted to have been done with a deadly weapon, the burden of proof is upon the defendant to show matters in self-defense which would excuse the killing. *Ibid.*

14. *Homicide—Evidence—Interest—Trials—Instructions.*—Upon a trial for a homicide wherein the defendant has testified in his own behalf, it is proper for the judge to charge the jury to consider his evidence in relation to the case, the interest he had in the result of the verdict, and to scrutinize his testimony with care in determining the credence they would give it. *Ibid.*

15. *Homicide—Common Design—Evidence.*—Where there is sufficient evidence that two defendants were acting together with common design to commit a homicide, the declarations or conduct of one of the parties in furtherance of their purpose is competent against the other. *S. v. Foster*, 960.

16. *Homicide—Murder—Evidence—Restricted Inquiry.*—Where there is no evidence of manslaughter, upon a trial for a homicide, it is proper for the trial judge to restrict the inquiry to murder in the first or second degree, when there is evidence thereof. *Ibid.*

17. *Homicide—Burden of Proof—Matters in Excuse.*—Upon a trial for a homicide the burden is on the State to show beyond a reasonable doubt that the killing was done with premeditation and deliberation, to convict of murder; and for the defendant to show matters in justification, mitigation, or excuse which would reduce the degree of the crime. *Ibid.*

18. *Homicide—Murder—Instructions—Appeal and Error—Harmless error.*—Where upon a trial for a homicide the trial judge has sufficiently defined the words "premeditation and deliberation" necessary for a

HOMICIDE—*Continued.*

conviction of murder in the first degree, the mere use of the words disjunctively, in a single instance, will not be held as reversible error. *Ibid.*

19. *Homicide—Instructions—Intoxication—Evidence—Appeal and Error.*—While the state of intoxication which will prevent deliberation and premeditation on the part of one accused of a homicide, and reduce the crime from murder in the first degree, does not depend upon whether the intoxication was voluntary on his part, it will not be held prejudicial error for the trial judge to have so charged the jury, when it appears that there was no sufficient evidence that the accused at the time of the homicide was too intoxicated to premeditate or deliberate upon the crime but that it was preconceived and committed by him with a fixed purpose to perpetrate it. *Ibid.*

HOSPITALS. See Abatement, 1.

HOUSEBREAKING. See Criminal Law, 7.

HUSBAND AND WIFE. See Estates, 1; Deeds and Conveyances, 14; Wills, 22; Contracts, 14; Abatement, 1; Mortgages, 8, 9; Principal and Agent, 9.

IDENTIFICATION. See Homicide, 4.

ILLEGAL CONSIDERATION. See Bills and Notes, 1.

IMPARTIALITY. See Jurors, 1.

IMPROVEMENTS. See Estates, 3.

INCORPORATION. See Evidence, 9.

INDEMNITY. See Contracts, 17, 18, 19; Insurance, 18.

INDEMNITY BONDS. See Mechanics' Liens, 7.

INDEPENDENT CONTRACTOR. See Principal and Agent, 5; Contracts, 17, 18, 19.

INDEBITATUS ASSUMPSIT. See Contracts, 15, 16.

INDICTMENT. See Criminal Law, 6, 19, 20.

1. *Indictment—Evidence—Variance.*—Where a guard is charged in an indictment for an assault with a club upon a convict, and the evidence tends to show that the assault was with a leather strap, the variance between the charge and the evidence is not fatally defective. *S. v. Mincher*, 895.

2. *Indictments—Criminal Law—Offense—Judgments—Motions to Quash.*—Where the warrant sufficiently charges a criminal offense created by statute, and informs the defendant of the offense with which he is charged, a motion in arrest of judgment is properly denied. *S. v. Freeman*, 925.

INFANTS. See Contracts, 9; Courts, 12; Judicial Sales, 1, 2.

IN FORMA PAUPERIS. See Appeal and Error, 67.

INHERITANCE TAX. See Taxation, 1, 20; Appeal and Error, 12.

INJUNCTION. See Municipal Corporations, 2; Easements, 2; Mortgages, 3; Courts, 10; Mandamus, 1.

1. *Injunction—Blasting—Insolvency—Allegations — Statutes.*—Continued blasting of stone in a rock quarry which unlawfully invades the property rights of an adjoining owner is a continuous trespass, and may be enjoined without allegation of insolvency. Revisal, sec. 807. *Cobb v. R. R.*, 58.

2. *Injunction—Blasting—Continuous Trespass.*—Where there is allegation that the defendant had theretofore operated a rock quarry near plaintiff's dwelling to the invasion of his property rights by continually blasting rock which was thrown in all directions onto plaintiff's lands, dwelling, and outhouses, endangering the life of his family and impairing the value of his property, and that the defendant was about to resume such operations; and the defendant admits it is about to resume operations, but denies that it will injure the plaintiff: *Held*, a restraining order should be continued to the hearing of the case upon its merits. *Ibid.*

3. *Injunction—Service—Affidavit—Statutes.*—Our statute requires that "a copy of the affidavit be served with the injunction," which must be done unless the judge allows such service to be made thereafter (Revisal, sec. 810), or the injunction will be dissolved. *Taylor v. Boone*, 93.

4. *Same — Agreement to Continue — Waiver.* — The requirements of the statute, Revisal, sec. 810, are not waived by an agreement made between the parties out of court, on the return day of a temporary restraining order, that the hearing may be had at a later day; and when such have not been observed by the plaintiff, the defendant may enter a special appearance and successfully move to dissolve the restraining order on the ground that it has not been served according to law. *Ibid.*

INSOLVENCY. See Corporations, 1; Injunction, 1; Removal of Causes, 13.

INSPECTION. See Master and Servant, 4, 7.

INSTRUCTIONS. See Appeal and Error, 7, 15, 22, 38, 57, 58, 59, 63, 65; Carriers of Goods, 2, 41; Damages, 4; Master and Servant, 1, 7; Limitation of Actions, 2, 5; Evidence, 6, 16; Wills, 4, 21, 25, 31; Tenant by Curtesy, 2; Vendor and Purchaser, 3; Deeds and Conveyances, 19, 28; Insurance, 14; Homicide, 1, 7, 8, 14, 18, 19; Courts, 14.

1. *Instructions—Trials—Deeds and Conveyances—Boundaries—Burden of Proof.*—In this action to recover land and for trespass the court properly charged the jury that the burden of establishing a certain boundary line as contended for by plaintiffs was upon them; and if they failed therein, to find for the defendant, in accordance with its contention that the line was a straight one from the last to the first call in plaintiff's deed. *Alsworth v. Cedar Works*, 17.

2. *Instructions—Timber Deeds—Measurements of Timber—Appeal and Error—Harmless Error.*—Where the plaintiff had conveyed to the defendant timber on certain lands that measured 12 inches and up diameter at the time of the conveyance, a charge of the court, in an action for damages for cutting smaller trees than conveyed, that

INSTRUCTIONS—*Continued.*

the measurement of the trees could be made at any height from the ground, cannot be considered as prejudicial to the defendant, if erroneous. *Semble*, the trees should be measured 12 inches from the ground, or according to the prevailing custom. *Bradshaw v. Lumber Co.*, 219.

3. *Instructions—Deeds and Conveyances—Limitations of Actions—Adverse Possession—Appeal and Error—Reversible Error.*—Where the controversy over lands depends upon the true location of the disputed boundary line between adjoining owners, the plaintiff claiming both under a perfect paper title and by adverse possession to a certain marked line, and there is evidence to sustain them, both of these contentions are material, and should properly be passed on by the jury; and it is reversible error for the judge in his charge to confine the inquiry as to his adverse possession to the location of the boundary given in his deed. *Matthews v. Myatt*, 230.

4. *Instructions — Contentions — Appeal and Error — Reversible Error.*—Where the trial judge correctly states the contention of a party upon a material phase of the controversy upon which he is entitled to an instruction, but fails to charge the jury in accordance therewith, it may leave them under the impression that the contention was not a correct one, and constitutes reversible error. *Ibid.*

5. *Instructions—Expression of Opinion—Statutes.*—In an action to recover damages for a personal injury, where a release is set up in defense, which the plaintiff attacks for fraud, involving the question of gross inadequacy of consideration, and there is evidence tending to show that defendant paid the plaintiff $7, and also $10 to his doctors, a charge which confines the inquiry before the jury to a consideration of $7 is an expression of opinion on the evidence forbidden by the statute. *Knight v. Bridge Co.*, 393.

6. *Instructions, Conflicting—Deeds and Conveyances—Dividing Lines—Burden of Proof—Appeal and Error.*—Where the dividing line between adjoining owners of lands is in dispute, the plaintiff claiming one location to be the true one, and the defendant claiming it to be at another place, the burden of proof is on the plaintiff to establish the line as claimed by him, and an instruction which places this burden upon him and at the same time places the burden on defendant to show its location according to his contention, is conflicting, and reversible error to the defendant's prejudice. *Tillotson v. Fulp*, 499.

7. *Instructions—Trials—Usury.*—Where the charge, construed as a whole, is free from error, it will not be condemned because an isolated paragraph, standing alone, may be misleading; and in this case the charge of the court upon the question of usury is approved. *Monk v. Goldstein*, 515.

8. *Instructions—Wills—Caveats—Evidence—Trials—Questions for Jury.*—The evidence in these proceedings of *devisavit vel non* being conflicting upon the issue, the propounder's requested instruction to find in favor of the validity of the will was properly refused. *In re Arledge's Will*, 563.

INSTRUCTIONS—*Continued.*

9. *Instructions—Narration of Evidence—Statutes—Substantial Compliance.*—As to whether the trial judge is compelled to read the stenographer's notes of the evidence on request of a party, *quære;* but where a request therefor has not been made, it is a sufficient compliance with the statute, Revisal, sec. 535, for him to state the substance of the evidence in his charge. *Ball v. McCormack*, 677.

10. *Instructions—Misrecitals—Appeal and Error—Objections and Exceptions.*—Misrecitals of the evidence or contentions of the parties by the trial judge should be called to the attention of the court at the proper time; and when this has not been done, exceptions thereto will not be considered on appeal. *Ibid.*

11. *Instructions—Expression of Opinion—Negligence—Contributory Negligence—Assumption of Risks—Burden of Proof—Trials.*—In an action by an employee to recover damages for the negligence of his employer in failing to furnish sufficient help to do the work required of him, a charge to the jury that being short of hands would not, of itself, legally excuse the defendant was not an expression of opinion forbidden by the statute; and that the charge as to negligence, contributory negligence, assumption of risk, and the burden of proof was free from error. *Hollifield v. Telephone Co.*, 714.

12. *Instructions—Verdict, Directing—Admitted Facts—Admission.*—In a suit to cancel a mortgage, the defendants set up as a counterclaim an amount due by a bankrupt corporation in the hands of a receiver for goods sold it by the defendant under defendants' letter of credit, for the payment of which plaintiffs thereafter executed their note secured by the mortgage sought to be canceled as additional security and not in extinguishment of the original obligation, after deduction for estimated dividends expected to be paid by the receiver. The estimated dividends were in excess of those actually paid, and there being no evidence that the note and mortgage were procured by fraud, and the amount of such dividends and the amount of the original debt being admitted, an instruction by the court that the jury should find that defendants recover on their counterclaim, in a stated sum, the amount of the debt due, less the receiver's dividends paid thereon, was a proper one. *Thrash v. Ould*, 728.

13. *Instructions—Requests—Substance—Banks and Banking—Bills and Notes—Due Course.*—This controversy affecting the question as to whether an intervening bank acquired a draft as a holder in due course, or for collection under an express or implied agreement that it was to be charged back to the depositor's account if not paid, it is *Held*, that the court gave substantially the requested prayers of the appellant in his general charge, and no error was committed in refusing appellant's requests, though they stated correctly the law as applied to the facts of the case. *Sternberg v. Crohon*, 731.

14. *Instructions—Lands—Commissioners to Allot—Mistake in Description.*—Where commissioners have duly allotted to the several claimants their interest in certain lands, a charge of the court, upon the evidence, is correct that if the jury found the commissioners in allotting the shares actually went upon the land and put up stakes as marking lines of each share, the actual allotment as made by them would control a mistake, if any in the written description. *Clark v. Aldridge*, 162 N. C., 326, cited and applied. *Lee v. Rowe*, 846.

INSTRUCTIONS—*Continued.*

15. *Instruction—Contentions—Motions—Appeal and Error.*—Objection to the statement of the contentions of a party by the trial judge should be made to him, or it will be deemed waived. *S. v. Merrick*, 870.

16. *Instructions—Contentions—Appeal and Error.*—It is the duty of a party to an action to at once call the attention of the judge to an alleged error made in stating his contention in the charge to the jury, in order to have his exception thereto considered on appeal. *S. v. Johnson*, 920.

17. *Instructions—Contentions—Appeal and Error.*—A mistake made by the judge as to the contentions of a party, in his charge, must be called to his attention at the time, or exception thereto will not be considered on appeal. *S. v. Burton*, 939.

18. *Instructions—Omissions—Special Requests—Appeal and Error—Objections and Exceptions.*—Exception to an omission of the trial judge to charge that the accused in a criminal action could be found guilty of a less offense, must be to the refusal of the court to give a requested instruction to that effect. *S. v. Davidson*, 944.

19. *Instructions—Trials—Evidence—Statements of Counsel.*—Upon this trial for a homicide, a charge of the court is held without error which instructed the jury to find the facts upon the evidence, and not from what the counsel and the court said. *S. v. Foster*, 960.

20. *Instructions—Homicide—Murder—Intoxication—Appeal and Error—Harmless Error.*—Where the charge of a judge, upon a trial for a homicide, taken as a whole, correctly states the law as to the prisoner's state of intoxication which would reduce the crime from murder in the first degree, an accidental slip of the judge in the use of the words "involuntary drunkenness" in connection therewith will not be held as reversible error. *Ibid.*

21. *Instructions—Circumstantial Evidence—Trials.*—The charge of the court as to the weight of circumstantial evidence and the consideration the jury should give it, upon the trial in this case for blackmailing, is approved. *S. v. Frady*, 978.

INSURANCE. See Evidence, 7; Taxation, 15.

1. *Insurance—Fire, Tornadoes—Policy Contract—Interpretation—Statutes.*—The rule of construction that a policy of fire or tornado insurance is construed against the insurer and in favor of the insured, when its terms admit of interpretation, applies to the statutory form of fire and tornado insurance policies. *Johnson v. Ins. Co.*, 141.

2. *Same—Presumptions—Validity.*—The construction of a contract which will make it legal and binding will be adopted as against one that will not make it so, when the contract would otherwise be susceptible of these two interpretations. *Ibid.*

3. *Same—Stipulations—Future Conditions—Performance.*—When a tornado policy of insurance is issued on a building in course of construction, containing a stipulation that the policy is void unless the building were enclosed and under roof, and at the time of issuing the policy the building was not enclosed and under roof, but such had been done before the damages sought in the action had accrued, the stipulation in the policy fixed the time and conditions under

INSURANCE—*Continued.*

which the policy should be valid; and as such had been done at the time of the damage and while the policy was in force, the insurer, is liable for its payment. *Ibid.*

4. *Insurance—Fire, Tornadoes—Stipulations—Conditions—Principal and Agent—Delivery.*—Where a policy against loss by tornadoes has been delivered by the agent of the insurer on its regular printed form, the agent knowing at the time that the building insured was not roofed and covered, which was required by a printed stipulation in the policy contract, the knowledge of the agent is imputed to his company. *Ibid.*

5. *Same—Written Contracts—Parol Evidence.*—Where the authorized agent of an insurance company delivers to the insured a policy against loss by tornadoes, containing stipulations that the building insured shall be roofed and closed in, which the agent knew at the time had not been done, the policy provision that the agent could not vary the terms of the written contract is construed as not applying to conditions existing at the inception of the policy. *Ibid.*

6. *Insurance, Health—Application — False Representation — Hernia — Sound Health—Trials—Evidence—Questions for Jury.*—Statements made in an application for a policy of health insurance are representations and not warranties, Revisal, sec. 4808; and where the insured had therein at the time of his application, and, without specific question as to this, stated he was in sound physical and mental condition, "no exceptions," and there is evidence tending to show that the hernia did not affect the soundness of his health, it is for the jury to determine whether his representation was false and material, upon an appropriate issue and correct instructions from the court, with the burden of proof on the plaintiff in his action on the policy. *Hines v. Casualty Co.*, 225.

7. *Insurance, Health—Policies — Restrictions — "Confined."* — Where recovery upon a policy of health insurance is restricted to the duration of time insured is "confined to his home" or "confined in a hospital," the restriction does not preclude a recovery if the insured, acting on the advice of his physician, and as a part of his treatment, should go beyond the confines of the designated places. *Ibid.*

8. *Insurance, Life— Contracts— Prima Facie Case— Evidence— Burden of Proof.*—In an action upon an endowment policy in a fraternal society, a *prima facie* right of recovery is established upon proof of the death of the member, presentation of the policy by the beneficiary, and denial of liability for the nonpayment of dues or other like default by the company, the burden of proof being on it to establish such defenses, if relied on. *Lyons v. Knights of Pythias*, 408.

9. *Insurance—Contracts—Interpretation.*—Where there is doubt and uncertainty as to the meaning of a contract of insurance, it should be resolved in favor of the insured when the language permits. *Ibid.*

10. *Insurance, Life — Fraternal Orders — Contracts — Constitution— By-Laws.*—A stipulation in a policy of endowment in a fraternal order requiring the member to be in good standing at the time of his death, and that "the records of the Grand Lodge shall sustain the same," must be construed in reference to provisions in the charter

INSURANCE—*Continued.*

and by-laws of the order, that the member can only be suspended for failure to pay his dues for six months, of which notice shall be given him; and an order of suspension made in his absence will not have the effect of suspending him from benefits when there is no evidence that he had failed to pay his dues for the stated period or that notice had been given in accordance with the constitution and by-laws. *Wilkie v. National Council*, 151 N. C., 527, cited and distinguished. *Ibid.*

11. *Insurance—Witnesses—Policyholders—Interest—Evidence.*—Where a policy of life insurance is sought to be set aside for material misrepresentations made by the insured in answering the questions contained in his application therefor, testimony of a physician, a policyholder, affecting the alleged misrepresentations, is not objectionable on account of interest, the interest to disqualify being that in the result of the action; and such as he has, if any, falls under the doctrine of *de minimis non curat lex. Ins. Co. v. Woolen Mills.* 534.

12. *Insurance, Life—Application—False Representations—Material Representations—Contract—Judgment.*—Where the application made by the insured for a policy of life insurance declares that the statements the applicant makes below are true and offered to the company as an inducement to issue the proposed policy, and following the questions and his answers, he certifies that he has read them, and that they are fully and correctly recorded, and there is no evidence that the company or its agents were aware of any facts to the contrary, all of the misrepresentations made as to the prior attendance of physicians, disease, surgical operations, and the like, are deemed material; and where their falsity has been established by the verdict of the jury, a further issue finding they were not material should be set aside and the policy declared invalid as a matter of law, with judgment accordingly, but upon condition that the company return the payments for premiums thereon it has received, with interest. *Ibid.*

13. *Same—Opinion—Questions for Jury.*—Where the applicant for a policy of life insurance declares his answers to the questions asked in his application are material and true, and it is made to appear that he has therein misrepresented facts relating to disease, attendance of physicians, and surgical operations performed on him, the matters so misrepresented are material under the contract of the parties, they must have been known to the applicant at the time, and do not call for the exercise of his opinion, requiring the jury to pass upon an issue as to whether the deceptions were intentional, or made by mistake in good faith, or otherwise. *Ibid.*

14. *Insurance, Health—Reservation—Instructions.*—Where a policy of health and accident insurance sued on contains a provision that it does not cover loss or sickness or disease existing, or contracted prior to its issuance, etc., a charge to the jury that they should answer an appropriate issue in the defendant's favor should they find from the evidence that the loss resulted from sickness or disease which existed before the policy was issued, or which was contracted before that time, is a proper one, and in this case held preferable to the instruction requested by the defendant. *Collins v. Casualty Co.*, 543.

INSURANCE—*Continued.*

15. *Same—Burden of Proof.*—Where a health and accident policy insures, among other things, against loss resulting from sickness or disease, with additional provision that it does not cover such as existed prior to the issue of the policy, the insured, in his action thereon, makes out a prima facie case when he introduces the policy in evidence and proves that he was sick and confined to a hospital with the kind of sickness or disease covered by its terms, and the burden of proof is on the defendant to show that such was contracted prior to its issue, this being, under the language of this policy, in the nature of an exemption to the company's liability from the general terms of its contract. *Ibid.*

16. *Insurance—Principal and Agent—Application—Misrepresentations—Good Faith.*—Where the agent of the insurer fills out the application for a policy, and is given full information by the applicant as to prior sickness and disease which would invalidate the policy, but the agent misrepresents the facts in writing the answers, and the policy is accordingly issued; and the insured, acting in good faith, has been induced by the conduct of the agent to sign the application without reading it or becoming aware of the misrepresentations, and has paid the premiums thereon: *Held*, the acts of the agent in writing the answers are within the scope and purview of his agency for the company, and it is bound by his conduct in misleading the applicant. *Ibid.*

17. *Insurance—Policies—Interpretation.*—The written terms of a policy of insurance which are of doubtful meaning are construed in favor of the insured. *Ibid.*

18. *Indemnity—Insurance—Contracts—Interpretation.*—A bond guaranteeing performance of a building contract will be construed with the contract in determining the liability of the sureties to third persons furnishing materials, etc., for the building. *McCausland v. Construction Co.*, 706.

19. *Same—Mechanics' Liens—Principal and Surety.*—Sureties on a bond indemnifying the owner of a building contracted to be erected are not liable for material, etc., used in the building when by the clearly expressed terms of the bond, construed with the contract, the indemnity is solely for the benefit of the owner, and he has sustained no loss. *Ibid.*

20. *Same—Mechanic's Lien—Principal and Surety—Public Building.*—Our public policy forbids the filing and enforcement of a lien for material used in the erection of a public building, in this case a building for a public school. *Ibid.*

21. *Same—Schools—Principal and Surety.*—The school committee of a town contracted for the erection of a public school building and required from the contractor a bond indemnifying the committee against liens or claims of material men, etc., and for the proper performance of the contract. In interpreting the bond with the contract in this case it is *Held*, that the interest of the owner or obligee was alone considered and protected, and that the sureties are not liable to material men, who could not enforce a valid claim against the school committee or lien on the completed building accepted and used for the contemplated purpose. *Ibid.*

INSURANCE—*Continued.*

22. *Insurance—Accident—Total Disability.*—A provision in an insurance policy that the insurer will pay a certain sum when the insured has become wholly disabled by bodily injuries and permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations, will be construed as expressed, and the liability of the insurer thereunder will not be extended so as to include a total disability of the insured to perform his trade or vocation when other gainful occupations are still open to him. *Buckner v. Ins. Co.*, 762.

23. *Insurance—Assessments—Classification of Members—Appeal and Error—Judgments of Lower Court.*—The plaintiff became a member of defendant insurance order upon a certain premium rate, with a right of assessment of all the members upon a ratable plan to pay losses out of a common fund. This plan was changed by the company, placing plaintiff in a class with those who had insured before a certain date, and those thereafter in a separate class. The judgment of the lower court permitting plaintiff to recover is affirmed. *Williams v. Order of Heptasophs*, 787.

INSURERS. See Carriers of Passengers, 2.

INTENT. See Deeds and Conveyances, 12, 29; Bills and Notes, 7; Wills, 12, 14; Usury, 1; Ballots, 1; Taxation, 22.

INTEREST. See Insurance, 11; Homicide, 14.

INTERPRETATION. See Wills, 5, 15; Deeds and Conveyances, 20; Estates, 4, 7; Limitation of Actions, 23; Criminal Law, 13.

INTERSTATE COMMERCE. See Carriers of Goods, 13.

INTERSTATE COMMERCE ACTS. See Carriers of Goods, 18.

INTESTACY. See Wills, 6.

INTIMATION OF OPINION. See Courts, 2.

INTOXICATION. See Homicide, 19; Instructions, 20.

INVITATION. See Railroads, 26.

IRREGULARITIES. See Drainage Districts, 3; Justice's Court, 1.

ISSUES. See Appeal and Error, 4, 22, 30, 55; Contracts, 5; Mortgages, 1; Municipal Corporations, 3; Pleadings, 1, 2; Bills and Notes, 3; Evidence, 15; Wills, 31.

1. *Issues—Appeal and Error.*—In this case the issues submitted by the court to the jury embraced all the controverted questions, and are held to be the proper ones. *Realty Co. v. Rumbough*, 741.

2. *Issues—Appeal and Error—Principal and Surety.*—The submission of issues to the jury which afforded the appellant opportunity to offer all material evidence and make proper defenses will not be considered as reversible error; and in this case one issue as to the liability of a principal and surety under a bond given by them was proper, the liability of each thereunder being the same. *Ellis v. Improvement Co.*, 852.

JOINDER. See Corporations, 2.

JUDGMENTS. See Bankruptcy, 3, 4, 7; Equity, 1; Appeal and Error, 10, 13, 21, 31, 35, 39; Mortgages, 3, 10; Limitation of Actions, 6; Actions, 2; Bills and Notes, 3; Homestead, 1; Attorney and Client, 3; Deeds and Conveyances, 23; Insurance, 12, 23; Partition, 1, 2; Attachments, 1; Contracts, 23; Pleadings, 7; Courts, 7; Executors and Administrators, 4; Motions in Arrest, 1; Indictment, 2; Criminal Law, 23.

1. *Judgments—Motions to Set Aside—During Term—Excusable Neglect —Statutes.*—A motion to set aside a judgment for excusable neglect, made at the time the judgment was signed, will be denied, such matters being *in fieri* during the term, and Revisal, sec. 513, applies only to judgments rendered at prior terms. *Gold v. Maxwell*, 149.

2. *Judgments—Parties—Estoppel.*—The widow of the deceased had her dower allotted in the lands in controversy, and in proceedings to sell lands of the deceased to pay his debts, regularly held, L., her father, became the purchaser of her reversionary interest, and again, under proceedings regularly had, in which the present plaintiffs were made parties, his executor sold the lands to make assets to pay his debts, and B. became the purchaser, which sale the court confirmed and ordered the executor to make a deed to him, which was accordingly done. B. was the second husband of the widow, now deceased, by which marriage children were born, the defendants in the present action, the plaintiffs being children by the first marriage, and claiming as heirs at law of their father. *Held*, the plaintiffs are estopped to claim title to the lands by the judgment in the second proceedings to sell them to make assets, to which they were parties. *Pinnell v. Burroughs*, 182.

3. *Same—Lost Records—Evidence—Judicial Sales—Recitations in Deed —Prima Facie Evidence—Presumptions.*—Where there is evidence tending to show that the courthouse of the county was rebuilt, and its records during the time had been placed in an attorney's office near by, and many of them were not recorded; that due and diligent search had been made for the records and proceedings in the present case in the courthouse and elsewhere, the recitals in the deed from an executor in proceedings to sell lands to make assets to pay the debts of the decedent became *prima facie* evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to have been founded, and permits the conclusion of the regularity of the proceedings, the presence of all proper parties and the binding force of the decree specified and referred to, unless it should in some portion of the record more directly apposite affirmatively appear to the contrary. In this case the record proper showed only an entry of report of sale, purchaser, price and payment, with recommendation of confirmation. *Ibid.*

4. *Judgments — Parties— Estoppel— Judicial Sales— Presumptions.* — A final decree in proceedings to sell lands to make assets in this case against W. A. P. *et als.*, is held to conclude a granddaughter of the testator, both under his will and as his heir at law, it appearing that two of testator's daughters married the same person, and

JUDGMENTS—*Continued.*

that children of both the first and second marriage were necessarily the testator's grandchildren, and those of each marriage were equally necessary parties to the proceedings. *Ibid.*

5. *Judgments—Consent—Effect.*—While the terms of a consent judgment are settled by the parties, such judgment has the same force and effect when accepted and sanctioned by the court, and ordered spread upon the records, as if it had been entered in regular course. *Gardiner v. May*, 192.

6. *Same—Findings—Presumptions—Attorney and Client—Burden of Proof.*—Where a judgment appears to have been entered by consent of the attorneys of the parties, it will be presumed, *prima facie*, that the attorneys had the necessary authority from their clients to consent thereto in their behalf, with the burden upon the party seeking to set aside the judgment to prove that no such authority actually existed. Where the judge has not stated the facts not having been requested so to do, it will be presumed that he found such facts as would support his judgment. The general authority conferred by the relation of attorney and client discussed by WALKER, J. *Ibid.*

7. *Same—Estates—Payment—Executors and Administrators—Remaindermen—Rights and Remedies.*—Where the trial court refused to set aside a judgment entered by the consent of the attorneys of the parties, without stating the facts upon which the refusal was based, questions presented in this Court as to the effect of payment by the administrator of the deceased of money to the life tenant under the will, without securing it to be paid to the remainderman, a boy 10 years of age, and the administrator's future liability on that account, cannot be considered. The remedies now open to the remainderman discussed by WALKER, J. *Ibid.*

8. *Judgments—Non Obstante—When Allowed.*—Judgments *non obstante veredicto* will not be allowed except where the plea confesses a cause of action and sets up new matter in avoidance which is insufficient, although true, to constitute a defense or a bar to the action. *Fleming v. Sexton*, 250.

9 *Judgments—Excusable Neglect—Attorney and Client—Principal and Agent.*—The negligence of counsel in failing to defend an action for his client in the course of his professional duty will not be attributed to the latter, if he himself is in no default, without regard to the solvency of the former; but where the counsel is authoritatively acting for his client outside of his professional employment, in matters which the client may perform, he then is the mere agent of the party, and his negligence is imputed to his principal. *Seawell v. Lumber Co.*, 320.

10. *Same—Neglect of Party—Rule of Prudent Man.*—The employment of an attorney by a party to an action does not of itself excuse the party from properly attending to his case, and the test as to whether the party is himself negligent is in the application of the rule of the prudent man while engaged in transacting important business. *Ibid.*

11. *Judgments—Excusable Neglect—Findings—Appeal and Error.*—Where the trial judge has set aside a judgment for excusable neglect, his findings as to good faith are conclusive on appeal. *Ibid.*

JUDGMENTS—*Continued.*

12. *Judgments—Excusable Neglect—Surety Bond.*—It appearing, in this case, that the trial judge has set aside a judgment for excusable neglect, and required the defendant to give a bond in a larger sum than the amount of the judgment, conditioned to pay the plainiff any damages recovered by him, it is *Held*, under the facts, that no substantial injury could be sustained by him. *Ibid.*

13. *Judgments — Justices of the Peace — Superior Court — Docketed.*—A judgment of a justice of the peace, docketed in the Superior Court, becomes a judgment of the Superior Court for the purposes of lien and execution, and is enforcible on the same property, by the same kind of execution, within the same limitations prescribed by law for the enforcement of judgments rendered in the Superior Court, and can be revived, when dormant, in the same way. *Pants Co. v. Mewborn*, 332.

14 *Same—Dormant Judgments—Executions—Revisal—Statutes.*—A judgment becomes dormant by the failure to issue execution thereon within three years, or by allowing this period of time to elapse between the issuance of successive executions; and where the judgment is one of a justice of the peace, docketed in the Superior Court, and has become dormant, it may be revived under Revisal, sec. 620, within ten years from its rendition, and execution may issue thereon though the proceeding to revive is commenced after seven years. *Ibid.*

15. *Same—Expiration of Lien—Execution—Levy.*—Execution on a judgment may issue from the Superior Court against real and personal property after the expiration of ten years, where the judgment has not become dormant, by the issuance of successive executions or when it is revived under Revisal, sec. 620; but after the ten-year period the lien of the judgment has ceased, and it can only be acquired from the levy. *Ibid.*

16. *Judgments—Assignments—Executions.*—A transfer and assignment of a judgment, in writing, filed in the record and noted on the docket in the Superior Court, is sufficient, and the assignee thereof is entitled to the same right to issue execution thereon as his assignor thereof; and the fact that he has asked, by affidavit, for an amendment to the judgment does not preclude him from resorting to the regular process of the courts to enforce it. *Ibid.*

17. *Judgments, Non Obstante.*—Under our Code system of pleading, a judgment *non obstante veredicto* may be rendered for either party, but only when the pleadings entitle the party to it irrespective of the verdict. *Fowler v. Murdock*, 349.

18. *Judgments—Verdict—Court's Discretion—Subsequent Term.*—The trial judge may not set aside a judgment upon a verdict, and continue the motion for judgment until a succeeding term, leaving the verdict to stand, and then, within his discretion, set the verdict aside; for the discretion given him must be exercised during the term in which the verdict was rendered. *Ibid.*

19. *Judgments, Non Obstante—Limitation of Actions—Trials—Matter in Defense—Questions for Jury.*—The plea of the statute of limitations in an action gives the right to the opposing party to introduce evi-

JUDGMENTS—*Continued.*

dence of disability, etc., to repel the bar of the statute, and ordinarily presents mixed questions of law and fact; and where it only appears that the period of time prescribed by the statute has run, it is reversible error for the trial judge to decide the matter as a question of law, and render a judgment *non obstante veredicto*, when it had not been passed upon by the jury in rendering their verdict; and a judgment upon the verdict should be rendered. *Ibid.*

20. *Judgments—Excusable Neglect—Meritorious Defense.*—Where two parties have signed a contract, jointly, for the purchase of fertilizers, upon the understanding and agreement that each of them would separately be charged with the part he received, but that the joint contract was to enable the shipment to be made in a car-load lot, the purchasers gave their separate notes, and upon demand of seller's attorney for payment and threat of suit, each for his own part said he would not resist judgment, and separate suits are brought, but thereafter consolidated with allegations affecting the personal integrity of the defendants, without the knowledge of either of them, and judgment is accordingly taken, the failure of the defendants to appear and answer is held to be excusable neglect, and a meritorious defense as to each having been shown, the judgment should be set aside. *Guano Co. v. Hearne*, 398.

21. *Judgments — Estoppel — Parties—Privies.*—Judgments and decrees of court regularly entered will conclude parties and privies as to all issuable matter contained in the pleadings, or other matter within the scope thereof, though not issuable in a technical sense, if they are material and relevant or are in fact investigated and determined. *Propst v. Caldwell*, 594.

22. *Judgments—Nonresidents—Motions to Set Aside—Statutes.*—Where a judgment has been rendered upon newspaper publication of summons against a defendant who was at the time and has continued to be a nonresident defendant, and he shows that he has moved to set it aside within one year after notice or knowledge thereof, and within five years after its rendition, the motion, excepting in actions for divorce, should be granted as a matter of right upon such terms as the court may consider just. Revisal, sec. 449. *Moore v. Rankin*, 599.

2. *Same—As a Whole—Descent and Distribution.*—Upon motion to set aside a judgment involving the distribution of personal estate, the court erroneously holding that it should be divided among uncles and aunts to the exclusion of the children of such as were dead, Revisal, sec. 132, Rule 3: *Held*, the judgment must be set aside in its entirety when the movant has brought himself within the provisions of Revisal, sec. 449, regarding setting aside a judgment against nonresidents. *Ibid.*

24. *Judgments—Estoppel—Administrators — Accounts.*—Proceedings upon exceptions of creditors filed to the final account of an administratrix, some of which were sustained by the judge and others reversed, with action by the clerk in conformity with the rulings, do not render the judgment accordingly entered by the clerk final in the sense it will operate as an estoppel between the parties. *Marler v. Golden*, 823.

JUDICIAL NOTICE. See Courts, 4; Limitation of Actions, 30.

JUDICIAL SALES. See Judgments, 3, 4.

1. *Judicial Sales—Infants — Parties — Decrees—Record—Irregularities—Evidence—Innocent Purchasers.*—Where the testator has died in 1878, leaving a remainder in an estate to plaintiff's grantor, with life estate to the widow, who has since died in 1914, the deed under which the plaintiff claims being executed in 1913, and it appears that proceedings were had by the executor of the testator in 1878 to sell the lands to pay his debts, the entries of record showing issuance and service of summons, order and report of sale, and final decree in 1878; that plaintiff's grantee was then a minor about 18 years of age, with evidence tending to show that he had filed answer by his general guardian, or guardian *ad litem*, which disappeared from the court and could not be found after due and diligent search: *Semble*, the proceedings for the sale of the lands were in all respects regular, and *Held*, the courts will not disturb them as against the grantee of an innocent purchaser for value holding under a deed executed in 1879, without question of title. *Rawls v. Henries*, 216.

2. *Judicial Sales—Infants—Parties—Summons — Service — Irregularities —Motions in Cause.*—Where an infant party to an action has not been personally served with summons, and it is shown that his general guardian or guardian *ad litem* appeared and filed an answer for him: *Held*, the failure to serve the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause, and then only upon a show of merits and where the complaining party has proceeded with proper diligence. *Ibid.*

JURISDICTION. See Municipal Corporations, 1; Drainage Districts, 4; School Districts, 1; Elections, 3; Removal of Causes, 10, 14; Mandamus, 2; Courts, 15; Criminal Law, 14, 15.

JURORS.

Jurors—Expressed Opinion—Findings—Impartiality—Appeal and Error. —A juror who states that he has formed and expressed an opinion adverse to the defendant on trial for a homicide, but that he could hear the case and render a verdict according to the evidence and the law, is not held on appeal to be disqualified to serve, when the trial judge has ruled that he was fair and impartial. *S. v. Foster*, 960.

JURY. See Estoppel, 1; Trials, 4.

JUSTICES OF THE PEACE. See Judgments, 13; Courts, 3.

JUVENILE DELINQUENTS. See Criminal Law, 13, 14.

KNOWLEDGE. See Partnership, 1; Carriers of Goods, 32.

LACHES. See Attorney and Client, 2.

LANDLORD AND TENANT. See Contracts, 21.

Landlord and Tenant—Contracts—Option of Purchase—Liens—Statutes. —Where the owner has entered into a written contract to rent his land at a stated price per annum, the relation of landlord and tenant

LANDLORD AND TENANT—*Coontinued.*

is not changed to that of vendor and purchaser or disturbed by the fact that, under the further terms of the contract, the other party had an option to purchase the lands upon making a certain additional payment, time being of the essence of the contract entered into, which he has not exercised; and as landlord, the owner may enforce his statutory lien for a part of the rent remaining due him. *Burwell v. Warehouse Co.*, 79.

LAPSE OF TIME. See Tenants in Common, 2.

LAST CLEAR CHANCE. See Railroads, 24; Evidence, 15.

LEASES. See Contracts, 21.

LEGISLATIVE POWERS. See Taxation, 10.

LEVY. See Equity, 1; Drainage Districts, 5, 6; Judgments, 15.

LICENSE TAX. See Taxation, 14, 18.

LIENS. See Landlord and Tenant, 1; Drainage Districts, 4; Carriers of Goods, 14, 28; Judgments, 15; Attachments, 1; Mechanics' Liens, 8.

1. *Liens—Corporations—Factories — Coal Furnished—Statutes.*—Revisal, sec. 1131, confers no lien on the products of a cotton factory corporation in favor of one furnishing coal used in their manufacture, but only the right to enforce their claims by judgment and execution, as against the holders of mortgages upon the corporate property. *Norfleet v. Cotton Factory*, 833.

2. *Liens — Enforcement — Corporations.* — As to whether one furnishing coal to a corporation used in the manufacture of its cotton products can claim his lien on the facts of this case, under the provisions of Revisal, sec. 2016, *quere*. But his failure to enforce his asserted lien under the provisions of Revisal, sec. 2027, deprives him of whatever right thereto he may have had. *Ibid.*

LIMITATION OF ACTIONS. See Railroads, 12; Instructions, 3; Mortgages, 6; Homestead, 1; Judgments, 19; Bankruptcy, 8; Reference, 5; Deeds and Conveyances, 33.

1. *Limitation of Actions — Adverse Possession — Pleadings — Deeds and Conveyances.*—Where the question of title to lands depends upon the true divisional line between the parties to the action, adjoining owners, and each has introduced a grant from the State to their lands respectively, which, taken together, cover the *locus in quo;* and the plaintiff has introduced evidence tending to show that he has had open and continuous adverse possession of the lands under known and visible metes and bounds for more than twenty years, it is sufficient to sustain a charge of the court to the jury as to his title by adverse possession, Revisal, sec., 383, 384; and where the plaintiff has sufficiently alleged general ownership of the *locus in quo*, he is not confined to the location of such line under his grant, for he may avail himself of any source of title that he may be able to establish by his testimony. *Stewart v. Stephenson*, 81.

2. *Limitation of Actions—Title — Adverse Possession — Continuity — Instructions—Appeal and Error.*—In an action involving the title to

LIMITATION OF ACTIONS—*Continued.*

land, where the defendant claims by adverse possession, evidence is sufficient to be submitted to the jury if it warrants the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected some portion of the disputed land to the only use of which it was susceptible; and an instruction that such possession must be shown to have been without any break, or moment of time when the land was not occupied, is reversible error. *Cross v. R. R.*, 119.

3. *Limitation of Actions—Adverse Possession—Continuity—Definition.*—Acts of adverse possession sufficient to ripen the title of a claimant of lands, the title being out of the State, are such as to put the true owner to his action, and consist in actual possession with an intent to hold solely for the possessor, to the exclusion of others, and of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, the acts to be so repeated as to show they are done in the character of owner, in opposition to the right or claim of any other person, and thus continued for seven years, if done under color, and for twenty years if done without color. *Ibid.*

4. *Limitation of Actions—Adverse Possession—Railroads.*—A railroad company may acquire a right of way over the lands of the owner by showing sufficient adverse possession for the statutory period. *Ibid.*

5. *Limitation of Actions—Alleys—Nonuser—Adverse Possession—Trials—Evidence—Instructions.*—An alleyway for the use certain lots in a plat of land which in fact has never been laid off, but fenced in and used by one of the parties for more than twenty years under sufficient adverse possession, and this appears by the admissions in the pleadings and the unconflicting evidence of the parties to the litigation: *Held*, in an action to enforce the opening of such way an instruction by the court that if the jury believed the evidence they should answer the appropriate issue in the affirmative, that the plaintiff had lost the right to the alley by failure to use it, etc., was not erroneous. *Hunter v. West*, 160.

6. *Limitation of Actions—Judgments—Exections—Alleys.*—An action to enforce the execution of a decree of court confirming a report that an alley was to be laid off in certain lands is barred by the ten-year statute of limitations. Revisal, sec. 399.

7. *Limitation of Actions—Adverse Possession—Coverture—Statutes.*—Adverse possession of lands against a married woman before 13 February, 1899, shall not be counted, Revisal, sec. 363; and in order to claim title against her by twenty years adverse possession it is necessary to show that the statute had commenced to run before her coverture. *Holmes v. Carr*, 213.

8. *Same — Trials — Evidence — Questions for Jury.*—Where the plaintiff pleads coverture in an action to recover lands against the defendant's claim of title under twenty years continuous adverse possession of himself and predecessors, and there is evidence tending to show that such possession commenced against a predecessor in the plaintiff's chain of paper title, the question of the defendant's title by sufficient

LIMITATION OF ACTIONS—*Continued.*

adverse possession is one for the jury; for if the statute is once put in motion the supervening disability of coverture will not stop it. *Ibid.*

9. *Same—Sufficient Possession.*—In this action to recover lands it appears that two-thirds thereof was woodland; and in behalf of the defendant, claiming title by twenty years adverse possession, that he had built a house on the cleared land, had cultivated it, made tobacco beds thereon, and had cut wood and used straw from the woodlands. *Held*, sufficient on the question of defendant's title by adverse possession to be submitted to the jury. *Locklear v. Savage*, 159 N. C., 237, cited and applied. *Ibid.*

10. *Limitations of Actions—Deeds and Conveyances—Adverse Possession—Different Boundaries—One Lot.*—Where the location of the true dividing line between adjoining owners is in dispute, the *locus in quo* lying between the lines contended for by the parties to the action respectively, and the plaintiff claims under his deed and also by adverse possession to a certain marked line, the plaintiff may treat the disputed and undisputed parts of the land as one lot, and upon proving sufficient adverse possession thereof, as a whole, it will ripen his title thereto. *Matthews v. Myatt*, 230.

11. *Limitation of Actions—Mortgages—Trusts — Fraud — Notice — Knowledge—Burden of Proof.*—Where the plaintiffs, as heirs at law of their mother, bring suit to set aside for fraud a foreclosure sale of her lands made in her lifetime, and claim that their action is not barred by reason of the fact that the fraud was not discovered until within three years next before the commencement of their action, the burden is on them to show that not only they, but their mother in her lifetime, had not known of the impeaching fact, or would not have discovered it in the exercise of reasonable business prudence. *Sanderlin v. Cross*, 234.

12. *Limitation of Actions—Fraud—Deeds and Conveyances—Registration—Notice.*—Where a foreclosure sale of lands is attacked for fraud upon the ground that the trustee sold the timber on the land separate from the land and made deeds to each to separate parties, which were duly recorded, the record itself gives notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claim, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and bar their recovery after three years. Revisal, sec. 395 (9). *Ibid.*

13. *Limitation of Actions — Fraud — Evidence—Notice—Conflicting Statements—Questions for Jury.*—Where to defeat the bar of the statute, Revisal, sec. 395 (9), the plaintiffs contend that they had no knowledge of the fraud relied upon to set aside a foreclosure sale of their mother's land made in her lifetime, and also that their mother had no knowledge thereof, there is direct testimony that their mother had no such knowledge, with further testimony in explanation that they had not heard their mother mention it, the testimony is not considered as contradictory, requiring that the jury determine the fact. *Ibid.*

LIMITATION OF ACTIONS—*Continued.*

14. *Limitation of Actions—Trespass—Damages—Cutting Trees—Statutes.*—Where the defendant pleads the three years staute of limitations to an action for trespass, with damages for cutting timber on lands, the burden is on the plaintiff to prove that he commenced his action within the time prescribed; and where from an analysis of the evidence it appears that this has not been done, a judgment of nonsuit is proper. Revisal, sec. 395 (4). *Tillery v. Lumber Co*, 296.

15. *Same—Against State.*—Construing Revisal, sec. 4048, providing that no statute of limitation shall affect the title or bar the action of one claiming it under an assignment from the State Board of Education, unless the same would protect the person holding the claim adversely to the State, with section 375, 380, and 389, it is *Held*, that the limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands; and the three years staute to recover damages for trespass in cutting and removing trees from the land applies under the facts in this case. Revisal, sec. 395 (4). *Ibid.*

16. *Limitation of Actions—Vendor and Purchaser—Possession—Mortgages—After-Acquired Property.*—The relation between vendor and purchaser, under a conditional sale reserving title, is in effect, that of mortgagor and mortgagee, and the purchaser's possession is not held adverse to the vendor in the absence of demand; and where the purchaser at a sale of lands under a mortgage claims the property as a fixture, passing with the lands as after-acquired property, and pleads the three-year statute in bar of the vendor's right, the period of the peaceful possession of the mortgagor will not be counted. *Dry-Kiln Co. v. Ellington*, 481.

17. *Limitation of Actions—Vendor and Purchaser—Conditional Sales—Purchase Price—Notes—Waiver—Mortgages.*—The vendor of property reserving title under the terms of a conditional sale specifying that the purchaser give his notes for deferred payments may waive the latter part of the agreement and rely upon the retention of his title; and where the purchaser of land at a mortgage sale claims the property as that after acquired under the terms of his mortgage, and pleads the three-year statute as a bar to the vendor's right of action, the failure of the vendor to require the purchaser to give the notes, or to rescind the contract, will not put the statute of limitations in motion against him. *Ibid.*

18. *Same—Advantage of Wrong.*—Where the purchaser of property is, by the terms of a conditional sale, reserving title, required to give notes for deferred payment of the purchase price, he cannot take advantage of his own wrong in failing to give the notes, and thus put the statute of limitations in motion against his vendor in favor of a subsequent purchaser at the sale of his lands under mortgage. *Ibid.*

19. *Limitation of Actions—Plea—Trials—Questions for Jury.*—The plea of the statute of limitations generally involves a mixed question of law and fact, and where the facts are not admitted they must be found by a jury unless by consent they are found by the court. *Garland v. Arrowood*, 591.

20. *Limitation of Actions—Pleas—Reference—Appeal and Error.*—Where the plea of the statute of limitations is a good plea in bar of the ac-

LIMITATION OF ACTIONS—*Continued.*

tion, it is reversible error to order a reference until the plea is disposed of. *Ibid.*

21. *Limitation of Actions—Pleas—Trials—Burden of Proof.*—When the statute of limitations is pleaded in bar of an action, the burden of proof is on the plaintiff to show that his cause of action accrued within the time limited by the statute. *Ibid.*

22. *Limitation of Actions—Pleas—Bankruptcy—Fraud—Trials—Questions for Jury—Reference—Appeal and Error.*—Where the bankrupt pleads the three-year statute of limitations against the trustee in bankruptcy, in the latter's action to recover money alleged to have been expended on the lands of another, with the consent of such other person, in fraud of the bankrupt's creditors, under an arrangement that the lands should be devised to the bankrupt, and that it was in fact devised to the bankrupt's wife under a further agreement, and that she had accordingly become the owner of the lands; and it is set out in the plea in bar that the creditors were aware of this arrangement more than three years prior to the adjudication in bankruptcy, and also alleging circumstances that would have put them upon reasonable inquiry, it is reversible error for the trial judge to hold, as a matter of law, that the plaintiff's action was not barred, and order a reference upon the other phases of the case. *Ibid.*

23. *Limitation of Actions—Pleas—Interpretation.*—The plea of the statute of limitations must sufficiently state the facts upon which it rests; and the courts in determining the sufficiency of the allegations will construe it liberally without requiring technical accuracy or precision. *Bank v. Warehouse Co.*, 602.

24. *Same—Conversion.*—A plea of the statute of limitations to an action for conversion of personal property, that the defendant "expressly pleads the statute of limitations," and then alleges "more particularly" that the plaintiff for more than three years next prior to the commencement of the action had knowledge that the property had been sold, and received the proceeds of sale, though a plea in payment, is also a sufficient plea of the statute. *Ibid.*

25. *Limitation of Actions—Trespass—Continuous Trespass—Independent Acts.*—The statutory requirement that an action for damages for continuing trespass on lands shall be barred after three years from the date of the original trespass, by the use of the words "continuing trespass," refers to trespass upon real property, caused by structures permanent in their nature where the wrongful act, being continued and complete, causes continuing damages, or where injuries from like sources are caused, or by companies in the exercise of some quasi-public franchise, and was not intended to apply when every successive act amounted to a distinct and separate renewal of wrong. *Teeter v. Tel. Co.*, 783.

26. *Same—Telegraphs — Easements — Rights of Way.*—Where a telegraph company has constructed its line of poles and wires along a railroad right of way on the lands of the owner more than three years next before the commencement of the owner's action for trespass, but within three years has constructed an additional line of its wires thereon and repaired its old line, replacing some of the old poles with

LIMITATION OF ACTIONS—*Continued.*

new ones in the same holes: *Held*, the plaintiff's right to damages for the construction of the old line is barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages may be awarded it. Revisal, sec. 395 (3). *Ibid.*

27. *Limitation of Actions—Adverse Possession—Successive Occupants—Continuity.*—To ripen title to lands by adverse possession, with or without color, the claimant must show continuity of sufficient possession for the requisite statutory period, and in case of successive occupants, some recognized connected possession between them, which may be shown by deed, will, or other writing or by parol. *Vanderbilt v. Chapman*, 809.

28. *Same—Evidence—Deeds and Conveyances—Color of Title.*—Where title to lands is claimed through the adverse possession of successive occupants, the ownership asserted is one dependent on adverse possession, which does not require privity of title in the successive occupants, but the actual occupancy by them of the land under or for another or in subordination to his claim under an agreement or arrangement recognized as valid between themselves; and when this continuity and identity is established between a subsequent and next preceding and prior occupant adverse to the true paper title, the claimant or subsequent holder under color may avail himself of the adverse occupation of his predecessors and refer the same to the conveyance under which he claims as color. *Ibid.*

29. *Same—Executors and Administrators—Powers of Sale.*—Where there is evidence that the one claiming title to lands by adverse possession under color directs his son, who managed his affairs, to hold possession under his deed, and by will appoints his son as his executor, who is interested therein as a devisee, and who thereafter enters and continues to remain in possession as such executor until he conveys the lands under a power conferred in the will, and that his grantees entered and remained in possession for a period sufficient under the statute to ripen the title, by counting the possession of his predecessors, it is *Held*, that the possession of the executor of the original grantee as such should be considered, and it is reversible error for the trial judge to instruct the jury in effect that the evidence of his possession as executor, not being in privity of title, was insufficient, and should not be counted. *Ibid.*

30. *Limitation of Actions—Record—Date of Summons—Judicial Notice.*—Where the statute of limitations is relied on and the summons has not been introduced in evidence, the Supreme Court, taking judcial notice of facts and entries of record, will ascertain the date of the summons as it there appears. *Harrell v. Lumber Co.*, 827.

LIMITATIONS. See Corporations, 4; Courts, 7, 8.

LIS PENDENS. See Pleadings, 3; Railroads, 19.

LIVE STOCK. See Carriers of Goods, 29, 37, 38, 39.

LOGGING ROADS. See Railroads, 1.

LOST IN THE MAIL. See Banks and Banking, 1.

LOTTERIES. See Bills and Notes, 1.

1. *Lotteries—Gift Enterprises—Statutes.*—A trade enlargement or expansion scheme which selects "contestants" to boost business for merchants, giving them prizes to engage in the movement, and tickets or books, in accordance with purchases by customers they may influence, with intermediate votes for prizes or gifts, and at the termination of the movement certain votes for an ultimate prize or gift, is a gift enterprise coming within the intent of the statute. Revisal, sec. 3726. *Mfg. Co., v Benjamin*, 53.

2. *Same—Police Powers—Constitutional Law.*—The regulation of lotteries or gift enterprises is within the police powers af the State, and Revisal, sec. 3726, is constitutional and valid. *Ibid.*

MAIL. See Carriers of Goods, 22; Banks and Banking, 1.

MALICE. See Damages, 4; Homicide, 1, 10.

MALICIOUS PROSECUTION.

Malicious Prosecution—Abuse of Process—Civil Summons—Motive—Demurrer.—An action for malicious prosecution or wrongful abuse of process will not lie upon the mere issuance of a summons in a civil action, where no attachment has been levied, the plaintiff's property has not been interfered with and no process issued against his person; and where such is alleged, with further allegation that the summons in the former action had been served while passing through another State, the motive underlying the issuance of the summons will not be inquired into, and a demurrer is properly sustained. *Jerome v. Shaw*, 862.

MANDAMUS. See Elections, 4; Courts, 10; Office, 1; County Commissioners, 1; Taxation, 19.

1. *Mandamus — Mandatory Injunction — Definitions.* — The purpose of a mandatory injunction is to restore the plaintiff to his previous condition changed by the wrongful act of the defendant, and that of a mandamus to compel the defendant to do an act which he has refused to do in violation of the plaintiff's rights. *Britt v. Board of Canvassers*, 797.

2. *Mandamus—Courts—Jurisdiction.—Semble*, it is only the resident judge or the one holding the courts of a district who may issue a mandamus in regard to a contested election held therein, and not a nonresident judge, or one holding the courts of a different district. *Moore v. Moore*, 131 N. C., 376, cited and applied. *Ibid.*

3. *Mandamus—Findings—Appeal and Error.*—Where the judge finds the facts in proceedings for mandamus, and the appellant has not demanded a trial by jury, the facts so found are conclusive on appeal, as where he has found that the board of canvassers ascertained and declared the result of the voting in an election on one of several controverted dates. *Ibid.*

4. *Mandamus—Equity—Appeal and Error—Findings of Fact.*—An application for mandamus is a legal and not an equitable remedy, and the Supreme Court on appeal may not pass upon the facts or find additional ones. *Ibid.*

MANDAMUS—*Continued.*

5. *Mandamus—Elections—Board of Canvassers—Adjournment—Scope of Writ.*—As to whether a board of canvassers can be compelled by mandamus to reconvene after its final adjournment, *quære;* and *semble*, it can be done therefore only for the purpose of requiring it to complete its labors, but not to reconsider its action. *Ibid.*

MARRIAGE. See Contracts, 14; Criminal Law, 18.

MARRIED WOMEN. See Tenants in Common, 3; Contracts, 23.

MARSHALING. See Equity, 3, 4.

MASTER AND SERVANT. See Railroads, 1; Evidence, 6; Negligence, 13.

1. *Master and Servant—Railroads—Negligence—Evidence—Trials—Questions for Jury—Instruction.*—There was evidence tending to show that the plaintiff, the manager of the defendant timber corporation, was on a logging train of defendant, in pursuance of his duties, and was injured by a tree, which had been cut by the defendant's other employees, falling upon the flat car on which he was riding at a speed of 5 miles an hour; that the employees had been instructed by him to be careful in cutting trees along the logging right of way, and that the engineer could have seen the tree falling, had been previously instructed to look for such dangers, and had been warned thereof in time to have stopped the logging engine on this occasion and avoid the injury; and there was evidence *per contra*, and further evidence that the tree would not have fallen on the train except for a current of wind which diverted it from its downward course to the tops of smaller trees, and thence upon the car. *Held*, the question of the defendant's negligence and its proximate cause was properly submitted to the jury. The charge in this case is approved. *Bloxham v. Timber Corporation*, 37.

2. *Same—Prior Admissions.*—Where there is evidence that the plaintiff has sustained a serious physical injury proximately caused by the defendant's negligence, and also that soon thereafter, while greatly suffering, he had made a statement exonerating the defendant from blame, it is for the jury to decide, upon the conflicting evidence, as to the defendant's actionable negligence, and not for the court to decide as a matter of law whether there was such negligence. *Ibid.*

3. *Master and Servant—Dangerous Instrumentalities—Duty to Instruct.*—The plaintiff was employed at the defendant's sawmill as a millwright, and was directed by his superior to operate a saw carriage used to take the logs to the saw for the purpose of sawing them, and to operate the appliances for holding the logs properly upon the carriage. *Held*, evidence tending to show that the plaintiff was inexperienced and ignorant, and was not properly instructed as to the danger of performing such duties, was material for the consideration of the jury upon the question of the defendant's actionable negligence under the facts of this case. *Dunn v. Lumber Co.*, 129.

4. *Master and Servant—Negligence—Safe Place to Work—Inspection—Duty of Master.*—Where the servant is required to work with dangerous instrumentalities and surroundings, such as operating the log carriage of a sawmill, it is the legal duty of the master to provide a reasonably safe place to work and reasonably safe tools and

MASTER AND SERVANT—*Continued.*

appliances with which to perform his work, and make such inspection thereof as a reasonably prudent man would make under the circumstances, as if the risk were his own. *Ibid.*

5. *Same—Evidence—Trials.*—The plaintiff was injured while operating a log carriage at a sawmill by a hammer-dog falling upon the saw in an unusual manner, causing it to fly off in fragments and injure him. *Held*, evidence as to the defective condition of the saw, and the defective working of the other parts of the machinery having a bearing upon the results that caused the injury, was proper for the consideration of the jury. *Ibid.*

6. *Master and Servant—Safe Appliances—Selection—Rule of Prudent Man—Known and Approved, etc.*—While it is the duty of the master to provide such implements and appliances for the servant in performance of his work as are known, approved, and in general use, this does not exempt him from liability if, notwithstanding, he has otherwise negligently failed in his duty to supply him a reasonably safe place for the work to be done, or reasonably safe machinery, tools, and appliances for that purpose. *Ibid.*

7. *Master and Servant—Negligence—Imputed Knowledge—Inspection—Ordinary Care—Requests for Instruction—Appeal and Error.*—Where there is evidence tending to show that an employee at a manufacturing plant permitted boys to bathe in a reservoir used by it for the purpose of a water supply, against his employer's instruction, and in a secret and concealed manner, it is *Held*, in an action against the company for damages for the alleged negligent drowning of the plaintiff's intestate, a boy, that the refusal of defendant's special instruction that the plaintiff would not be fixed with implied knowledge of the conditions if it had used ordinary care in inspection, etc., is reversible error. *Gurley v. Power Co.*, 670.

8. *Master and Servant—Employer and Employee—Dangerous Work—Duty of Employer.*—It is the duty of an employer to furnish the employee, while engaged within the scope of his duties, a reasonably safe place to work, reasonably safe appliances, and to give such inspection to the premises and appliances as are necessary to keep them in this condition, and to warn the employee of dangers known to him or which he should have known by the exercise of ordinary care, and which were unknown to the employee or which he could not discover in the careful performance of his duty. *Orr v. Rumbough*, 754.

9. *Same—Instructions—Trials—Burden of Proof.*—In an action to recover of the employer damages for the negligent killing of an employee, alleged to have proximately resulted from the failure of the former to instruct the latter in doing dangerous work required of him in the course of his employment, the burden is upon the plaintiff to show that the defendant knew of the defect or danger or that it could have discovered it in the exercise of ordinary care, with the presumption that it was familiar with the dangers ordinarily accompanying that character of work. *Ibid.*

10. *Master and Servant—Negligence—Presumptions—Res Ipsa Loquitur—Exceptions to Rule.*—The exception to the general rule which raises a presumption of negligence where a personal injury occurs

MASTER AND SERVANT—*Continued.*

to an employee under conditions exclusively within the control of the employer, is not applicable when all of the facts are known, and they rebut the presumption, or where the injurious occurrence could not happen without the voluntary act of the injured person, or where both were in the exercise of an equal right and chargeable with the same degree of care. *Ibid.*

11. *Same—Trials—Evidence—Dangerous Work—Delegated Duty.*—Where the plaintiff's intestate, a man experienced in such work, had been employed by the defendant as foreman in his repair shop, and the defendant had the intestate to install a welding machine under the instruction and with the assistance of an expert sent from the factory for the purpose, leaving the two in full charge; and the intestate and the expert, by faulty construction, had permitted coal oil to leak upon the floor, become mixed with chemicals used in a retort, which afterwards caused an explosion in the retort resulting in the intestate's death; and there is no evidence that the defendant should reasonably have known the effect the oil would have on the chemicals: *Held*, insufficient to show that the plaintiff had failed in the performance of any duty he owed the intestate, his employee, and a judgment as of nonsuit should be entered. The doctrine that an employer may not escape liability by delegating to another duties he is required to perform are inapplicable to the facts of this case. *Ibid.*

MATERIALS. See Mechanics' Liens, 1, 3.

MATTERS IN EXCUSE. See Homicide, 17.

MECHANICS' LIENS. See Insurance, 19, 20.

1. *Mechanics' Liens—Materials—Assignment—Attachment.*—Where a second subcontractor files its itemized statement of goods furnished for and used in the building, with the owner thereof, in the manner provided by law, it is entitled to a lien on the funds then due by the owner to his contractor, and by the latter to his subcontractor, and where the first subcontractor has assigned the amount due him by the contractor, and yet another has taken out proceedings in attachment against him on this fund, but in neither case for material or labor, etc., for which the statutes create a lien upon the building, the filing of the claim by the second subcontractor relates back to the furnishing of the material, without the necessity of its having filed its statement with the clerk; and upon bringing action of foreclosure against the owner and the contractor, to which the others are made parties, within the statutory time, this lien has priority both of the assignments and the levy of attachment, though subsequent in time and without notice to them of the lien for material. Revisal, secs. 2020, 2022, 2023. *Granite Co. v. Bank*, 354.

2. *Same—Priorities.*—Where a subcontractor has assigned the funds due him by his contractor to A., and B., his creditor, has sued out an attachment thereon, but in neither case for materials, etc., furnished for the building; and C., a material man, has previously furnished materials used in the building and has duly filed his statutory statement with the owner, which entitles him to a lien: *Held*, the assignment to A. was of a chose in action, which would put him in the shoes of his assignor, against whom the lien for material, per-

MECHANICS' LIENS—*Continued.*

fected under the statute by C., is superior, according to its terms; and as notice by an assignee to a debtor at any time before judgment is sufficient, the lien of the attachment in this case is secondary to the rights of A., the assignee of the subcontractor. *Ibid.*

3. *Mechanics' Liens—Materials—Filing Claims—Subsequent Funds.*—Where the owner of the building has paid his contractor to the time of filing the statutory claim for material furnished, the moneys thereafter becoming due the contractor, under the same contract, are subject to the lien. *Ibid.*

4. *Mechanics' Liens—Notice—Trusts—Statutes.*—The amount due the contractor and subject to the claims of material men who have filed their statutory notice is not a debt due by the owner to the material men in the ordinary sense, but a fund held in trust for them strictly arising from the operation of the statute, in conformity with its terms; and the statute imposes no duty upon the owner when the material men have not filed the required notice or acquired their lien accordingly. *Foundry Co. v. Aluminum Co.*, 704.

5. *Same—Double Security—Distribution.*—The statute furnishes a double security to those furnishing material, etc., to the contractor used in a building and who give the statutory notice to the owner, in giving them a lien upon the property if enforced by suit within six months (Revisal, sec. 2019), and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed *pro rata* among the claimants thereto entitled (Revisal, sec. 2023), the latter security not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor. *Ibid.*

6. *Same—Priorities.*—One who has furnished material to a contractor, which was used in the building, and who, with others, has given the statutory notice to the owner, who then owes his contractor, according to his contract, by enforcing his lien by action within the six months acquires no superior right in the pro rata distribution of the trust funds, but only the additional security of his lien. Revisal, secs. 2019, 2021. *Ibid.*

7. *Mechanics' Liens—Public Buildings—Indemnity Bonds—Principal and Surety—Statutes.*—Chapter 150, sec. 2, Laws 1913, making it a misdemeanor for the authorized persons having charge of the erection of a public building to omit to take a bond from the contractor indemnifying those furnishing the material used therein against loss, does not expressly or by implication provide that a bond taken omitting this provision shall be available to the material men; and where the bond fails in this respect, no liability attaches to the sureties thereon. *McCausland v. Construction Co.*, 708.

8. *Mechanics' Liens—Public Buildings—Liens—Trust Funds—Distribution—Statutes.*—One furnishing material to a contractor for a public building can acquire no lien thereon under the statute, and notice given to the commissioners gives him no right of distribution in the funds in their hands due to the contractor; hence, the commissioners are without authority to deduct the amount due such material man from that due the contractor before payment, and a receiver of the contractor may recover the full amount thereof. *Hutchinson v. Commissioners*, 844.

MENTAL ANGUISH. See Carriers of Passengers, 6; Abatement, 1.

MENTAL CAPACITY. See Wills, 20, 26.

MERCHANDISE IN BULK. See Vendor and Purchaser, 2, 4, 5.

MERITS. See Removal of Causes, 6.

MILEAGE. See Carriers of Passengers, 4.

MINORS. See Negligence, 4.

MISDEMEANOR. See Courts 15; Criminal Law, 15.

MISMANAGEMENT. See Corporations, 5; Partnership, 1.

MISREPRESENTATION. See Deeds and Conveyances, 25, 27; Contracts, 7; Insurance, 16.

MISTAKE IN DESCRIPTION. See Instructions, 14.

MORTGAGES. See Limitation of Actions, 11, 16, 17; Deeds and Conveyances, 22; Vendor and Purchaser, 7; Contracts, 8; Conversion, 1; Parties, 2.

1. *Mortgages—Sales—Fraud—Issues — Appeal and Error.*—Where the sale of lands under the execution of a power in a mortgage is sought to be set aside upon allegation that it was fraudulent for the lack of a consideration for the mortgage, and in answer to responsive issues the jury has found that there was a valid consideration for the mortgage, it is not error that the court refused to submit an issue tendered by the plaintiff drawing a conclusion of fraud based entirely upon an affirmative finding of the issues submitted. *Norris v. Hudson*, 91.

2. *Mortgages—Release of Lien—Deeds and Conveyances—Fraud—Evidence.*—A release by deed or otherwise by the mortgagee of his lien upon lands sold by his mortgagor to another does not furnish any evidence *per se* that he participated in the fraudulent representations of his mortgagor in procuring the sale, or in such representations made by his own attorney acting independently of him. *Poe v. Smith*, 67.

3. *Mortgages— Foreclosure— Injunction—Partnership Profits—Verdict—Judgments.*—In a suit to restrain the foreclosure of a mortgage there was evidence in plaintiff's behalf tending to show that the mortgage was only given to indemnify the defendant in advancing money for partnership purposes, and that the enterprise had resulted in a profit; and in defendant's behalf that the mortgage was given to secure an additional debt owed by the plaintiff, with evidence to the contrary. Under appropriate issues and correct instructions the jury found that the note and mortgage had been paid and that defendant was indebted to plaintiff for partnership profits: *Held*, the verdict established the fact that plaintiff owed defendant nothing for outside individual transactions, and judgment was properly entered in plaintiff's favor. The principle that reversals are not granted upon slight technical errors alone discussed by WALKER, J. *Smith v. Hancock*, 151.

4. *Mortgages—Trusts—Powers of Sale—Interest—Default.*—A deed in trust to lands to secure the payment of notes given by the *cestui que*

MORTGAGES—*Continued.*

trust authorizing a sale upon failure to pay interest thereon as same may thereafter become due, etc., and directing the trustee, after deducting his commissions for making the sale, to apply so much of the residue as may be necessary to pay off and discharge the said notes and all accrued interest then due, etc., confers upon the trustee the power to sell the lands thereunder before the maturity of the notes, upon default in the payment of the interest thereon at the time stated, without reference, in the absence of fraud, to any hardship it might then impose upon the *cestui que trust*. *Sanderlin v. Cross*, 234.

5. *Mortgages—Trusts—Foreclosure Sales—Suppression of Bids—Trials—Evidence.*—Where lands have been duly advertised and fairly and openly sold to the last and highest bidder under the terms of a deed of trust given to secure money loaned, evidence that the trustor had agreed with a third person to take the lands and the other timber thereon, each at a separate price, is not sufficient proof of a combination to suppress the bidding and cause the lands to bring an inadequate price at the sale. *Ibid.*

6. *Mortgages—Trusts—Actions—Accounting—Limitation of Actions.*—A suit brought to set aside a deed given to a purchaser of lands at a foreclosure sale under a deed of trust to secure money loaned and for an accounting, falls within the meaning of an action to redeem, and is barred after ten years. *Ibid.*

7. *Mortgages—Registration—Notice—Right of Possession.*—A purchaser of a chattel upon which there is a prior registered mortgage is a purchaser with notice thereof, and the assignee of the mortgage has the right of possession as against him. *Harrington v. Furr*, 610.

8 *Mortgages—Husband and Wife—Surplus—Power of Sale—Entireties—Interests.*—A mortgage of the husband's land, joined in by the wife with power of sale and direction that the surplus, after paying the mortgage debt, be paid to "the parties of the first part, their executors and administrators," does not, by this direction, vest the surplus, after foreclosure, regarded as lands, in the husband and wife in entireties, so that she will take the whole by survivorship, but should be construed as meaning that the surplus should be paid to them as their several interests may appear. *Bailey v. Bailey*, 669.

9. *Mortgages—Surplus—Equity—Deeds and Conveyances—Support of Grantor—Charge Upon Lands—Husband and Wife—Dower—Descent and Distribution.*—Where before marriage a wife has conveyed her lands to her husband in consideration of her support for life, and thereafter she joins in his mortgage of the lands, which after his death has been foreclosed, with surplus over the mortgage debt and costs of sale, etc., in the hands of the trustee: *Held*, the surplus is regarded as realty descending to the heirs at law of the husband before the execution of the power of sale, subject to the widow's dower, and, in addition, charged with her support during her life. *Ibid.*

10. *Mortgages—Payment—Foreclosure—Principal and Agent—Purchase by Mortgagee—Judgments.*—There being evidence in this case that the mortgagee of lands sold the same by foreclosure after the mortgage debt had been paid, and that the purchaser acted for, and has

MORTGAGES—*Continued.*

reconveyed the lands to him, and the jury having so found, under a proper charge, these as facts by their verdict, a decree of the court that the mortgage be satisfied of record and that the attempted foreclosure was void, etc., is a correct one. *Poe v. Bright*, 838.

MOTIONS. See Judgments, 1, 22; Appeal and Error, 13, 48, 49, 54, 68; Railroads, 19; Courts, 8, 11, 13; Instructions, 15; Indictment, 2.

MOTION IN ARREST.

Motions in Arrest—Judgments.—A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. *S. v. Taylor*, 892.

MOTIONS IN CAUSE. See Judicial Sales, 2.

MOTION TO DISMISS. See Appeal and Error, 35.

MOTIVES. See Homicide, 3.

MUNICIPAL CORPORATIONS. See Telephone Companies, 1; Constitutional Law, 2.

1. *Municipal Corporations—Roads and Highways—Relocation—Discretionary Powers—Private Use—Courts—Jurisdiction.*—Where in an action against a railroad company and a township road committee there are allegations and affidavits that the defendant committee are about to change the location of a public road running in front of plaintiff's lands to the rear thereof, taking about an acre of plaintiff's land, not for the public good, but for the sole advantage of the railroad company in again commencing to use a rock quarry which it had theretofore used, a judicial question is raised, cognizable by our courts, whether the power sought to be exercised is for the public benefit or solely to advance private interests. *Cobb v. R. R.*, 58.

2. *Same—Injunction.*—Where the relocation of a public road by a township road committee is made for the public benefit in the honest exercise of their discretionary powers, they will not be interfered with by the courts solely because there are some incidental advantages to be gained by an adjoining property owner. *Ibid.*

3. *Same—Serious Questions—Issues.*—Where an injunction is sought against a township road committee and a railroad company, and the pleadings and affidavits raise the question as to whether the relocation of a public road running in front of plaintiff's lands was for the sole benefit of the railroad company, and not the public, serious issues are raised, and a restraining order, theretofore granted, should be continued to the hearing of the case upon its merits. The principle that the courts will not enjoin the operation of industrial and other enterprises which aid in the development of the country has no application to the facts of this case. *Ibid.*

4. *Municipal Corporations—Road Trustees—Government Agencies—Torts.*—A township board of trustees incorporated by the Legislature to maintain and construct the public roads of the township are

MUNICIPAL CORPORATIONS—*Continued.*

clothed with duties governmental in their nature and for the public benefit; and while strictly acting in pursuance thereof they are not liable for a pure tort of their employees or agents in inflicting a personal injury upon others, as in this case, by their negligence in leaving explosives exposed, resulting in their being found by young children and set off by them in their play. The distinction between instances in which the injury amounts to the taking of private property and where the primary purpose of a corporation is for private gain is pointed out and distinguished. *Price v. Trustees*, 84.

5. *Municipal Corporations—Cities and Towns—Sunday Ordinances—Statutes.*—Established municipal authorities may enact such ordinances as are promotive of the peace and good order of the town, and enforce them by appropriate penalties, when they are not unreasonable or unduly discriminative, or manifestly oppressive and in "derogation of common right." Revisal, sec. 2923. *S. v. Burbage*, 876.

6. *Same—Public Policy—Drug Stores—Discrimination—Constitutional Law.*—It is against the public policy of this State that one should pursue his ordinary business calling on Sunday, and such may not only be regulated by town ordinances, but altogether prohibited on that day; and an ordinance of this kind is not rendered invalid, as unduly discriminative, by reason of an exception in favor of drug stores or on account of Revisal, sec, 2836, forbidding work "in ordinary callings on Sunday under penalty of $1." *Ibid.*

7. *Municipal Corporations—Cities and Towns—Sunday Ordinances—Admission to Stores.*—An ordinance designed to prevent people from gathering at business places in the town at a time when business there has been lawfully prohibited is a reasonable regulation in promotion of the public policy which the ordinance intends to enforce; and an ordinance which prohibits a storekeeper from transacting business on Sunday except in cases of necessity, and from allowing persons other than himself or clerk from entering his place of business on that day, imposing a fine of $10 for its violation, is valid and enforcible. Revisal, sec. 2836. *S. v. Thomas* 118, N. C., cited and distinguished. *Ibid.*

MURDER. See Homicide, 1, 3, 5, 6, 16, 18; Appeal and Error, 62; Instructions, 20.

NAVIGABLE WATERS. See Water and Water Courses, 3.

NECESSARIES. See Taxation, 12; Constitutional Law, 2.

NEGLIGENCE. See Appeal and Error, 4, 23; Evidence, 1, 15; Master and Servant, 1, 4, 7, 10; Water and Water-Courses, 2; Railroads, 3, 7, 8, 9, 13, 21, 22, 23, 24, 25, 27, 28; Carriers of Passengers, 2, 11; Banks and Banking, 1, 2, 3; Carriers of Goods, 37, 40; Automobiles, 1; Torts, 2; Principal and Agent, 6, 8; Abatement, 1; Executors and Administrators, 2; Instructions, 11; Criminal Law, 21.

1. *Negligence—Evidence—Proximate Cause—Vis Major.*—The plaintiff, an employee of the defendant, was injured by a tree falling upon him as he was riding on the car of defendant's logging road in the performance of his duties, and there was evidence that a change of wind had deflected the tree from its expected course, so that it

NEGLIGENCE—*Continued.*

struck the tops of smaller trees, and thence fell upon the plaintiff. There was further evidence that the engineer of defendant's logging train should reasonably have seen the danger in time for him to have stopped the train and avoided the injury, after the course of the falling tree had been unexpectedly deflected. *Held*, the proximate cause of the injury depended upon whether the engineer had been negligent in this respect, and, if so, the change of the wind would be the remote cause, and the doctrine of *vis major* is not applicable. *Bloxham v. Timber Corporation*, 37.

2. *Contributory Negligence—Children—Trials—Evidence—Questions of Law.*—A lad 8 years of age, injured while assisting, at their request, the defendant's employees in pushing a car loaded with cross-ties, and injured while endeavoring to jump on the car to ride across a cattle-glard, was too young to be guilty of contributory negligence under the facts of this case. *Ashley v. R. R.*, 98.

3. *Negligence—Concurrent Causes—Proximate Cause.*—In this action to recover damages for personal injury received by the plaintiff while operating defendant's log carriage at its sawmill, there was evidence tending to show that the defendant was operating a defective saw furnished by the defendant, and through defective machinery a hammer-dog fell upon it, resulting in the injury: *Held*, the proximate cause of the injury would be the result of the two negligent acts of the defendant, if established. *Dunn v. Lumber Co.*, 129.

4. *Negligence—Automobiles—Minors—Statutes.*—Where a person within the age prohibited by the statute runs an automobile upon and injures a pedestrain, the violation of the statute is negligence *per se*, and a charge by the court that it is a circumstance from which the jury could infer negligence is reversible error. *Taylor v. Stewart*, 203.

5. *Same—Proximate Cause—Questions for Jury—Burden of Proof—Trials.*—While it is negligence *per se* for one within the prohibited age to run an automobile, it is necessary that such negligence proximately causes the injury for damages to be recovered on that account, with the burden of proof on the plaintiff to show it by the preponderance of the evidence. *Ibid.*

6. *Same—Evidence.*—It is when the facts are admitted and only one inference may be drawn therefrom that the courts will declare whether a negligent act was the proximate cause of a personal injury; and it is *Held*, in this case, that it is for the jury to determine whether a competent and careful chauffeur of maturer years could have avoided the injury under the circumstances, or whether it was due to the fact that a lad within the prohibited age was running it at the time. *Ibid.*

7. *Negligence—Parent and Child—Torts—Minors—Consent of Parent—Consent Implied—Automobiles.*—While ordinarily a father is not held responsible in damages for the negligent acts of his minor son done without his knowledge and consent, such may be inferred, as where the father constantly permitted his 13-year-old son to run his automobile, had ridden with him, and upon the present occasion the son, in the absence of his father, had taken the operation of the car from his father's chauffeur and inflicted the injury complained of. *Ibid.*

NEGLIGENCE—*Continued.*

8. *Negligence—Evidence—Sudden Peril—Railroads—Crossings—Automobiles.*—The doctrine that a person in the presence of imminent peril is not held to the same deliberation or circumspection of care as he would be under ordinary conditions applies to the facts of this case, where an automobile, driven by the owner, was approaching a railroad crossing, with his view of a coming train obstructed, and the employee of the company suddenly dropped the gate to allow a train to rapidly pass, thereby causing him to deflect the course of his car to its damage and causing him personal injury. *Hinton v. R. R.*, 587.

9. *Negligence—Partnership—Pleadings—Carriers of Goods.*—Where the plaintiff sues a carrier, an express company, for damages to a shipment of goods, and in the complaint alleges ownership thereof, which is not denied in the answer, the defendant cannot escape liability upon the ground that the shipment was owned by a partnership between plaintiff and others. *Teeter v. Express Co.*, 616.

10. *Negligence—Trespass—Torts of Third Persons.*—The rule that one who is a trespasser upon lands cannot maintain an action against the owner for negligent injuries received by reason of conditions upon the premises has no application when the injury complained of was caused by the wrong of a third person having no connection with the owner or his proprietary rights. *Ferrell v. R. R.*, 682.

11. *Negligence—Telephone Companies—Torts—Reasonable Anticipation—Damages.*—The intestate was riding on top of a car of a freight train at the request of the company's employee to do so and help with the freight at the next station, and was struck from the top of the car to his death by a low hanging wire of a telephone company stretched across the railroad company's right of way. In an action by the intestate's administrator against the telephone company, wherein the defendant's negligence has been properly established, it is *Held*, the death of the intestate should reasonably have been expected to follow from the defendant's wrongful act, and a recovery will not be denied. *Ibid.*

12. *Negligence—Attractive Nuisances—Reservoirs.*—A tank 30 feet long, 35 feet wide, and 11 feet deep, used by a manufacturing concern on its own premises for a water supply, does not fall within the doctrine of dangerous instrumentalities and attractive nuisances so as to impose on the owner the same degree of care in guarding them against the trespass of children. *Gurley v. Power Co.*, 690.

13. *Same—Master and Servant—Employer and Empolyee—Principal and Agent—Scope of Employment—Respondeat Superior.*—Where a manufacturing concern has a reservoir on its own premises for its water supply, well guarded by a fence around it and sign forbidding trespassing, and situated at a substation in charge of an employee, who had been instructed to prohibit boys from bathing there, but the employee, in violation of his instruction, secretly permitted the boys to bathe, making a small charge for bathing suits, and one of the boys is drowned, the doctrine of *respondeat superior* has no application, upon the principle that the acts of the employee were not within the scope of his employment and done against the command of the

NEGLIGENCE—*Continued.*

master; and the refusal of the defendant's special requests for instruction to this effect, with supporting evidence, is reversible error in the action of the intestate's administrator for damages. *Ibid.*

14. *Negligence—Principal and Agent—Trials—Evidence—Opinion.*—In an action to recover damages against a principal and his agent for the alleged negligence of the latter in ordering the plaintiff to do dangerous work with insufficient help, it is held competent for the plaintiff to testify how the injury was received, or what caused it, and why more hands were needed, when stating facts within his own knowledge, and it is not objectionable as opinion evidence. *Hollifield v. Telephone Co.*, 714.

15. *Damages—Negligence—Evidence—Character.*—In an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant's vice-principal, it is comptent to show that the plaintiff was sober and industrious, upon the question of his earning capacity and the extent to which it had been impaired by the injury. *Ibid.*

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 4, 7, 8.

NEGOTIATIONS. See Contracts, 2, 22.

NON OBSTANTE. See Judgments, 8.

NONRESIDENTS. See Judgments, 22.

NONSUIT. See Principal and Agent, 3; Railroads, 7, 21, 24; Carriers of Passengers, 3; Appeal and Error, 31, 32; Evidence, 12; Commerce, 2; Carriers of Goods, 41; Criminal Law, 23.

1. *Evidence—Nonsuit.*—In an action to enforce payment on a policy of health insurance, defended by the company for alleged fraud and misrepresentations made by the insured, the evidence upon defendant's motion to nonsuit must be construed favorably in behalf of the plaintiff, and, so construed, there being sufficient evidence to sustain his condition, the motion was properly disallowed. *Collins v. Casualty Co.*, 543.

2. *Nonsuit—Statutes—Costs—New Action.*—Revisal, sec. 370, providing, among other things, that a new action upon the same subject-matter between the same parties may be commenced within one year after nonsuit, as amended by chapter 211, Laws 1915, with proviso that the costs in such action shall have been paid before the commencement of the new suit, etc., does not forbid the commencement of a second action without paying the costs of the first, but annexes this as a condition to bringing the new action free from the bar of the statute if pleaded, and a motion to dismiss it before answer filed, upon the ground that the costs of the former one had not been paid, will be denied. *Bradshaw v. Bank*, 632.

NONUSER. See Limitation of Actions, 5.

NOTICE. See Carriers of Goods, 5, 22, 23; Elections, 1; Limitation of Actions, 11, 12, 13; Roads and Highways, 1; Courts, 3; Mortgages, 7; Mechanics' Liens, 4.

NOTIFICATION. See Carriers of Goods, 16.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 1, 8, 15, 16, 21, 26, 33, 53, 55, 57, 58, 59, 60, 61; Removal of Causes, 6; Railroads, 15; Courts, 6; Instructions, 10, 18.

OCCUPANTS. See Limitation of Actions, 27.

OFFENSE. See Indictment, 2.

OFFICE. See Pleadings, 1; Elections, 5.

Office—Title—Quo Warranto—Mandamus—Elections—Courts—Inquiry. An action of *quo warranto*, and not the writ of mandamus, is the proper remedy to try title to office, and in the latter case the courts cannot inquire into questions of fraud, illegal voting, illegality of the election and the like. *Britt v. Board of Canvassers*, 797.

OFFICER. See Trials, 4.

OMISSIONS. See Instructions, 18.

OPINION. See Instructions, 5, 11; Wills, 20; Insurance, 13; Sale, 2; Negligence, 14; Appeal and Error, 44; Trials, 2; Courts, 14; Jurors, 1.

OPTION. See Landlord and Tenant, 1.

ORAL AGREEMENT. See Appeal and Error, 26.

ORDERS. See Appeal and Error, 2, 29; Removal of Causes, 8; Courts, 6.

ORDER TO PAY. See Banks and Banking, 4, 5.

ORDINANCES. See Railroads, 8; Carriers of Passengers, 11; Municipal Corporations, 5, 7.

OVERCHARGE. See Carriers of Goods, 21.

OWNER. See Carriers of Goods, 36.

PARENT AND CHILD. See Negligence, 7; Executors and Administrators, 2, 6.

PAROL EVIDENCE. See Deeds and Conveyances, 21; Carriers of Goods, 23.

PAROL TRUSTS. See Trusts and Trustees, 1, 2.

PARTIES. See Carriers of Goods, 4; Corporations, 2; Evidence, 2; Judgments, 2, 4, 21; Judicial Sales, 1, 2; Actions, 3; Removal of Causes, 7; Wills, 23, 30; Appeal and Error, 29; Statutes, 5; Register of Deeds, 2; Contracts, 17, 19; Trusts, 1; Principal and Agent, 14; Executors and Administrators, 6.

1. *Tenants in Common—Partition of Lands—Sales—Leinors—Parties—Appeal and Error.*—In proceedings to sell lands for partition among tenants in common, judgment creditors of the individual tenants, and their mortgagees, having liens on the lands to the extent of their interests, are proper parties to the proceedings; and where such lienors have been made parties thereto, and the trial judge has dismissed the action as to them, it is reversible error. The distinction between proper and necessary parties pointed out by BROWN, J. *Holley v. White*, 77.

PARTIES—*Continued.*

2. *Parties—Deeds and Conveyances—Mortgages—Actions—Accounting.*—A purchaser of land from a mortgagor upon consideration that the former pay off the mortgage, the amount of which the latter agreed to ascertain, but failed or refused to do, may maintain his action against the mortgagee as a necessary party, for an accounting, in order that he may relieve the land from the lien of the mortgage, and remove the cloud upon his title. Revisal, sec. 411. *Elliott v. Brady*, 828.

PARTITION. See Parties, 1; Tenants in Common, 1.

1. *Partition—Title—Judgments—Estoppel.*—While ordinarily the title to lands is not adjudicated in proceedings to partition them, it may be put at issue by a party thereto properly pleading it; and where the lands are ordered to be partitioned, reserving the question of title, and a final judgment entered, adjudicating it, the judgment so entered will operate as an estoppel in another and independent action between the parties and privies calling it into question. *Propst v. Caldwell*, 594.

2. *Partition—Judgments—Estoppels—Wills.*—Where in proceedings to partition lands the question as to whether certain devisees under the terms of a will were entitled to their part of the lands or its proceeds, or whether they were to be held in trust for them, has properly been put in issue and determined by final judgment therein, it is *Held*, that the parties and privies thereto are estopped in an independent action to question the correct interpretation of this clause of the will. *Ibid.*

PARTNERSHIP. See Mortgages, 3; Negligence, 9; Contracts, 18.

Partnership—Principal and Agent—Corporations—Gross Mismanagement—Directors—Imputed Knowledge—Actual Knowledge—Burden of Proof.—The knowledge of one partner which will be imputed to the others of the partnership must have been acquired within the agency implied from the partnership relation; and where the partnership sells goods to an insolvent and grossly mismanaged corporation, in which one of them is a director, the knowledge of the corporate affairs will not be imputed to the other; and where, after a receiver has been appointed for the corporation, the director therein assigns his claim to his partner upon a sufficient consideration, the other may recover from the individual directors his proportionate share of the debt. Under the evidence in this case the burden of proof is on the plaintiff to show the want of actual knowledge and that he acted in good faith. *Authony v. Jeffress*, 378.

PARTY AGGRIEVED. See Carriers of Goods, 3, 10, 19.

PAYMENTS. See Judgments, 7; Deeds and Conveyances, 18, 22, 23; Banks and Banking, 4, 5; Trials, 1.

PEDESTRIANS. See Railroads, 9, 21, 25.

PENALTY STATUTES. See Carriers of Goods, 19.

PERFORMANCE. See Insurance, 3; Arbitration and Award, 2.

PERJURY. See Pleadings, 7.

PERSONALTY. See Wills, 14; Descent and Distribution, 1.

PETITIONS. See School Districts, 1, 3, 4, 5, 6; Roads and Highways, 4.

PLEADING. See Contracts, 4; Deeds and Conveyances, 6, 11; Evidence, 2; Limitation of Actions, 1; Taxation, 7; Carriers of Goods, 34; Courts, 5; Negligence, 9; Appeal and Error, 32; Removal of Causes, 12.

1. *Pleadings—Issues—Title to Office—Damages.*—In an action to determine the title to the office of register of deeds, the complaint alleged that the plaintiff had been duly elected in November, 1914, was entitled to the office, and that defendant had been wrongfully sworn in and installed and had received the emoluments of said office, which he sought to recover. The lower court held with defendant, but on appeal it was decided that the vote was a tie, and the case remanded to the county board of elections, who decided with defendant, *Held*, an issue to determine what sum the plaintiff should recover of the defendant for fees received for services performed by him prior to 1914 does not arise upon the pleadings, and was properly refused. *Bray v. Baxter*, 7.

2. *Pleadings—Issues—Tenant by the Curtesy.*—Where the defendant is in possession of lands of his deceased wife, which the plaintiff claims in his action alleging title, which is denied, it is competent for the defendant, without specially pleading it, to show that issue had been born alive of the marriage, capable of inheriting it, and that he was tenant by the curtesy, and as such held the legal title thereto for his life, with the right of possession. *Fleming v. Sexton*, 250.

3. *Pleadings—Complaint—Lis Pendens—Statutes—Innocent Purchaser.*—A complaint in an action involving the title to lands has the effect of notice of the plaintiff's claim to the land as therein set forth, when the party to be affected therewith resides within the county, and summons has been issued in the cause; and where such party lives in a different county of the State, and claims as a bona fide purchaser, to affect him with notice of *lis pendens* the requirements of the statute must be strictly followed; among other things, that it be served within sixty days after its filing. Revisal, sec. 461. *Powell v. Dail*, 261.

4. *Same—Record Entries—Alias Summons—Presumptions—Rebuttals.*—In an action involving the title to lands there was entered on the summons docket, "Case continued. Time to file pleadings." Thereafter an alias summons was issued. *Held*, the issuance of the alias summons presupposes that the court had not obtained jurisdiction up to that time, and would rebut the presumption, had it arisen under the former entries, that the defendant, claiming to be an innocent purchaser of the lands, had constructive notice of the complaint filed in the action as *lis pendens*. *Ibid.*

5. *Same—Appeal and Error—Trials—Questions for Jury.*—Entries in this case on the summons docket that it had been continued, with time allowed both parties to plead, being rebutted by a subsequent order for an alias summons, and it being necessary to determine the date on which the defendant in that action, the plaintiff in this one, had been served with summons, upon the question as to whether the complaint would operate as a *lis pendens*, the cause is

PLEADING—*Continued.*

remanded to the Superior Court, that the fact be determined by a jury under the general or special issues, with the right of either party to offer evidence thereon. *Ibid.*

6. *Pleadings—Interpretation—Demurrer.*—The allegations of a complaint tending to show a cause of action must be taken as true upon demurrer. *Bailey v. Long*, 661.

7. *Pleadings—Demurrer—Judgment—Estoppel—False Testimony—Perjury—Evidence.*—In an action to set aside a verdict and judgment between the same parties for false testimony of a witness therein to a material fact, the complaint must allege that the witness had been convicted of the perjury and that the plaintiff was free from laches; and when such is not alleged, and it appears from the complaint that a final judgment had been entered creating an estoppel, a demurrer should be sustained. *Kinsland v. Adams*, 765.

8. *Pleadings—Demurrer—Fraud—Good Faith.*—In this case the complaint alleged that one of the defendants, with the advice and suggestion of the other, unlawfully, with intent to hinder, delay, and defeat plaintiff's recovery, burnt certain deeds and papers, and it appearing that findings as to good faith were necessary for a proper determination, it is *Held* that the demurrer was properly overruled. *Vinson v. Pugh*, 843.

PLEAS. See Limitation of Actions, 19, 20, 21, 22, 23; Reference, 5; Usury, 3; Arbitration and Award, 3.

PLEAS IN BAR. See Arbitration and Award, 1; Reference, 9; Evidence, 1.

POLICE POWERS. See Lotteries, 2.

POLICIES. See Insurance, 7, 17.

POLLS. See Taxation, 11.

POLL TAX. See Taxation, 8.

POSSESSION. See Deeds and Conveyances, 1, 4, 5, 7, 23, 31; Limitation of Actions, 1, 5, 9, 10, 16; Telephone Companies, 3; Instructions, 3; Criminal Law, 6, 9, 10.

POSSESSION OF PREMISES. See Criminal Law, 10.

POWERS OF SALE. See Mortgages, 4, 8; Wills, 29.

PREMATURE APPEAL. See Appeal and Error, 31.

PREMEDITATION. See Homicide, 5, 6.

PRESUMPTIONS. See Appeal and Error, 4, 13, 25, 63; Telephone Companies, 3; Drainage Districts, 3; Insurance, 2; Deeds and Conveyances, 12; Judgments, 3, 4, 6; Wills, 23, 25; Railroads, 25; Statutes, 7; Homicide, 7.

PRESUMPTIVE EVIDENCE. See Bills and Notes, 8; Master and Servant, 10.

PRIMA FACIE CASE. See Bills and Notes, 2.

PRIMARY LAWS. See Elections, 1, 3.

PRINCIPAL AND AGENT. See Carriers of Goods, 5; Evidence, 7, 13; Insurance, 4, 61; Actions, 2; Judgments, 9; Attorney and Client, 2; Bills and Notes, 5; Partnership, 1; Negligence, 13, 14; Mortgages, 10; Criminal Law, 19.

1. *Principal and Agent—Contracts—Unusual Acts.*—A general agent has no implied authority to bind his principal by contracts unusual to agencies of like character, or beyond the usual scope of such agencies; and when he attempts to bind his principal by his extraordinary acts, the one dealing with him is put upon notice, and required to ascertain from some authoritative source whether such agent had the power to bind his principal thereby. *Chesson v. Cedar Works*, 32.

2. *Same—Logging Boss—Indefinite Contracts—Cutting Timber.*—One who has been employed as a field superintendent of logging operations, with authority to have timber cut from time to time as needed for a corporation, his principal, and subject to be discharged at any time, has no implied authority to bind his principal with an indefinite contract for cutting the timber from a large tract of land which might last for years, and involving the expenditure of many thousands of dollars; and in an action to recover damages for a breach of the contract it is necessary for the plaintiff to show that the agent had express authority or that the principal ratified his act. *Ibid.*

3. *Principal and Agent—Trials—Evidence—Questions of Law—Nonsuit.* Whether one assuming to act as an agent in making a contract for another made the contract sued on is a question for the jury when the evidence is conflicting; but whether there is more than a scintilla of evidence of such agency is a question of law; and if there is not, a judgment of nonsuit is proper. *Ibid.*

4. *Principal and Agent—Evidence—Declarations of Agent.*—Declarations of an agent made after the event and as mere narrative of a past occurrence, are not competent as substantive evidence against th principal. *Johnson v. Ins. Co.*, 142.

5. *Principal and Agent—Contracts—Independent Contractor—Work Inherently Dangerous.*—Where a principal is sought to be held responsible in damages for the negligence of his independent contractor, on the ground that he cannot escape liability if the work contracted to be done is "inherently dangerous," the test is not whether a man of ordinary prudence would have anticipated that injury would have ensued from this work, but whether the work was of itself full of risks, perilous, hazardous, and unsafe to others while being done; and where the raising or elevation of a tenant house had been let to an independent contractor, and the roof of the porch fell and injured a person through the negligence of the independent contractor, the principal is not responsible. *Scales v. Lewellyn*, 494.

6. *Principal and Agent—Vice-Principal—Trials—Evidence—Negligence.* Where the principal and his agent are sued for a personal injury alleged to have been caused by the negligence of the latter in ordering the plaintiff and others to do certain work under dangerous condi-

PRINCIPAL AND AGENT—*Continued.*

tions, it is competent for the plaintiff to show that the agent was in control of the work and the employees, and that the latter had previously complained to the agent of the danger in doing the work under the surrounding circumstances, and that notwithstanding the complaint he had ordered it to be done. *Hollifield v. Telephone Co.*, 714.

7. *Principal and Agent — Vice-Principal — Evidence — Control of Employees—Trials.*—The evidence in this case held sufficient for the jury to infer that the agent of the principal defendant represented the latter, and that a refusal by the plaintiff, and the other employees working under him, to obey his orders would be followed by a discharge. *Turner v. Lumber Co.*, 119 N. C., 387, cited and applied. *Ibid.*

8. *Principal and Agent—Negligence of Agent—Joint Liability—Damages.*—An order by the vice-principal directing an employee to do certain work under dangerous conditions, from which an injury resulted to the plaintiff, and which was negligent in him to have given, renders both the principal and his vice-principal jointly liable for the resultant damages. *Ibid.*

9. *Principal and Agent—Evidence—Husband and Wife.*—The mere relationship of husband and wife is not evidence of authority of the former to lease the lands of the latter. *Realty Co. v. Rumbough*, 741.

10. *Same—Declarations of Agent.*—Evidence is sufficient of the agency of the husband to contract with a real estate agency to lease the wife's lands for a term of years upon a commission on the rental receipts, which tends to show that he negotiated with the agency upon that basis, changed the original terms of the proposed lease, stating it was not in conformity with his wife's wishes, and she and her husband afterwards signed the lease with a tenant procured by the agency, in the presence of others, who testified at the trial that she willingly signed the lease, stating at the time it was a fair and acceptable one; and she afterwards received the rental, less plaintiff's commissions, the testimony is not objectionable as a proof of agency by the sole declarations or acts of one representing himself as such agent. *Ibid.*

11. *Same—Ratification.*—Where the husband assumes to act for his wife in contracting with a real estate agency to rent her lands upon a commission based on the rental receipts, and there is direct evidence that she willingly signed a lease with a tenant procured by the realty company in the presence of a member of the company, expressing her satisfaction therewith, and there is further evidence that the tenant entered into possession of the property, lived up to the terms of the lease, paid rent to the realty company, who remitted by check through the husband, payable directly to the wife, less the commissions agreed to by him: *Held*, the act of the wife in signing the lease in the presence of a member of the realty company, and accepting remittances for the rental money less commissions agreed upon with the husband, is evidence of her ratification of the contract made by him with the realty company in her behalf. *Ibid.*

12. *Principal and Agent—Scope of Agency.*—A principal is bound by the acts of his agent in leasing his lands which were done in the further-

PRINCIPAL AND AGENT—*Continued.*

ance of the agency and within the scope of the agent's employment. *Latham v. Fields*, 163 N. C., 356, cited and applied. *Ibid.*

13. *Principal and Agent—Real Estate—Rentals—License Tax—Statutes.*—One who is employed by a rental agency upon a share in commissions based upon business which he may bring to such agency, the latter of which has paid the license tax required by ch. 201, sec. 32, Public Laws 1913, acts as the agent of the company thus employing him, and under its license, and is not himself engaged in transactions in selling and renting real estate within the intent and meaning of the statute. *Ibid.*

14. *Principal and Agent—Parties.*—Where one acts solely as the agent of another in consummating a transaction for the lease of lands, looking to his principal alone for his compensation, he is not a proper party to an action to recover upon the contract, and as to him the action is properly dismissed. *Ibid.*

PRINCIPAL AND SURETY. See Usury, 4; Insurance, 19, 20, 21; Mechanics' Liens, 7; Issues, 2; Criminal Law, 1.

PRIORITIES. See Vendor and Purchaser, 1; Mechanics' Liens, 2, 6.

PRIVIES. See Judgments, 21.

PROBATE. See Deeds and Conveyances, 13, 14; Removal of Causes, 3; Wills, 7, 18, 19, 28.

PROCESS. See Malicious Prosecution, 1.

PROSPECTIVE EFFECT. See Statutes, 3.

PROTEST. See Appeal and Error, 10.

PROXIMATE CAUSE. See Negligence, 1, 3, 5, 27, 28; Railroads, 14, 22; Torts, 1, 3.

PUBLIC BUILDINGS. See Mechanics' Liens, 7, 8.

PUBLIC POLICY. See Municipal Corporations, 6.

PULLMAN. See Carriers of Passengers, 9.

PUNISHMENTS. See Criminal Law, 4; Convicts, 1, 2.

PUNITIVE DAMAGES. See Telephone Companies, 2; Carriers of Passengers, 6; Assaults, 2.

PURCHASE BY MORTGAGEE. See Mortgages, 10.

PURCHASE PRICE. See Contracts, 10.

PURCHASERS. See Contracts, 8; Bills and Notes, 9; Deeds and Conveyances, 30.

QUALIFICATIONS. See School Districts, 3, 4, 5.

QUANTUM MERUIT. See Contracts, 14.

QUANTUM VALEBAT. See Contracts, 25.

QUESTIONS AND ANSWERS. See Railroads, 15.

QUESTIONS FOR JURY. See Damages, 3; Evidence, 3; Master and Servant, 1; Railroads, 2, 9, 12, 14, 27; Wills, 1, 3; Negligence, 5; Limitation of Actions, 8, 13, 19, 22; Insurance, 6, 13; Pleadings, 5; Deeds and Conveyances, 15, 31; Vendor and Purchaser, 4; Bills and Notes, 6, 8; Banks and Banking, 3; Judgments, 19; Release, 3; Carriers of Passengers, 7; Instructions, 8; Automobiles, 1; Homicide, 2, 4, 7; Trials, 3; Criminal Law, 25.

QUESTIONS OF LAW. See Negligence, 2; Torts, 2; Estoppel, 1.

QUO WARRANTO. See Elections, 5; Office, 1.

RAILROADS. See Master and Servant, 1; Easements, 1; Limitation of Actions, 4; Carriers of Goods, 11, 19, 22, 38; Carriers of Passengers, 4, 11; Negligence, 8; Commerce, 1.

1. *Railroads—Logging Roads—Master and Servant—Assumption of Risks —Statutes—Fellow-servant.*—The common-law doctrine that an employee assumes the risk of injury from the negligence of a coemployee in the course of his ordinary employment, etc., has been changed by statute in its application to railroad companies, including logging roads operated by steam and other like power, and extends to an injury received by a manager or superintendent from the negligent acts of a subordinate employee. Revisal, sec. 2646. *Bloxham v. Timber Corporation*, 37.

2. *Railroads—Push-Cars—Children—Dangerous Places—Trials—Evidence —Negligence—Questions for Jury.*—Evidence tending to show that employees of defendant railroad company were operating a push-car loaded with cross-ties on defendant's track, and asked plaintiff, a boy 8 years of age and some other children to help push the car to a switch to clear the track for an expected train; that to pass a trestle the lad jumped upon the car, and to avoid a cattleguard 700 yards beyond, and being warned thereof by the employees, the plaintiff again attempted to jump upon the car, but fell, to his injury; that the foreman of the gang saw the boy thus engaged and did not object: *Held*, upon a motion to nonsuit, sufficient evidence of defendant's actionable negligence to take the case to the jury. *Ashby v. R. R.*, 98.

3. *Railroads— Children — Dangerous Places— Push-Cars— Negligence.*— Where the defendant railroad company's employees operating a push-car loaded with cross-ties invited or permitted a lad 8 years of age to help them, in consequence of which he was injured, and this had been observed by the foreman of the gang for some length of time: *Held*, the company was liable, though it had theretofore forbidden its employees to permit children to thus help them. *Ibid.*

4. *Same—Duty of Company.*—The plaintiff, a lad of 8 years, was injured while assisting employees of defendant railroad company to push a car loaded with cross-ties along the track, at their request, with the knowledge of the foreman. *Held*, it was not only the duty of the defendant to order the child away from the track, but it should have seen that he went away. *Ibid.*

5. *Railroads—Spur-Tracks— Condemnation— Corporation Commission— Statutes.*—A railroad company, of its own initiative or by virtue of

RAILROADS—*Continued.*

a contract with private persons, can acquire no right to construct and use its side-tracks to private industries off its right of way and over the lands of intervening owners against their will; and where it has permanently located its line, it is, as a rule, restricted to that and the right of way incident to it; nor is this principle affected by Revisal, sec. 1097, subsec. 5, which authorizes the Corporation Commission to permit the building of industrial spur-tracks after investigation. *Hales v. R. R.*, 104.

6. *Railroads—Spur-Tracks—Easements—Appurtenant — Equal Facilities.* Where the grantees of the use of a spur-track over the lands to be used only with reference to the grantees' private business enterprises located on their own lands have granted the right of this use to a railroad company which seeks to extend it to its other patrons, the railroad company can only act as the agent of the grantees of the right, with only such powers as they may have had, and the rule that such corporations are required to furnish equal facilities to all its shippers has no application. *Ibid.*

7. *Railroads—Negligence—Unloading Car—Gang-plank—Accident—Trials—Evidence—Nonsuit.*—Where the evidence tends to show that a consignee of plumbing material would not wait for the agent of the railroad company to unload it from the car, but voluntarily took two of his own employees, plaintiff and another, to help him do so; that they used an iron gang-plank about the usual size and kind ordinarily used at railroad stations for such purposes, which was placed at the time from the car door to the depot platform; that after several trips in unloading had been made the gang-plank slipped off of the car door as plaintiff was returning empty-handed for another load, when he could have reasonably seen its condition: *Held*, the plaintiff's injury resulted either from an unforeseen accident or from his own negligence, and recovery was properly denied upon a motion to nonsuit. *Silvey v. R. R.*, 110.

8. *Railroads — Flying Switches — Ordinances —Negligence per se.*—It is negligence *per se* for the employees on a railroad train to make a flying switch along the streets of populous towns or at public or much frequented crossings, and especially in violation of a town ordinance prohibiting it. *Lutterloh v. R. R.*, 116.

9. *Same — Pedestrians — Look and Listen — Contributory Negligence — Trials—Evidence—Questions for Jury.*—While one who is undertaking to cross a railroad track is ordinarily required to look and listen and to take note of conditions which are likely to cause him injury in doing so, the facts and attendant circumstances may so qualify this obligation that the question of contributory negligence must be submitted to the jury; and where the plaintiff's intestate was injured by the defendant company in making a flying switch in a town in violation of an ordinance, there is evidence tending to show that the intestate, while attempting to avoid the locomotive, was struck by the switched cars following without warning on another track which he could have observed by looking, but which did not leave the main track more than five seconds before the collision, it is *Held*, that defendant's motion to nonsuit, or instructions tendered by it that the plaintiff could not recover, were properly denied and refused. *Ibid.*

RAILROADS—*Continued.*

10. *Railroads — Right of Way — Ultra Vires Acts — Objection by State*— Where the owner of lands brings action against a railroad company involving its right of way thereon, it is not open to the plaintiff to show that the defendant was acting *ultra vires* in its use and occupation, such position being available only to the State. *Cross v. R. R.*, 119.

11. *Same—Deeds and Conveyances.*—Where a railroad company takes a conveyance of lands for use beyond its charter powers, the deed is not void, but only voidable upon the objection of the State. *Ibid.*

12. *Railroads — Limitation of Actions — Adverse Possession — Ultra Vires Acts—Trials—Evidence—Questions for Jury.*—In this action involving the right of defendant railroad company to the land claimed for it by adverse possession, and its occupation and use for railroad purposes, the plaintiff also claiming to be the owner of the lands, the evidence is held sufficient to take the case to the jury. *Ibid.*

13. *Railroads—Fires—Foul Right of Way—Negligence.*—The skillful and careful running of a properly equipped locomotive by the employees of a railroad company does not relieve the company from liability for damages caused to the owner of the lands by its negligence in permitting its right of way to be in a foul condition, covered by inflammable matter which was ignited by the dropping of sparks from the engine. *Meares v. Lumber Co.*, 289.

14. *Same—Trials—Evidence—Proximate Cause—Questions for Jury.*—Evidence is held sufficient to be submitted to the jury upon the issue of the defendant railroad company's actionable negligence in setting fire to the plaintiff's land, and upon the question of the proximate cause of the injury, which tends to show that the fire broke out upon the defendant's foul right of way, which had not been previously burnt off and was covered with pine straw and other inflammable matter, before the locomotive had passed from sight; that it had previously on several occasions been observed to throw quantities of sparks from its smokestack, and that the fire spread to the lands of the plaintiff, an adjoining owner, and damaged the growth thereon. *Ibid.*

15. *Railroads—Fires—Evidence—Appeal and Error—Objections and Exceptions—Questions and Answers.*—A question, material to the controversy, asked a witness, whether he saw sparks from defendant railroad company's locomotive fall upon its right of way, ignite the matter thereon, and spread to adjoining lands, is not objectionable, and where the answer is not objected to, it will not be considered on appeal, though erroneous. In this case the answer is held competent as tending to show that the locomotive was defective in emitting sparks. *Ibid.*

16. *Railroads—Streets—Additional Burden—Abutting Owners—Compensation—Constitutional Law.*—The construction and operation of a steam railroad upon a street is an additional burden thereon not contemplated by or included in the original dedication for street purposes, and is a physical interference with the proper enjoyment of an abutting owner on the street of his easement therein; and when used

RAILROADS—*Continued.*

without compensation amounts to a "taking" within the meaning of the Constitution, though neither the abutting lot nor a part thereof has been entered upon by the railroad company. *Caveness v. R. R.*, 305.

17. *Same—Measure of Damages.*—Where a steam railroad enters upon a street in front of an abutting owner thereon, and constructs and operates its railroad there so as to constitute an additional burden, to the injury of the owner, for which compensation should be allowed, the owner may recover for the injury to the extent that the value of his property is impaired by the obstruction or hindrance to his easement, and by the annoyances and inconveniences usually allowed for in condemnation proceedings. *Ibid.*

18. *Railroads—Streets—Additional Burden—Deeds and Conveyances—Actions—Statutes.*—The act of a railroad in entering upon and constructing and operating its railroad over a street abutting the lands of another, without having resorted to condemnation proceedings or having otherwise acquired the right, is a continuing trespass upon the lands of the abutting owner, and the right to recover permanent damages therefor will pass to the grantee of the owner, when no other provision has been made in the deed, unless the grantor has theretofore instituted his action to recover them. *Ibid.*

19. *Same—Lis Pendens—Motions in Cause.*—Where the owner of lands at the time of the entry of a steam railroad company on his easement in a street has a right of action against it for permanent damages, which he brings and then conveys the land to another, the proceedings thus instituted may be carried on and perfected as if no conveyance had been made, such proceedings constituting a *lis pendens*, Revisal, sec. 2594; and the vendee must assert his right of action by appropriate proceedings in the cause. *Ibid.*

20. *Railroads—Streets—Additional Burden—Damages—Actions—Title to Easement—Deeds and Conveyances.*—Where a railroad company, without authority, enters upon a street abutting private owners of lands, and constructs and operates its railroad thereon, the owner, by instituting his action to recover damages, confers the right to the easement to the railroad company, upon payment and tender, etc., by the company of the amount awarded by the appraisers; and where no action has been instituted, and the lands have been conveyed after their appropriation and use by the company, the right to recover permanent damages therefor inures to him who first institutes his action pending his ownership, unless there is a different provision in the conveyance. *Ibid.*

21. *Railroads—Negligence—Pedestrians on Track—Assumptions in Avoidance—Evidence—Trials—Nonsuit.*—The intestate of the plaintiff was a schoolgirl on her way to school with other girls on a dirt road alongside the defendant's right of way, and, seeing the train approach, went upon the track in an intervening cut. The other children climbed the side of the cut and avoided injury; but the intestate, while leaving the track for a place of safety, where there was sufficient room for the train to pass, caught her foot in a switch rod, and was struck by the locomotive and killed. *Held*, a motion as of nonsuit upon the evidence should have been allowed, upon the prin-

RAILROADS—*Continued.*

ciple that the employees on defendant's train had the right to assume, up to the last moment, that the intestate, in full possession of her faculties, would leave the track and avoid the injury. In this case there was no evidence that the engineer was negligent or that he could have avoided the injury after seeing the intestate's peril. *Wyrick v. R. R.*, 549.

22. *Railroads—Negligence — Automobiles — Statutes—Speed Limit—Proximate Cause.*—Where a railroad company has provided a gate at a public street crossing of a town to be let down for the protection of vehicles, etc., from passing trains, and it has been shown that the employee in charge has negligently let down this gate in front of an automobile too suddenly for the river and owner to stop, and has caused him to deflect his course to the damage of the machine and his own injury, without negligence on his part, the fact that the driver was at the time exceeding the statutory speed limit, and was therefore guilty of a misdemeanor, does not alone bar his recovery, such being dependent upon the question as to whether his act was the proximate cause of the injury. *Lloyd v. R. R.*, 151 N. C., 536, where the statute itself is made the basis of the injury, cited and distinguished. *Hinton v. R. R.* 587.

23. *Railroads—Negligence—Automobiles—Speed Limit — Statutes.*—Chapter 107, Laws 1913, among other things providing that a person operating a motor vehicle shall have it under control and not exceed 7 miles an hour in certain surroundings, having regard to the traffic on the highway, making a violation thereof a misdemeanor, includes railroads within its provisions, and it is therefore a misdemeanor to run an automobile at a greater speed than 7 miles an hour while approaching a railroad crossing in a town. *Ibid.*

24. *Railroads—Negligence—Trials — Evidence — Last Clear Chance—Nonsuit.*—Where in an action against a railroad company for the negligent killing of plaintiff's intestate there was evidence tending to show that he was intoxicated and was killed by the train rapidly rolling down grade 40 miles an hour upon him in a populous town where the track was straight for a mile or more and frequently used by pedestrians for years, and at a point between two public crossings 250 yards apart; that the train approached without signals or warnings, and the intestate was not seen by the engineer until after he was struck; that the intestate had been drinking and his wounds indicated he was helpless upon the track; and also evidence to the contrary, that the intestate had suddenly stepped from a place of safely in front of the defendant's fast moving train: *Held*, upon a motion to nonsuit it was sufficient upon the question of proximate cause and to sustain a verdict against the defendant upon the third issue as to the last clear chance. *Brown v. R. R.*, 604.

25. *Railroads—Negligence—Pedestrians—Engineers — Presumptions.*—The doctrine that an engineer on the locomotive of a railway train is not required to stop or slacken the speed of the train upon seeing a pedestrian on the track in apparent possession of his faculties is approved. *Hill v. R. R.*, 169 N. C., 740, cited and approved. *Ibid.*

26. *Railroads—Statutes—Riding on Trains—Invitation—Criminal Intent.* Revisal, sec. 3748, prohibiting persons other than employees from

RAILROADS—*Continued.*

riding on trains, etc., was intended to punish such persons who ride on the trains without permission of the conductor or engineer, with the intent of being transported free, and does not necessarily and as a conclusion of law apply where the person has been requested by an employee of the company to get on the train to "help unload freight at the next station"; and as to them no criminal intent will be imputed. *Ferrell v. R. R.*, 682.

27. *Railroads—Automobiles—Collisions—Negligence — Proximate Cause—Trials — Evidence — Questions for Jury.* — Where an intestate is killed by a collision of an automobile in which he was riding, independently driven by another, with defendant's train at a crossing, the question of contributory negligence does not arise, and it is held in this case that the only question presented was, under conflicting evidence, that of proximate cause, for the jury to determine which was submitted under proper instructions, as to the duty of the engineer to persons on or near the track. *Rosser v. Bynum*, 168 N. C., 340; *Treadwell v. R. R.*, 169 N. C., 394, cited and applied. *McMillan v. R. R.*, 853.

28. *Railroads— Automobiles — Independently Driven— Crossings— Negligence— Evidence— Proximate Cause— Trials.*—Where intestate is killed by a collision by an automobile in which he was riding, independently driven by another, with a train at a crossing, the negligence of the driver may only be considered upon the question of proximate cause, in the administrator's action against the railroad. *Ibid.*

29. *Railroads—Automobiles—Crossings— Signals— Subsequent Changes—Evidence.*—In an action against a railroad company for damages for the alleged negligent killing of plaintiff's intestate in a collision while riding in an automobile with defendant's train at a crossing, evidence of subsequent changes in signals or warnings for additional safety made there by the defendant is incompetent, the case falling within the application of the general rule and not the exceptions. *Ibid.*

RATIFICATION. See School Districts, 6; Attorney and Client, 1; Deeds and Conveyances, 19; Contracts, 11; Principal and Agent, 11.

REALTY. See Deeds and Conveyances, 16.

REBUTTER. See Deeds and Conveyances, 36.

RECEIPTS. See Executors and Administrators, 5.

RECEIVERS. See Appeal and Error, 29.

RECESS. See Courts, 8.

RECORD. See Appeal and Error, 4, 7; Evidence, 7; Judicial Sales, 1; Reference, 3; Limitation of Actions, 30.

RECORDARI. See Appeal and Error, 54.

RECORDER'S COURT. See Courts, 15; Criminal Law, 15.

RE-ENTRY. See Water and Water-Courses, 4.

REFERENCE. See Appeal and Error, 18, 27, 37; Limitations of Actions, 20, 22; Taxation, 19.

1. *Reference—Exceptions—Trial by Jury—Waiver.*—Where the court of its own motion orders a reference of a cause, to which a party excepts at the time, and also excepts to the referee's report, and tenders issues of fact upon which he demands a trial by jury, nothing else appearing, he has preserved his right to a jury trial, and cannot be held to have waived it. *Bradshaw v. Lumber Co.*, 219.

2. *Reference — Courts — Trials — Statement of Referee—Evidence.*—It is not error for the court to refuse to permit a party to a reference to introduced a written statement of the referee attached to the testimony of a witness, though it would be competent to introduce the referee as a witness to prove the statement, thus affording the opposing party the opportunity to cross-examine him. *Ibid.*

3. *Same—Witness—Record—Report.*—It is incompetent for a party to a compulsory reference to prove by the referee what he had proposed to prove by a witness, for the evidence is transcribed and is a part of the report of the case heard before him. *Ibid.*

4. *Reference—Courts—Trial by Jury—Report—Conclusions—Evidence.*—The findings of fact of the referee and his conclusions of law are not a part of the evidence which the jury may consider in passing upon the issues submitted to them, and are properly disallowed for such purpose. *Ibid.*

5. *Reference—Pleas—Limitation of Actions.*—A plea of the statute of limitations is a plea in bar, and when pending the court cannot order a reference except by consent. *Bank v. Warehouse Co.*, 602.

6. *Reference—Findings—Evidence—Appeal and Error.*—Findings of fact of a referee, supported by legal evidence and affirmed by the Superior Court judge, are not reviewable on appeal. *Taylor v. Hayes*, 663.

7. *Reference—Contradictory Findings.*—The findings of the referee in this suit to set a deed aside as fraudulent against the grantor's creditors with his conclusion in plaintiff's favor, are held not to be contradictory, or inconsistent with the matters alleged in the complaint. *Ibid.*

8. *Reference—Findings—Evidence—Contracts—Breach—Cutting Timber — Appeal and Error — Measure of Damages.* — Where plaintiff has breached his contract by rendering it impossible for the defendant to cut wood on his lands for a certain profit for certain periods of time, the report of the referee finding defendant's damage in a certain sum, which necessarily exceeds the profit that the defendant could have made from cutting the timber standing thereon, is without supporting evidence, and though approved by the trial judge, will not be upheld on appeal, the rule of damages as to such excess being the interest on capital invested during the suspension periods, expenses of employees and teams, deterioration in value of the property, and such other as directly and necessarily result from the wrongful act. *Fiber Co. v. Hardin*, 767.

9. *References—Pleas in Bar.—Appeal and Error.*—Where the defendant enters a plea in bar to an action involving an accounting, which is bad upon its face, it is not error for the trial court to deny the plea and refer the matter. *Marler v. Golden*, 823.

REFERENCE—*Continued.*

10. *Reference—Evidence—Findings—Appeal and Error.*—Where the referee finds the facts upon supporting evidence, and the findings are approved by the trial judge, they will not be disturbed on appeal. *Ibid.*

REFUSAL OF SHIPMENT. See Carriers of Goods, 33.

REGISTER OF DEEDS. See Statutes, 6; Actions, 5.

1. *Register of Deeds — Fees — Counties — Vested Rights — Legislature—Statutes.*—The county has a vested right in fees collected by its register of deeds and wrongfully withheld, and these being in relation to the governmental agency of the county, the Legislature has the control of the remedy and procedure to enforce their collection. *Waddill v. Masten*, 582.

2. *Register of Deeds—Fees—Parties — Actions — Suits — Amendments.*—While a taxpayer, in his suit independent of the statute, should make the proper county officials parties to his action against a register of deeds for unlawfully withholding fees collected by him, so they may be heard on the questions presented, and that the funds, if recovered, should be in proper custody or control, this matter affects the remedy, and may be cured by amendment. *Ibid.*

REGISTRATION. See Limitation of Actions, 12; Vendor and Purchaser, 6; Contracts, 8; Conversion, 1; Mortgages, 7.

REHEARINGS. See Appeal and Error 42.

RELATIONSHIP. See Removal of Causes, 14.

RELEASE. See Mortgages, 2; Appeal and Error, 31.

1. *Release—Contracts—Consideration—Fraud.*—A receipt given by one who claims damages for a personal injury alleged to have been caused by the negligence of another, for a valuable consideration, and which in legal effect is a release not under seal, is a complete defense in his action to recover such damages, when it has not been procured by fraud and undue influence. *Knight v. Bridge Co.*, 393.

2. *Same—Evidence—Burden of Proof.*—The parties to a release from liability arising from a personal injury alleged negligently to have been inflicted may agree upon the consideration to be paid, and when the execution of the paper for the consideration is shown by the defendant in the action to recover damages, the burden is then on the plaintiff, where fraud is alleged, to prove the fraud or inadequacy of consideration, etc., when they are relied upon. The distinction between a consideration which will support a contract affecting only the parties and such as will affect creditors, etc., pointed out by ALLEN, J. *Ibid.*

3. *Release—Contracts—Consideration—Evidence—Inadequacy — Fraud—Trials—Questions for Jury.*—The matter of inadequacy of consideration paid for a release from liability is one to be considered and passed upon by the jury, with other evidence of fraud relied on to set it aside; and while gross inadequacy may alone be sufficient upon this issue, it may not, as a matter of law, be declared to void the instrument. *Ibid.*

RELEVANCY. See Appeal and Error, 29.

REMAINDERMEN. See Tenants in Common, 4.

REMAINDERS. See Estates, 7.

REMARKS. See Trials, 4.

REMITTANCE. See Taxation, 17.

REMOVAL OF CAUSES.

1. *Removal of Causes—Transfer of Causes—Executors and Administrators—Settlement of Estate—Executor's Petition.*—An executor having qualified in the county where his testator died domiciled, properly filed his petition therein to have the facts found and the law applied relative to a bequest given him by the testator, and which is contested by some of the heirs at law, to the end that his executorship may be terminated and that he may be discharged from its duties: *Held*, the court may not order the action removed to another county as a matter of law. *Perry v. Perry*, 62.

2. *Removal of Causes—Transfer of Causes—Convenience—Discretionary Powers—Appeal and Error—Statutes.*—The discretionary power conferred on the trial judge to remove a cause to another county, "for the convenience of witnesses and to promote justice," is not reviewable on appeal in the Supreme Court. Revisal, sec. 525 (2) *Ibid.*

3. *Removal of Causes—Wills—Probate—Federal Courts—Collateral Attack.*—The Federal statutes for the removal of "any suit of a civil nature, at law or in equity, from the State to the Federal courts" does not extend to or include causes concerning the probate of a will, and where a will has been admitted to probate in a State court having jurisdiction, its validity may not be further questioned independent or collateral suits in the Federal courts, unless the adjudication of probate may be so assailed in the courts of the State. *Powell v. Watkins*, 244.

4. *Same—State Procedure—Caveat.*—The statutory requirements as to probating a will before the clerk, and transferring it to the civil-issue docket upon filing a caveat thereto, does not affect the exclusive jurisdiction of our State courts, having obtained it, or the position that the cause may not be removed to the Federal court under the Federal statutes, for the issue and its determination in the State court is only a part of the precedure to establish the validity of the will. *Ibid.*

5. *Removal of Causes—Petition—Amendments—Power of Courts.*—After a proper petition and bond for the removal of a cause from the State to the Federal court, for diversity of citizenship, has been filed in the State court, the judge is without authority to permit the plaintiff to amend, and then demand a less amount than formerly claimed by him; but though this has erroneously been done, if not appealed from, it is conclusive in the State courts. *Ibid.*

6. *Removal of Cause—Appeal and Error—Objections and Exceptions—Exceptional Cases—Merits.—Held*, the question of the removal of this cause from the State to the Federal court is not open to the appellant, who had not excepted to a former order made at a prior

REMOVAL OF CAUSES—*Continued.*

term of the court, refusing to remove it; but this Court passed upon its merits, as it may do when it considers the case as exceptional. *Ibid.*

7. *Removal of Causes—Foreign Executors—Voluntary Parties.*—Foreign executors may not, of their own motion, make themselves parties to an action brought against their testator, in his lifetime; and where this has been attempted, without order of court to that effect, they may not enter proceedings to remove the cause to the Federal court for diversity of citizenship. *Bank v. Pancake*, 513.

8. *Same—Order of Court—Requisites.*—Foreign executors may not obtain an order of court to make them parties to an action which had been brought against their testator upon filing a certificate of their appointment, without the seal of any court thereon, unaccompanied by letters testamentary, or copy of will, or without other adequate proof of their appointment as such. *Ibid.*

9. *Removal of Causes—Foreign Executors—Administration—Statutes—Requisites.*—An attachment levied against the property of a nonresident shows that he had property in this State, and when he has died after action brought it becomes necessary for his executors or administrators to prove the will here and take out ancillary letters of administration with the will annexed and give the bond as required by our statute, Revisal, sec. 28 (1), before they will be recognized by our courts, or permitted to file a petition and bond for removal of the cause to the Federal court for diversity of citizenship. *Ibid.*

10. *Removal of Causes—Diversity of Citizenship—Sufficient Petition and Bond—Jurisdiction.*—When a nonresident defendant files, in apt time, a petition and proper bond for the removal of the cause to the Federal court for diversity of citizenship, the former of which contains allegations of fact sufficient under the law to entitle him to a removal, the jurisdiction of the State court is at an end, and the issues of fact, affecting the right of removal, properly raised by the petition and papers in the proceedings, are to be determined by the Federal court. *Hollifield v. Telephone Co.*, 714.

11. *Same—Idefinite Averments.*—Where a nonresident defendant seeks to remove a cause to the Federal court upon the ground of diversity of citizenship, and alleges in his petition that a resident defendant was fraudulently therein joined to prevent the removal, before the State court is under any duty or obligation to surrender its jurisdiction there must be specific allegation of the facts constituting the allegal illegal or fraudulent joinder, and it is not sufficient to charge generally or by indefinite averment that the joinder is or was intended to be in fraud of the nonresident defendant's rights. *Ibid.*

12. *Removal of Causes—Diversity of Citizenship—Pleadings—Joint Torts—Fraudulent Joinder.*—Where a nonresident defendant is seeking to remove the cause of action to the Federal court for diversity of citizenship, setting up the fraudulent joinder of a resident defendant to prevent his right thereto, the plaintiff is entitled to have his cause of action considered as stated in his complaint; and if it is therein sufficiently alleged that the cause of action arose from a joint tort, he may sue the wrong-doers jointly, and in the lawful pursuance of this right his motives will not be inquired into. *Ibid.*

REMOVAL OF CAUSES—*Continued.*

13. *Same—Insolvency—Conspiracy.*—Where a nonresident defendant seeks to have the cause removed to the Federal court, and the petition of the nonresident defendant sets up a fraudulent joinder of a resident defendant, the right of the plaintiff to sue the resident defendant is the material question involved, and the question of his solvency is immaterial; and where a conspiracy between the defendants is relied upon, the matters constituting the alleged conspiracy must be sufficiently alleged to raise the issue for the determination in the Federal court; and the fact alone that the resident defendant is the son of the plaintiff is sufficient. *Ibid.*

14. *Same—Relationship—Jurisdiction.*—Where the complaint alleges that the resident defendant was the agent of the nonresident defendant, with the right to employ, discharge, and control the plaintiff and other employees in the work of loading telephone poles upon a railroad car; that the agent negligently ordered the work to be done with insufficient help, without instructing the plaintiff, inexperienced in such work, and at the time the agent knew or should have known of the danger, etc., which in its petition to remove the cause to the Federal court, the principal defendant does not directly controvert, but merely avers that it was not the agent's duty to provide sufficient help, and that he could not have failed therefore in his duty respecting it; that the resident defendant was the son of the plaintiff and permitted a judgment by default for want of an answer; and that the cause alleged was only against the principal defendant: *Held*, the averment of the principal defendant is not sufficient to raise the issue of fraudulent joinder to have it passed upon by the Federal court, and deprive the State court of its jurisdiction. *Ibid.*

REPAIR. See Telegraphs, 3.

REPORT. See Drainage Districts, 2; Reference, 3.

REPRESENTATIONS. See Insurance, 12.

REQUESTS. See Carriers of Goods, 2.

REQUISITES. See Carriers of Goods, 9.

RESALES. See Taxation, 13.

RESERVOIRS. See Negligence, 12.

RES INTER ALIOS ACTA. See Deeds and Conveyances, 3.

RES IPSA LOQUITUR. See Evidence, 4; Master and Servant, 10.

RESTRAINT IN ALIENATION. See Estates, 7.

RESTRICTIONS. See Insurance, 7.

RETENTION OF GOODS. See Damages, 5.

RETURNS. See Elections, 9.

REVIEW. See Roads and Highways, 3; Criminal Law, 3.

REVISAL.

SEC.

28 (1). Non resident personal representatives of a deceased having had property here, must prove the will and take out ancillary letters here, to be recognized by our courts on petition to remove a cause to the Federal court for diversity of citizenship. *Bank v. Pancake*, 513.

59-60. The administrator alone is given the rights to sue for wrongful death. *Gurley v. Power Co.*, 690.

132 Rule 3. Personalty now descends, like realty, to children of deceased parents, who would have taken by descent, if living. *Moore v. Rankin*, 599.

150. An administrator, after final accounting, may file petition against parties interested, in Superior Court, at term, for accounting and settlement. *Moore v. Rankin*, 599.

363. In order for statute of limitation to run against married women since 1899, it must have commenced before coverture. *Holmes v. Carr*, 213.

370. Amended by ch. 211, laws of 1915, does not forbid the second action after nonsuit, and requires the statute to be pleaded. *Bradshaw v. Bank*, 632.

380. Construed with secs. 389, 4048, the limitation as to "color" for twenty-one years and without for thirty years does not apply, State having parted with title. *Tillery v. Lumber Co.*, 296.

383. Title to lands being shown out of the State, twenty years adverse possession is sufficient. *Stewart v. Stephenson*, 81.

384. Title to lands being shown out of the State, twenty years adverse possession is sufficient. *Stewart v. Stephenson*, 81.

389. Construed with secs. 380, 4048, the twenty-one years limitation with color, and thirty years without, does not apply, State having parted with title. *Tillery v. Lumber Co.*, 296.

393 (5). Where a telegraph company had constructed lines on another's land for more than three years before action brought, and within the period constructed additional lines, the statute will not run against the later damages. *Teeter v. Telephone Co.*, 783.

394. The acquisition of easement by user for five years does not apply to telegraph companies. *Teeter v. Telephone Co.*, 783.

395 (4). Defendant in trespass for cutting trees on lands pleading the three-year statute of limitations has the burden of proof. *Tillery v. Lumber Co.*, 296.

395 (9). Deeds given to separate purchasers of land and timber, under foreclosure sale puts the parties in interest upon reasonable notice and bars their right of action after three years. *Sanderlin v. Cross*, 234.

399. Execution of decree to lay off an alleyway is barred in ten years. *Hunter v. West*, 160.

400. An agent paying excessive freight charges under agreement with his principal, is the party aggrieved. *Tilley v. R. R.*, 363.

404. This does not apply to the question of whether the trustee of an express trust has exceeded his authority under the instrument imposing the trust. *Barbee v. Penny*, 653.

411. Purchaser of mortgaged land under agreement with mortgagor to pay off encumbrance may maintain suit for accounting to ascertain debt and relieve land of cloud on title. *Elliott v. Brady*, 828.

REVISAL—*Continued.*

SEC.

449. A defendant by publication may move to set aside a judgment, as of right, within one year of notice and five after its rendition, excepting in divorce. *Moore v. Rankin*, 599.

461. A *lis pendens* as notice to purchaser of lands in adjoining county must be served within sixty days from its filing. *Powell v. Dail*, 261.

513. Section applies to judgments rendered at prior terms, those within the terms being *in fieri*. *Gold v. Maxwell*, 149.

525. Authority given trial judge to remove cause for convenience, etc., is not reviewable on appeal. *Perry v. Perry*, 62.

535. Without request, it is sufficient for the trial judge to state the substance of the evidence in his charge; as to whether he is required to read the stenographer's notes when requested, *quære*. *Ball v. McCormack*, 677.

535. Where a surveyor's map has been put in evidence tending to show a call in a deed to which he has also testified with others, an instruction to disregard the map is reversible error. *Swain v. Clemmons*, 277.

591. Appeal to Supreme Court dismissed upon failure to comply with this section. *Lindsey v. Knights of Honor*, 818.

620. Justice's judgment docketed in Superior Court may be revived after seven years and execution issued within ten years, and not dormant, execution may issue after ten years, but not as a lien. *Pants Co. v. Mewborn*, 332.

686. During continuance of homestead laid off under judgment, is it free from execution until conveyance, and title does not pass to trustee in bankruptcy. *Walters v. Hedgepeth*, 310.

721 (1). Injury to property must have been intentional or malicious for execution against person. *Oakley v. Lasater*, 96.

727 (1). Injury to property must have been intentional or malicious, for execution against person. *Oakley v. Lasater*, 96.

810. Unless copy of affidavit is served with injunction or served thereafter with judge's permission, it will be dismissed; and the requirement is not waived by agreement of parties that injunction be heard later than return day. *Taylor v. Boone*, 93.

859. When the seller of goods to be delivered at stated intervals accepts, in the interval, a check in full, with request of the purchaser to cancel balance of order, there being no dispute as to the amount due or to become due, the transaction is not a compromise. *Bogert v. Mfg. Co.*, 248.

952. This section is valid as to the form and method of executing deed by husband and wife. *Graves v. Johnson*, 176.

964a. (Greg. Sup.) Without compliance with terms of statute as to inventory and notice, a sale of merchandise in bulk is void, with burden on seller, with burden on affirmative of issue as to fraud on plaintiff. *Gallup v. Rozier*, 283.

976. A lease on a store house for three years is required by the statute to be in writing. *Smithdeal v. McAdoo*, 700.

982. Where the evidence, in conversion, is conflicting as to proper registration of a chattel mortgage and sufficient description, it is error to confine the jury to the question of description. *Foy v. Hurley*, 575.

REVISAL—*Continued.*

SEC.

1097. The right of spur track over adjoining owner by deed from private owner does not apply under this section. *Hales v. R. R.*, 104.

1097 (5). The Corporation Commission's power to allow building of industrial spur tracks over intervening lands does not apply to such running from a track acquired from a private owner. *Hales v. R. R.*, 104.

1131. No lien is given on factory products for coal furnished for their manufacture. *Norfleet v. Cotton Factory*, 833.

1268. Upon sustaining a will concerning lands, the taxing of costs against the estate is within the discretion of trial judge. *In re Winston*, 270.

1272, 1273. The acquisition of easement by five years user (Rev., 384), does not apply to telephone companies. *Teeter v. Telephone Co.*, 783.

1493. Justices' judgment by default in two cases against one defendant requires two transcripts on appeal. *Drainage Commissioners v. Kirby*, 415.

1578. An estate tail is converted into a fee simple absolute. *Blake v. Shields*, 628.

1578. An estate to A. and his bodily heirs is a fee simple under our statute, which, in this case, the terms of the instrument confirm. *Revis v. Murphy*, 579.

1591. Where the maker of an usurious note is bankrupt, having paid the note, in an action thereon against the surety he may offset the note with the amount of unlawful interest paid by his principal. *Bank v. Loven*, 666.

1635-1636. The fact of marriage may be proved by the wife in her action for abandonment. *S. v. Chester*, 946.

1696. The riparian owner on navigable waters is restricted in its use to the erection of wharfs on the side of deep water. *R. R. v. Way*, 774.

1918a. Prisoner discharged from execution in arrest and bail, upon payment or giving notice and surrender of property exceeding $50, exclusive of constitutional exceptions. *Oakley v. Lasater*, 96.

1920. Prisoner discharged from execution against person in arrest and bail, upon payment or giving notice and surrender if his property exceeding $50, exclusive of constitutional exemptions. *Oakley v. Lasater*, 96.

2016. One claiming lien on factory products for furnishing coal loses such right by failure to enforce it. *Norfleet v. Cotton Factory*, 833.

2019-2023. A lien for material enforced within six months gives a double security over a statement given the owner and uninforced by action, the latter being a right to an accounting and equal distribution of the balance due the owner upon the contract, as a trust fund. *Foundry Co. v. Aluminum Co.*, 704.

2027. One claiming lien on factory products loses such right by failure to enforce it. *Norfleet v. Cotton Factory*, 833.

2020, 2022, 2023. The filing of the statement by a second subcontractor with the owner for labor and materials entitles him to a lien on the funds then due the contractor, ahead of an attachment, or the claim of a subconstractor not so filing his claim. *Granite Co. v. Bank*, 354.

REVISAL—*Continued.*

SEC.

2201. Without allegation or evidence of defect, a negotiable instrument introduced is *prima facie* evidence of purchase for value, before maturity, and without notice. *Worth Co. v. Feed Co.*, 335.

2204. Without allegation or evidence of defect in a negotiable instrument, its introduction is evidence *prima facie* of purchase for value before maturity, and without notice. *Worth Co. v. Feed Co.*, 335.

2204. Evidence that bank took a note from indorser and paid for it is no evidence of defect in the bank's title. *Moon v. Simpson*, 576.

2237. Note payable at maker's bank is order on bank to pay for his account. *Peaslee v. Dixon*, 411.

2595. An action brought against a railroad company for permanent damages for injury to lands adjoining the latter's easement is *lis pendens* and notice to the owner's subsequent grantee. *Caveness v. R. R.*, 305.

2629. A flag station, without any passenger accommodations, is not a "usual stopping place or dwelling," within the meaning of the statute. *McNairy v. R. R.*, 505.

2642, 2643, 2644. An agent paying excess freight charges by agreement with his principal is the "party aggrieved," and may recover such excess and penalty, under the terms of the statutes, and it is necessary that he state the exact amount of the excess. *Tilley v. R. R.*, 363.

2646. The statutory change in doctrine of assumption of risk of negligence of coemployee, as to railroads and logging roads, extends to injury to manager and superintendent by subordinate. *Bloxham v. Timber Co.*, 37.

2728a (Greg. Supt.). Where the evidence is conflicting as to whether a motorcycle turned in the wrong direction and caused a collision with an automobile, the question of proximate cause depends upon the exercise of proper care by the driver of the automobile. *Cooke v. Jerome*, 626.

2836. It is not discriminative to permit drug stores to be opened on Sunday and require other places to close and not permit them to sell tobacco, etc., or other than the storekeeper or clerk to enter on Sunday. *S. v. Burbage*, 876.

2923. Ordinances for the peace and good order of the town are valid, if not unreasonable or discriminative. *S. v. Burbage*, 876.

3278. Application to appeal to Supreme Court in *forma pauperis* must show "good faith," and when appeal is dismissed appellant may not file bond or make cash deposit. *S. v. Martin*, 977.

3354. Supporting evidence required to make that of wife competent in breach of promise suits is not necessarily substantive, and her testimony may be rendered competent by the circumstances. *S. v. Moody*, 967.

3406. Evidence that defendant directed application of funds to cover former misapplication is evidence of embezzlement. *S. v. Klingman*, 947.

3428. The burning of prosecutor's barn, with evidence of his failing to comply with defendant's demands for money, with the other evidence in this case, was sufficient for conviction of blackmailing. *S. v. Frady*, 978.

3434b. Check drawn to pay freight charges, without funds, comes within section, and when offense is made a misdemeanor, recorder's court may have jurisdiction. *S. v. Freeman*, 925.

REVISAL—*Continued.*

SEC.

3506. Larceny is a felony, and a recorder's court, without jurisdiction, may not dispose of a juvenile delinquent, under the statute, who is guilty of that offense. *S. v. Newell*, 933.

3673. For removing fence on land in another's possession defense as to defendant's title is not available. *S. v. Taylor*, 892.

3708. Carrying concealed weapons in apprehension of assault with deadly weapon may be considered in aggravation in imposing sentence, and upon submission may also be considered upon punishment for assault. *S. v. Woodlief*, 885.

3726. Prizes given to voters or "boosters" to enlarge sales are within the meaning of this section; constitutional within the police powers, and notes therein given may not be collected in our courts. *Mfg. Co. v. Benjamin*, 53.

3996 (Pell's). Drainage assessments are liens on lands, subject to execution. *Canal Co. v. Whitley*, 100.

4003 (Pell's). Drainage assessments are liens on land, subject to execution. *Canal Co. v. Whitley*, 100.

4048. Construed with sections 380, 389, the limitation as to "color" for twenty-one years, and without for thirty years, does not apply, State having parted with title. *Tillery v. Lumber Co.*, 296.

4115. The requisite number of signers of petition for new school district is jurisdictional exclusive of women, of freeholders beyond the limits, and of such who have not listed their property within the district. *Chitty v. Parker*, 126.

4129. This does not prohibit the exercise of the sound discretion of county board in rebuilding school on old site within 3 miles, etc., of another. *Pemberton v. Board of Education*, 552.

4350. Interference with the powers conferred on board of canvassers to determine and declare result of election is by *quo warranto*, not permissible as to election of Congressmen. *Britt v. Board of Canvassers*, 797.

4515. Construed with 5175, is a license tax upon gross receipts of insurance companies within the State, and constitutional. *Trust Co. v. Young*, 470.

4808. Statements made in application for health insurance are representations, not warranties. *Hines v. Casualty Co.*, 225.

5175. Construed with 4515, is a license tax upon gross earnings of insurance companies within the State, and constitutional. *Trust Co. v.* Young, 470.

5232. County commissioners and city aldermen enter the succeeding year property which has escaped taxation. *Guano Co. v. New Bern*, 258.

5234-15-6. Exclusive original jurisdiction to relieve against excessive tax valuation is given county board of equalization. *Guano Co. v. New Bern*, 258.

RIGHTS OF WAY. See Railroads, 10, 13; Telegraphs, 1, 2, 3, 4; Limitation of Actions, 26.

ROADS. See Taxation, 12.

ROADS AND HIGHWAYS. See Municipal Corporations, 1; Statutes, 2; County Commissioners, 1.

1. *Roads and Highways—Eminent Domain—Statutes—Notice—Constitutional Law.*—A landowner is entitled to notice that his land is

ROADS AND HIGHWAYS—*Continued.*

being taken for the establishment and maintenance of a highway under proceedings had therefor under the terms and provisions of a statute, if the statute provides that notice and opportunity be afforded him to appear before a designated tribunal and contest the question of damages. *Dickson v. Perkins*, 359.

2. *Roads and Highways—Constitutional Law—Due Process—Damages—Appeal—Statutes.*—Where the statute authorizing the laying out, construction, etc., of a public road by commissioners provides for an appeal therefrom to the courts, *Semble*, the assessment of damages to the landowners, being incidental to the construction of the road, are included in the right to appeal, though not expressly stated, and come within the true intent and meaning of the statute. *Ibid.*

3. *Same—Courts—Right of Review.—Semble*, the Legislature may make the award of assessors to lay off and construct a public road final as to the amount of damages to be paid the owners of the land so appropriated; and *Held*, the awarding of such damages is to a large extent a judicial question, unless the statute clearly shows that the action of the appraisers is to be regarded as final, and the Superior Court, in the exercise of its general powers of supervision and control over any and all subordinate tribunals, may in proper instances bring the cause before it for review, certainly in case of manifest and gross abuse. *Ibid.*

4. *Roads and Highways—Statutes—Interpretation—County Commissioners—Damages—Petition.*—Where legislative authority is given the county commissioners to construct, etc., the public roads of the county, levy taxes for the purpose, and to appoint juries of view to assess damages to the landowners, with right of appeal, and to pay such damages from the general county fund; and by a later statute enacted for the greater improvement of the roads of a township, a "township road commission" is created therefor, giving them full control and management of the roads, providing for a bond issue for the purpose of macadamizing, etc., which had been duly put into effect, and with further provision "that the land may be condemned and used by said road commission, as provided by the general law" of the county: *Held*, the statutes should be construed together, and as a whole constitute the road law of the county, and thereunder it becomes the duty of the county commissioners to act upon the petition of the owners of the lands taken, and appoint the viewers for the assessment of their damages, with right of appeal, the damages to be paid out of the county general road fund. *Worley v. Commissioners*, 815.

RULE OF PRUDENT MAN. See Evidence, 1; Master and Servant, 6; Judgments, 10; Automobiles, 1.

RULES. See Appeal and Error, 1; Carriers of Passengers, 11; Convicts, 2.

RULES OF COURT. See Appeal and Error, 11, 20, 28, 42, 47, 48, 52.

SAFE APPLIANCES. See Master and Servant, 6.

SAFE PLACE TO WORK. See Master and Servant, 4.

SALES. See Mortgages, 1, 5; Parties, 1; Carriers of Goods, 12; Limitation of Actions, 29.

1. *Sale—Form of Award—Finality—Obscurity.*—Where an oral (or written, if so required by law) agreement of arbitration has been sufficiently entered into between the parties it must be followed by a consideration of the matters submitted and an award of the arbitrators; and unless the articles of submission prescribe certain formalities, the arbitrators may express their conclusion in any form they choose, and their decision therein expressed is conclusive if its terms can be understood, and it is so expressed that the intention of the arbitrators can be clearly gathered therefrom, and not couched in conditional, obscure, or dubious form. *Ball v. McCormack*, 677.

2. *Same—Expert Opinion—Evidence—Trials.*—In an action upon notes given for the balance of the purchase price for furnishing and installing a heating plant in defendant's residence, an award proposed to be introduced as a defense which purported upon its face to be only the advice of a supposed expert, who had given the arbitrators figures, based upon his estimate as to shortage of heat radiation and his opinion that certain pipes would have to be changed, not stating how and to what extent, and having no finality as to cost, amount to be deducted, or final directions, is properly excluded, as too uncertain for enforcement. *Ibid.*

SCHOOL DISTRICTS. See Education, 1.

1. *School Districts—Petitions—Conditions Precedent—Jurisdictional—Statutes—Courts.*—The signing of the petition by the requisite number of the resident freeholders in a proposed new school district, Gregory's Supplement, sec. 4115, is a condition precedent and jurisdictional to the establishing of the district by popular vote therein, and noncompliance therewith renders the subsequent proceedings void. *Chitty v. Parker*, 126.

2. *Same—Women.*—In ascertaining the number of resident freeholders in a proposed new school district in considering the sufficiency of the petition, Gregory's Supplement, sec. 4115, women freeholders must be counted, Ch. 22, Laws 1915. *Ibid.*

3. *School Districts—Petition—Qualifications—Listing Property.*—Resident freeholders of a proposed new school district, who have not listed their property within the district for taxation, are not to be counted in ascertaining whether the petition has the requisite number of signers. Gregory's Supplement, sec. 4115. *Ibid.*

4. *School Districts—Petition—Qualifications—Freeholders—Temporary Absence.*—Those who have temporarily left the proposed new school district, having the *animus revertendi* and having the statutory requirements, are to be counted in ascertaining whether a sufficient number of resident freeholders in the district have signed the petition; also those who have dower interests in lands therein, heirs at law of an estate, a resident tenant in common of lands, landowners at the time who died before the election was ordered, and a resident wife who holds lands in entireties with her husband; but an inmate in an insane asylum in another State will not be counted as a resident freeholder of the proposed district. *Ibid.*

SCHOOL DISTRICTS—*Continued.*

5. *School Districts—Petition—Qualifications—Listing Property—Taxes.* Those who are residents of the township, but outside of a proposed new school district, are not to be counted in ascertaining whether a sufficiency of the resident freeholders have signed the petition for an election. Gregory's Supplement, sec. 4115. *Ibid.*

6. *School Districts—Petition—Enlarging District—Ratification—New Petition.*—Where the boundaries of a proposed new school district have been changed since the signing of the petition by the resident freeholders within the district first proposed, the original petition is not sufficient, unless again submitted to the signers thereof for their approval and ratification; and the assent of the signers present at the hearing of the action to declare the election void is not sufficient. The proceedings may, however, be commenced *ab initio*. *Ibid.*

SCHOOLS. See Constitutional Law, 2; Insurance, 21; Taxation, 19; Trials, 2.

SCHOOL TERMS. See Constitutional Law, 3.

SEARCH. See Criminal Law, 10.

SECTION. See Taxation, 21.

SEDUCTION. See Criminal Law, 24.

SENTENCE. See Criminal Law, 2, 3.

SERVICE. Judicial Sales, 2; Appeal and Error, 46, 50, 53.

SETTLEMENT. See Executors and Administrators, 1.

SHADE TREES. See Telephone Companies, 1, 2, 3.

SIGNALS. See Railroads, 29; Criminal Law, 22.

SIGNATURE. See Wills, 24.

SPECIAL TAX. See Taxation, 8, 10, 11.

SPIRITUOUS LIQUORS.

Spirituous Liquors—Cider—Manufactured, Etc.—Statutes—Exceptions.—The right to sell property is one of the incidents of ownership and should not be withdrawn or restricted unless clearly required by statute; and construing together the laws relative to prohibition, chapter 71, Extra Session of the Legislature of 1908, excepting the sale of "cider in any quantity by the manufacturer from fruits grown on his own lands within the State," appearing in substantially similar terms in "An act to prohibit the sale of near-beer," etc., ch. 35, Laws 1911, sec. 3, and the exception from the Search and Seizure Law, ch. 44, Laws 1913, of "wines and ciders in any quantity from fruits grown on the premises of any persons in whose possession they may be," and ch. 97, Laws 1915, passed primarily to regulate the shipment of spirituous liquor, which is silent upon this subject, it is *Held*, that the sale of cider containing 4.7 per cent alcohol

SPIRITUOUS LIQUORS—*Continued.*

does not come within inhibition of our statutes, and may be sold by the manufacturer from fruits grown on his own premises within the State, or by his agent, when the parties are acting in good faith. *S. v. Williams*, 973.

SPOLIATION. See Wills, 28.

SPUR TRACKS. See Railroads, 6.

STATE. See Limitation of Actions, 15.

STATE GRANTS. See Water and Water-Courses, 3.

STATE'S LANDS. See Appeal and Error, 10.

STATUTE OF FRAUDS. See Deeds and Conveyances, 11; Trusts and Trustees, 2; Contracts, 22, 27.

STATUTES. See Appeal and Error, 5, 45, 67; Bills and Notes, 1, 4; Injunction, 1, 3; Landlord and Tenant, 1; Lotteries, 1; Railroads, 1, 5, 18, 22, 23, 26; Removal of Causes, 2; Easements, 4; School Districts, 1; Insurance, 1; Judgments, 1, 14, 22; Pleadings, 3; Elections, 1; Deeds and Conveyances, 13, 29; Negligence, 4; Limitation of Actions, 7, 14; Accord and Satisfaction, 1; Taxation, 6, 9, 10, 13, 16; Courts, 2, 3, 14, 15; Vendor and Purchaser, 2, 4, 5; Bankruptcy, 4; Roads and Highways, 1, 2, 4; Wills, 17; Instructions, 5; Spirituous Liquors, 1; Banks and Banking, 5; Carriers of Passengers, 5; Removal of Causes, 9; Education, 1; Contracts, 12, 23; Actions, 5; Register of Deeds, 1; Descent and Distribution, 1; Executors and Administrators, 1; Trials, 2; Automobiles, 1; Estates, 6; Nonsuit, 2; Trusts, 1; Usury, 4; Instructions, 9; Mechanics' Liens, 4, 7, 8; Principal and Agent, 13; Water and Water-Courses, 3; Liens, 1; Municipal Corporations, 5; Criminal Law, 5, 11, 13, 14, 15, 19, 24.

1. *Statutes—Different Acts—Interpretation.*—Where a later legislative enactment refers to a former one, with express recognition of its existence, and that it controls the subject-matter, except as therein modified, they should be construed together as the law regulating the subject, and applied as a whole. *Dickson v. Perkins*, 359.

2. *Same—Roads and Highways—Damages—Constitutional Law—Taking of Property—Due Process.*—A public-local law provided for the establishment, etc., of highways on petition before the county commissioners, with right of appeal to the Superior Court on all material issues, the road to be laid off by a surveyor and two freeholders, who should assess damages, report to county commissioners, allowing the landowners ten days within which to except and have such exceptions duly passed upon, and a later one recognized its provisions except as therein modified, required the petition to be filed before the township trustees, with intermediate appeal to the county commissioners, provided payment out of the road funds, if any, but otherwise to become a county charge. *Held*, the later statute directing the trustees as commissioners to lay out the highway established it by direct legislation; and construing the acts together, they were not unconstitutional as a taking of the lands of the owners without compensation and due process of law. *Ibid.*

STATUTES—*Continued.*

3. *Statutes, Interpretation — Prospective Effect.*— Generally a statute will be construed so as to give it prospective effect, unless the law in question clearly forbids such construction. *Waddill v. Masten*, 582.

4. *Statutes, Interpretation— Retroactive Effect— Remedial Statutes.* —A statute which is retrospective is one in some way affecting the rights of the parties incident to and growing out of a past transaction, and in case of a remedial statute the rule is not so insistent, and it may be given retrospective effect where the language permits and such construction will best promote the meaning and purpose of the legislation. *Ibid.*

5. *Same—Procedure—Parties.*—The rule that statutes may not be construed to have retrospective effect does not prevail when they concern mere matters of court procedure before action instituted, or the substitution or designation of new parties deemed necessary to a proper determination of a controversy or authorized to maintain and enforce a recognized or existent right. *Ibid.*

6. *Same—Statutes—Register of Deeds—Fees.*—The statute, Laws 1905, ch. 436, changing the basis of compensating the register of deeds, among other county officers, from a fee to a salary basis, giving the taxpayer, having first made demand on the county commissioners, a right of action against the sheriff and his sureties, to recover taxes which the sheriff actually had collected, or should have collected, operates only on the procedure and the parties thereto, having no substantial effect on the rights and liabilities of the persons interested in the transaction, and is not a retrospective law. *Ibid.*

7. *Statutes—Interpretation— Existing Law— Presumptions— Reasonable Construction.*—In construing a statute, the General Assembly is presumed to have acted advisedly and with knowledge of the meaning of the language of existing law, and it will never be assumed, if any other conclusion is permissible, that the statute is meaningless in giving a right theretofore conferred by an existing statute still in force. *Bank v. Loven*, 666.

STIPULATIONS. See Insurance, 4; Carriers of Goods, 31.

STOCK LAW. See Appeal and Error, 34.

STOCKHOLDERS. See Corporations, 1.

STORAGE. See Carriers of Goods, 26, 27, 28.

STREET RAILWAYS. See Carriers of Passengers, 11; Carriers of Goods, 40.

STREETS. See Telephone Companies, 1, 2; Railroads, 16, 18, 20.

SUBMISSION. See Homicide, 9.

SUBROGATION. See Usury, 5.

SUBSCRIPTIONS. See Corporations, 3, 4.

SUDDEN PERIL. See Evidence, 1; Negligence, 8.

SUFFICIENCY. See Ballots, 1.

SUFFRAGE. See Elections, 7.

SUITS. See Actions, 5.

SUMMONS. See Judicial Sales, 2; Limitations of Actions, 30; Malicious Prosecution, 1.

SUNDAY. See Municipal Corporations, 7.

SUPPORT OF GRANTOR. See Mortgages, 9.

SURETY BOND. See Judgments, 12.

SURPLUS. See Mortgages, 9.

SURVEYS. See Wills, 9.

SUSPICION. See Criminal Law, 8.

TAIL. See Estates, 6.

TAXATION.

1. *Taxation—Inheritance Tax—Wills—Widow—Support of Children.*—A bequest of an annuity from the increase and profits of testator's estate to the wife during widowhood, to be paid at her request, not exceeding $5,000, for her own use and the support and education of the minor children of the marriage, gives such children a vested right and interest in the funds, the amount of which is to be determined by the widow upon a consideration of what will be required for their support and education. *In re Inheritance Tax*, 170.

2. *Same—Interest—Ascertained—Courts.*—Where an annuity not exceeding $5,000 is bequeathed to a widow, to be paid at her request for her own use and the maintenance and education of the children of the marriage, to be used by her in accordance with her judgment, the portion of the annuity for her own use is not subject to the tax under our inheritance laws, chapter 438, section 6 (5), Laws 1909; but the part for the use of the children is presently subject to such tax in accordance with section 6 thereof, and the courts will adjudge what is a fair and reasonable allowance for the children in accordance with the terms of the will, and so tax the same that no part thereof shall be laid upon that part bequeathed to the widow, under the method set out in the opinion in this case. *Ibid.*

3. *Same—Trusts.*—The fact that a testator has bequeathed to his widow the discretionary control of an interest in his estate for the use and benefit of the children of the marriage cannot affect the imposition of the inheritance tax upon such interest. Chapter 438, section 6, Laws 1909. *Ibid.*

4. *Same—During Widowhood—Interpretation.*—A bequest of an annuity to the widow of the testator and the testator's children during her widowhood is construed, for the purpose of valuing the children's interest subject to the inheritance tax, as for her life, and this should be ascertained and determined in accordance with the expectancy fixed by the life tables and other competent evidence thereof as permitted in such instances. *S. v. Bridgers*, 161 N. C., 246, cited and distinguished. *Ibid.*

TAXATION—*Continued.*

5. *Taxation—Tax List—Personalty Omitted—Back Taxes—County Commissioners.*—Where specific property has been omitted from the tax list by the owner or person required by law to list it, the county commissioners shall enter the same on the duplicate of the next succeeding year in which it shall have escaped taxation; and the aldermen of a city shall do likewise. Revisal, sec. 5232. *Guano Co. v. New Bern*, 258.

6. *Taxation—Uniformity—Constitutional Law—Equalization—Statutes—Excessive Valuation.*—Our Constitution requires that all taxes, whether levied by State, county, city, or town, shall be laid by a uniform rule, which can only be done, as to property, by providing for one valuation; and by statute creating a county board of equalization, with authority to hear and determine complaints as to improper valuation and excessive rates, etc., Revisal, secs. 5234, 5235, 5236, the county board is given exclusive original jurisdiction to grant relief against excessive valuation, and the valuation thus determined by it is binding upon cities and towns and must be adopted by them. *Ibid.*

7. *Same—Pleadings—Demurrer.*—The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained. *Ibid.*

8. *Taxation—Constitutional Law—Counties—Special Tax—Poll Tax.*—Article V, section 1, of our Constitution, providing an equation between the property and poll tax, and requiring that "the State and county capitation tax shall never exceed $2 on the head," is related to and should be construed with sections 2 and 6 of the same article; and it is *Held*, that the limitation imposed is for a levy for the ordinary expenses of the State and county governments, which, under section 2, is to be applied, so far as it relates to the poll, to the purpose of education and the support of the poor; and that under section 6 taxes may be "levied by the commissioners of the several counties for county purposes in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly." *Moose v. Commissioners*, 419.

9. *Same—Statutes—Equation—Bond Issues.*—The limitation as to the levy on poll tax prescribed by Article V, sections 1 and 2, of our Constitution does not apply to the levy of a special tax by a county for road purposes, authorized by the Legislature under section 6 thereof, submitted to the vote of the electors of the county and duly approved by them; and where the statute authorizes an issue of bonds for such purpose upon the property and polls, providing that the equation between the property and poll tax be observed, and at the time the taxes of the county have reached the limitation imposed by Article V, sections 1 and 2, bonds issued in accordance with the provisions of the statute are not void on the ground that the statute authorizing them is unconstitutional for that the poll tax in the county would exceed $2, and the equation prescribed would make it impossible to separate the property special tax from the special tax on the poll. *Ibid.*

TAXATION—*Continued.*

10. *Taxation—Counties—Special Tax—Statutes—Legislative Powers—Constitutional Law.*—The constitutional power conferred on the Legislature to authorize counties to levy a special tax upon the property and poll for special county purposes is essential to the existence of the State, and in the exercise of this power the Legislature is supreme. The doctrine of *stare decisis discussed. Ibid.*

11. *Taxation—Counties—Special Tax—Polls—Elector—Disqualification.*—Where the Legislature, in the exercise of its power (Art. V, sec. 6) confers on a county the authority to levy an additional tax in excess of the poll tax of $2 (secs. 1 and 2), a failure to pay this additional tax on poll does not disqualify the person failing to pay it of his vote; for this only applies to the failure to pay the poll tax levied directly under the limitation of Article V, secs. 1 and 2. *Ibid.*

12. *Taxation—Counties—Roads—Necessaries.*—A levy of taxes authorized by statute for road purposes of the county is for a necessary expense. *Ibid.*

13. *Taxation—Statutes—Bond Issues—Par—Resales.*—Where a statute authorizes a county to issue special tax bonds at their face value, to bear 5 per cent interest, and time certificates of deposit for a short period of time bearing only 2 per cent are partly taken in exchange, the difference in the interest rate reduces the purchase price of the bonds to below par, and the transaction is void, requiring a resale in accordance with the terms of the statute. *Ibid.*

14. *Taxation—License Tax—Foreign Corporations.*—Foreign corporations do business here by comity of the State, and the latter may impose a license tax as a condition upon which such corporations may do business here under the protection of our laws, where such is not an interference with interstate commerce, or the tax otherwise invalid. *Trust Co. v. Young*, 470.

15. *Same—Gross Earnings—Insurance.*—A license tax imposed as a condition upon which a foreign life insurance company may do business here may be fixed by a percentage upon its gross earnings within our borders. *Ibid.*

16. *Same—Statutes, Interpretation.*—The various statutes contained in Schedule B of our revenue laws, taxing gross earnings within our borders of foreign life insurance companies, brought forward in section 5175 of the Revisal and subsequent statutes, and section 4515 of the Revisal, codifying and classifying the insurance laws, should be construed as a whole as constituting one scheme of taxation, and thus construed, it is *Held*, that the tax imposed upon the gross earnings of such companies derived within the State is a license or occupation tax. *Ibid.*

17. *Same—Direct Remittance.*—Where a foreign life insurance company has acquired business by reinsurance from other foreign companies, the policies being on the lives of residents of this State, who remit their premiums direct to the home office, the company by receiving remittances in this manner may not escape taxation to that extent upon its gross earnings, derived within the State, for the license tax imposed by the statutes is not a tax upon the receipts, but a tax

TAXATION—*Continued.*

equal to 2½ per cent on their gross amount, and not confined to cash received or collections actually made within our borders. *Ibid.*

18. *Taxation—License Tax—Gross Receipts—Constitutional Law—Commerce.*—The license tax imposed upon the gross receipts of insurance companies on business written within the borders of our State, Revisal, secs. 5175, 4515, is not in contravention of the fourteenth amendment to the Constitution of the United States, as to due process and the equal protection of the law, nor a burden upon interstate commerce, being restricted to intrastate commerce, and not extending beyond the boundaries of the State. *Ibid.*

19. *Taxation—Schools—Four Months Term—Reference—Mandamus—Costs.*—It having been established by a reference in this case that the tax levied by the county commissioners was sufficient for a four months term of school: *Held*, a mandamus to compel them to issue an additional levy for that purpose at the suit of the county board of education was improper. Cost of appeal taxed against plaintiff; allowance to referee, etc., taxed equally against the parties. *Board of Education v. Board of Commissioners*, 861.

20. *Taxation—Inheritance Tax—Interpretation.*—Our inheritance tax laws should be liberally construed to the end that all property coming within their provisions may fairly and reasonably be taxed, keeping in view the history of this legislation and the statutory amendments made from time to time. *S. v. Scales*, 915.

21. *Same—"Section."*—Our statutes passed upon the subject of inheritance tax are construed as showing an advancing tendency to include all property to decrease exemptions, and to maintain a distinct classification of persons, placing the lineal descendant, the lineal ancestor, husband and wife in the most favored class, and the stranger and the corporation in the class subject to the highest tax; and construing the act of 1913, applying the exemptions only to those in the first class, with the act of 1915, reducing the classifications from five to three, and allowing an exemption of $2,000 to "all other beneficiaries in this section": *Held*, the word "section" was intended and meant for the subdivision in which it was placed, and does not apply to the whole section to exempt strangers of the blood of the testator along with the beneficiaries of the first class. *Ibid.*

22. *Same—Intent.*—The inheritance tax law, in grading the widow and blood relations, etc., of the deceased into one classification, exempting property to the value of "$2,000 to a child over 21," and permitting but one exemption to grandchildren of one child of the deceased, etc., cannot rationally be construed, by the additional words to this classification, "all other beneficiaries in this section, $2,000," to apply to the second and third classification, so as to give this exemption to strangers of the testator's blood, who take under his will. *Ibid.*

TAXES. See School Districts, 5; Principal and Agent, 13; Executors and Administrators, 3.

TAX LIST. See Taxation, 5.

TAX PAYER. See Actions, 5.

TEACHERS. See Trials, 2.

TECHNICAL ERROR. See Appeal and Error, 51-

TELEGRAPHS. See Limitation of Actions, 26.

1. *Telegraphs—Easements—Rights of Way—Additional Burden—Compensation—Damages.*—The construction of a telegraph company's lines upon a railroad right of way imposes an additional burden upon the fee-simple title to the lands which entitles the owner to compensation. *Teeter v. Tel. Co.*, 783.

2. *Telegraphs—Easements—Rights of Way—Requisition of Right.*—A telegraph company can only acquire an easement in lands for construction and maintenance of its lines by grant, or pursuant to the statutes, Revisal, secs. 1572, 1573, or by adverse and continuous use for twenty years, the period of the acquisition by such user for five years, allowed to railroad companies by Revisal, sec. 394, not extending to telegraph companies. *Ibid.*

3. *Telegraphs—Easement—Rights of Way—Permanent Damages—Right to Repair.*—Upon payment of a recovery for permanent damages for a right of way in plaintiff's action of trespass against a telegraph company, the defendant, so far as the plaintiff is concerned, acquires the right to maintain its lines on the land for an indefinite period, and to enter on the same whenever reasonably required for the planting, repairing, and preservation of its poles and other property. *Ibid.*

4. *Telegraphs—Easements—Rights of Way—Measure of Damages—Prospective Values.*—In admeasuring the damages for the imposition of an additional burden upon the plaintiff's land by the construction and maintenance upon a railroad right of way by the defendant telegraph company of its line of poles and wires, the inquiry is not confined to the diminution in value of the land as then used, but is extended to all the uses for which it is adapted or applied and which may be reasonably anticipated in the further use or development of the property; and under the circumstances of this case it is *Held*, that the inquiry should not be confined to the diminution of plaintiff's land as farming lands, but that its availability for factory sites was properly considered. *Ibid.*

TELEPHONE COMPANIES. See Negligence, 11.

1. *Telephone Companies—Streets—Abutting Owners—Shade Trees—Damages—Municipal Corporations—Title—Sanction.*—The owner of land abutting upon the streets of a town may recover damages for cutting shade trees on the sidewalks in front of his property which afforded protection thereto, in his action against an individual or corporation so mutilating the trees in furtherance of some private interest, though the ultimate title to the streets is in the municipalty, and the acts complained of were done with its sanction. *Wheeler v. Tel. Co.*, 9.

2. *Telephone Companies—Streets—Abutting Owners—Shade Trees—Damages—Punitive Damages.*—Where in an action for damages against a telephone company it is shown that defendant's employees cut shade trees on the sidewalk in front of plaintiff's dwelling in a town; that they had commenced to cut the trees before the owner was aware,

TELEPHONE COMPANIES—*Continued.*

and continued to cut after having been forbidden by his wife, claiming permission from the municipal authorities, and replied to the objection of the plaintiff's wife with the statement that they would cut down the trees, if this would be no more objectionable than trimming them: *Held*, sufficient to sustain a verdict awarding punitive damages. *Ibid.*

3. *Telephone Companies—Shade Trees—Damages—Torts—Abutting—Owner—Title—Possession—Presumptions.*—One who is in possession of a town lot abutting on a street on the sidewalk of which a telephone company has cut the trees to run its wires through, and who asserts ownership of the lot under a deed, may maintain his action against the company as a wrongdoer, nothing else appearing, for as to it such occupant will be presumed to be the owner until the contrary is made to appear. *Daniels v. R. R.*, 158 N. C., 418, cited and distinguished. *Ibid.*

TENANTS BY CURTESY. See Pleadings, 2.

1. *Tenant by the Curtesy—Evidence—Issue Born Alive—Interest.*—Where the defendant is in possession of the lands in dispute, claiming the right thereto as tenant by the courtesy, it is competent for him to testify diretly to the fact that issue of the marriage had been born alive, notwithstanding his interest in the result of the action, which goes to its weight and not to his competency to testify thereto. *Fleming v. Sexton*, 250.

2. *Tenant by the Curtesy—Issue Born Alive—Instructions—Appeal and Error.*—As to whether it is necessary for the child to have an independent life from its mother after the severance of the umbilical cord in order for the husband to be tenant by the courtesy consummate in his wife's land, after her death, *quære.* But when there is evidence that the child existed independently of the mother, for a while, a charge to the jury that they must so find in order that the defendant should establish his right as tenant by the curtesy, if erroneous, is not error prejudicial to the plaintiff. *Ibid.*

3. *Tenant by the Curtesy—Issue Born Alive—Wife's Declarations—Evidence.*—Where the defendant claims title and possession of his wife's land after her death, as tenant by the curtesy, declarations of the deceased wife that the child was not born alive are incompetent as evidence, if not shown to have been made *ante litem motam. Ibid.*

TENANTS FOR LIFE. See Tenants in Common, 4.

TENANTS IN COMMON. See Parties, 1.

1. *Tenants in Common—Partition of Lands—Oral Partition—Acquiescence—Estoppel.*—An oral partition of lands among tenants in common is not void, but voidable, and evidence is admissible to show ratification of the partition made, or conduct from which the parties seeking to disregard it are held to be estopped from so doing. *Collier v. Paper Corporation*, 74.

2. *Same—Lapse of Time.*—Where parties seeking to avoid an oral partition of lands have lived on the portions allotted to them and peaceably and continuously accepted it for twenty years or more, they are estopped to deny its validity. *Ibid.*

TENANTS IN COMMON—*Continued.*

3. *Same — Executors and Administrators — Donees of Power — Married Women.*—Where the testator has conferred upon his executors the power to partition his lands among certain of his beneficiaries, they act, in making the partition, *sui juris*, as donees of such power, and where they have made an oral partition, the statute of limitations begins to run from its date, notwithstanding the fact that one of the parties was a married woman. *Ibid.*

4. *Same—Estates—Tenants for Life— Remaindermen.*— A testator devised his lands to two of his daughters for life, and at their death to their children, upon certain contingencies, the lands to be divided among the life tenants by the executors, who accordingly exercised the power, without writing, except maps of the division were made by surveyors they employed for the purpose. Each of the life tenants entered into and remained in possession of the lands allotted to them, respectively, for twenty years or more. *Held*, the life tenants, by their conduct, are estopped to deny the validity of the partition, which is binding upon their children and those claiming under them. *Ibid.*

TERM. See Judgments, 1; Courts, 6, 7, 8.

THREATS. See Assaults, 1; Homicide, 10.

TICKETS. See Carriers of Passengers, 4.

TIMBER. See Deeds and Conveyances, 16, 18, 19; Reference, 8; Principal and Agent, 2.

TIMBER DEEDS. See Instructions, 2.

Timber Deeds—Measurements—Exceptions—Burden of Proof—Deeds and Conveyances.—Where in an action for damages brought against the grantee of a timber deed for cutting timber of smaller size than that specified, the defendant claims that the trees thus cut came within an exception in the deed permitting it to be done for certain particular purposes, he having peculiar knowledge of the facts, has the burden of showing that they were cut and used for the purposes specified. *Bradshaw v. Lumber Co.*, 219.

TITLE. See Carriers of Goods, 3; Deeds and Conveyances, 5, 16; Telephone Companies, 1, 3; Limitation of Actions, 2; Courts, 9; Office, 1; Criminal Law, 5.

TORTS. See Municipal Corporations, 4; Telephone Companies, 3; Negligence, 7, 10, 11; Contracts, 16; Carriers of Goods, 38; Removal of Causes, 12; Appeal and Error, 39.

1. *Torts—Damages—Proximate Cause.*—A wrong-doer is responsible in damages resulting directly and proximately from the tort he has committed; but if the cause is remote in efficiency and does not naturally result from the tort, it will not be considered as proximate. *Garland v. R. R.*, 638.

2. *Same—Carriers of Passengers—Negligence—Intervening Cause—Trials —Courts—Questions of Law.*—Where a railroad company has negligently carried a female passenger a mile or two beyond her station,

TORTS—*Continued.*

causing her to walk that distance to her home with a suitcase, and the failure of her husband to meet her; and it appears that, at the time the weather was clear and pleasant, but she was caught in a storm before she reached home, after having stopped a while on her way at a friend's: *Held*, the damages she may have sustained by reason of the storm were caused by an independent, intervening act, the act of God, and not those arising proximately from the carrier's tort, and are properly excluded as an element of damages as a matter of law. *Ibid.*

3. *Torts — Carriers — Damages—Contracts—Proximate Cause.*—Where a carrier is sued for damages in tort for a neglect of its duty in negligently carrying a passenger to a station beyond her destination, the rule that the damages must have been within the contemplation of the parties, applying to breaches of contract, has no application. *Ibid.*

TRANSCRIPTS. See Courts, 3; Appeal and Error, 47.

TRANSFER OF CAUSES. See Removal of Causes, 1, 2.

TRESPASS. See Injunction, 2; Limitation of Actions, 14, 25; Deeds and Conveyances, 17, 19; Appeal and Error, 34; Negligence, 10.

TRESPASSERS. See Carriers of Goods, 40.

TRIAL BY JURY. See Reference, 1, 4.

TRIALS. See Carriers of Goods, 6, 36; Contracts, 5, 6, 24; Damages, 3; Evidence, 3, 8, 16; Instructions, 1, 7, 8, 11, 19, 21; Master and Servant, 1, 5, 9, 11; Homicide, 2, 4, 7, 8, 10, 11, 14; Principal and Agent, 3, 6, 7; Railroads, 2, 7, 12, 14, 21, 24, 28; Negligence, 2, 5, 14; Wills, 1, 3, 19, 20, 31; Appeal and Error, 8, 22, 23, 30, 32, 38, 56, 61; Verdicts, 2; Limitation of Actions, 5, 8, 19, 21, 22; Reference, 2; Insurance, 6; Mortgages, 5; Pleadings, 5; Carriers of Passengers, 3, 6, 7; Bills and Notes, 2, 8; Deeds and Conveyances, 15, 19, 24, 31; Vendor and Purchaser, 4, 10; Banks and Banking, 3; Judgments, 19; Release, 3; Usury, 2; Torts, 2; Commerce, 2; Sale, 2; Estoppel, 1; Carriers of Goods, 41; Criminal Law, 6, 12, 16, 24, 25; Courts, 14.

1. *Trials — Evidence — Letter of Credit — Payment—Burden of Proof.*—Where in an action to cancel a note and mortgage the defendant sets up as a counterclaim an amount due under plaintiff's letter of credit for goods sold and delivered to another, which letter the plaintiff admits, but pleads payment, the burden of proof is on the plaintiff to show that the alleged payments had been made. *Thrash v. Ould*, 728.

2. *Trials—Courts—Expression of Opinion—Statutes—Schools—Teachers —Assaults.*—Where a school teacher is tried for an assault upon a lad, his pupil, and the evidence is conflicting as to whether he acted in the exercise of proper chastisement, or "slung him around," hit him against a wall, and he fell to the floor, causing an injury, a charge of the judge to the effect that the judge believed in whipping posts, but that the defendant had no right to sling the boy against the house and bruise him, and that the proper way was to have

TRIALS—*Continued.*

taken a switch and whipped him, is an expression by the court of his opinion on the evidence, forbidden by the statute. *S. v. Williams*, 894.

3. *Trials—Evidence—Ex-convicts—Questions for Jury.*—A guard indicted for unlawfully assaulting a convict may be convicted upon testimony of ex-convicts, the weight and credibility of such evidence being for the jury. *S. v. Mincher*, 896.

4. *Trials—Juries—Officer in Charge—Remarks—Appeal and Error.*—A remark to the jury by the officer having them in charge while deliberating upon their verdict, that the judge would keep them until Sunday, though authorized by the judge, would not be reversible error. *S. v. Burton*, 939.

TRUSTEE. See Bankruptcy, 8.

TRUST FUNDS. See Mechanics' Liens, 8

TRUSTS. See Estates, 2, 4; Vendor and Purchaser, 1; Taxation, 3; Limitation of Actions, 11; Mortgages, 4, 5, 6; Wills 29; Mechanics' Liens, 4.

1. *Trusts—Statutes—Beneficiaries—Parties.*—Revisal, sec. 404, providing that "a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted" does not apply so as to exclude the beneficiary as a necessary party in a suit involving the question as to whether the trustee has exceeded his authority under the terms of the instrument creating the trust, and wherein the interests of the beneficiary may be seriously affected. *Barbee v. Penny*, 653.

2. *Same — Wills — Executors — Interests — Merits—Appeal and Error.*— Where in a suit by the executors to remove a cloud upon the title to lands where they had contracted with the defendants to sell upon certain terms, the question involved affects the right of the executors to make the contract under the terms of the will, they alleging in their own behalf and in behalf of the beneficiaries the want of such power, and the defendant insisting on a specific performance of the contract, and also asking damages for its breach; and it appears that the beneficiaries are necessary parties to the suit, but were not so made: *Held*, questions as to whether the executors acted within the powers conferred, or whether they had divested themselves of the power to sell advantageously, etc., affect the merits of the cause, and consideration thereof will be postponed until they shall have properly been made parties thereto. *Ibid.*

TRUSTS AND TRUSTEES.

1. *Trusts and Trustees — Parol Trusts — Deeds and Conveyances.* — A grantor in a conveyance of lands reciting the consideration that the grantee should pay off a certain mortgage thereon is estopped by his deed from setting up a resulting trust in his favor and want of consideration, and showing that the grantee agreed by parol to pay off the mortgage from the rents and profits of the land. *Walters v. Walters*, 328.

2. *Trusts and Trustees—Parol Trusts—Deeds and Conveyances—Statute of Frauds.*—A parol trust in favor of the grantor, that the grantee

TRUSTS AND TRUSTEES—*Continued.*

pay off a mortgage thereon from the rents and profits, being unenforcible, it is incompetent to further show by parol that the grantee had then obligated himself to sell the lands and pay his grantor a part of the proceeds of sale, as such falls within the meaning of the statute of frauds. *Ibid.*

ULTRA VIRES. See Railroads, 10, 12.

UNDUE INFLUENCE. See Wills, 2, 3, 22; Appeal and Error, 9.

USURY. See Instructions, 7.

1. *Usury—Contracts—Intent—Interpretation.*—Where in an action to recover for alleged usury charged, the evidence is conflicting as to whether the defendant loaned the plaintiff money at an excessive or usurious rate of interest, to purchase an automobile, taking title to himself to protect himself in the transaction; or whether the defendant purchased the automobile, and sold it to the plaintiff at an advanced price, or for a profit, the intent of the parties and not the form of the transaction should be considered. *Monk v. Goldstein*, 515.

2. *Usury—Trials—Burden of Proof.*—Where the plaintiff sues to recover for usury alleged to have been charged him for a loan of money to purchase an automobile, and the evidence is conflicting as to whether the defendant loaned the money, or purchased the car and sold it to the plaintiff for a profit, the burden of proof is upon the plaintiff to establish, by the preponderance of the evidence, the fact that the money was loaned to him under an agreement requiring him to pay more than the legal rate of interest; and, if paid, that the defendant received it as usury, or with knowledge that it was usury, or with the wrongful intent of violating our statute upon the subject. *Ibid.*

3. *Usury—Pleas—Counterclaim—Cross Action.*—A plea of usury by a surety in an action against him on the note, by way of counterclaim, is in effect a cross action. *Bank v. Loven*, 666.

4. *Same—Statutes—Principal and Surety—Actions—Counterclaim.*—Revisal, sec. 1951, providing that in an action brought to recover upon a note, etc., it shall be lawful for the one who has paid usury thereon to plead the penalty as a counterclaim, recover twice the amount of the interest paid, and the forfeiture of the entire interest, should be construed in the light of the history of legislation on the subject, to ascertain the legislative intent; and when so construed it is *Held*, that when the principal debtor has become bankrupt, after having paid interest at an usurious rate, and the surety is sued on the note, the defendant may set up such payment by way of counterclaim. *S. v. Johnson*, 170 N. C., 169, cited and applied. *Ibid.*

5. *Same—Subrogation.*—Where the principal of a note has paid usurious interest to the payee thereof, and the payee sues only the surety, the surety is entitled to all of the defenses of the principal debtor, and he may set up the usury paid by his principal as a counterclaim: for otherwise the payee could collect the usurious interest, and nevertheless recover the whole amount of the debt by suit against the surety alone. *Ibid.*

VALUATION. See Carriers of Goods, 29.

VALUE. See Criminal Law, 11.

VARIANCE. See Courts, 6; Indictment, 1.

VENDOR AND PURCHASER. See Evidence, 10; Contracts, 6; Limitation of Actions, 16, 17.

1. *Vendor and Purchaser—Proceeds of Sale—Trusts—General Assignment—Priorities—Commingling of Goods.*—A partnership conducting a general merchandise business, including the sale of fertilizers, handled the plaintiff's fertilizers and that of others, under agreement that the proceeds of the sales of plaintiff's fertilizers should be segregated and held in trust to be paid over to it, which they failed to do, and made an assignment for the benefit of their creditors. The plaintiff being unable to identify such proceeds, it is *Held*, that it was not entitled to any preference over the other creditors in their action against the trustee; and this principle applies to the proceeds of collateral notes which the partnership set apart for plaintiff, which had not been registered or sent to it, and which could not be identified. The doctrine of confusion of goods is not applicable to this case. *Chemical Co. v. Rogers*, 154.

2. *Vendor and Purchaser—Merchandise in Bulk—Statutes—Burden of Proof.*—Under our statute the sale of a stock of merchandise, in large part or as a whole, in bulk, is prima facie evidence of fraud, and renders the transaction void, unless the seller has complied with the statutory requirements as to inventory and notice to his creditors, with the burden on him to show that he has done so. Gregory's Suppl. to Pell's Revisal, sec. 964a. *Gallup v. Rozier*, 283.

3. *Same—Instructions—Appeal and Error.*—In an action to set aside the sale of a stock of merchandise in bulk (Gregory's Suppl. to Pell's Revisal, sec. 964a) as void against creditors, it is for the jury to determine the fact as to whether the seller had complied with the statutory requirement as to invoice, notice to creditors, etc., upon his evidence that he had done so, under proper instructions from the court; and a charge in effect that if he had failed in this respect the transaction was prima facie fraudulent, and not that it was void, is reversible error. *Ibid.*

4. *Vendor and Purchaser—Merchandise in Bulk—Statutes—Burden of Proof—Trials—Evidence—Questions for Jury.*—The burden of proof on the affirmative of the issue as to fraud in the sale of a stock of merchandise in bulk remains with the plaintiff in this action to set it aside, even if the seller had complied with the statute (Gregory's Suppl. to Pell's Revisal, sec. 964a), as in that case the sale in bulk is still prima facie evidence of fraud under the statute, leaving it for the jury to determine the ultimate fact of fraud, upon the evidence. *Ibid.*

5. *Vendor and Purchaser—Merchandise in Bulk—Statutes—Time of Notice—Definition.*—The statutory requirement that the seller of a stock of merchandise in bulk shall give notice thereof to his creditors "within seven days" is interpreted to mean that such notice may be given at any time within the number of days specified. *Ibid.*

VENDOR AND PURCHASER—*Continued.*

6. *Vendor and Purchaser — Title — Registration.*—A conditional sale reserving title in the vendor is good between the parties without registration. *Dry-Kiln Co. v. Ellington,* 481.

7. *Same—Mortgages—After-Acquired Property.*—A mortgage of after-acquired property, though not good at common law, is now upheld as valid; but the mortgagee's right of lien is subject to the conditions in which the after-acquired property comes into the mortgagor's hands, and if the mortgagor has obtained it subject to the reservation of title in the vendor, the general lien of the prior mortgage is subject to the vendor's right, though the constitutional sale is unrecorded, and the property has been annexed to the land and become a fixture thereon. *Ibid.*

VERDICT, DIRECTING. See Instructions, 12.

VERDICTS. See Mortgages, 3; Appeal and Error, 18; Judgments, 18; Contracts, 20; Courts, 13; Criminal Law, 20, 23.

1. *Verdicts—Interpretation—Courts.*—A verdict of the jury may be interpreted by proper reference to the pleadings, evidence, and charge of the court. *Reynolds v. Express Co.,* 487.

2. *Verdicts—Weight of Evidence—Trials—Court's Discretion—Appeal and Error.*—A motion to set aside a verdict as being against the weight of the evidence is addressed to the sound discretion of the trial judge, and not reviewable on appeal. *Collins v. Casualty Co.,* 543.

VESTED INTERESTS. See Deeds and Conveyances, 34.

VESTING OF INTERESTS. See Estates, 4.

VIS MAJOR. See Negligence, 1.

WAGES. See Contracts, 27.

WAIVER. See Injunction, 4; Justice's Court, 1; Reference, 1; Deeds and Conveyances, 17, 32; Appeal and Error, 24, 26; Limitation of Actions, 17; Carriers of Goods, 32; Contracts, 16, 17.

WARRANT. See Criminal Law, 8.

WASTE. See Estates 3.

WATER AND WATER-COURSES.

1. *Water and Water-courses — Diverting Waters — Drainage Districts — Damages.*—A district created under the drainage statute is not a political agency of the State and is liable for the wrongful diversion of water to the damage of a lower proprietor of lands lying beyond the boundaries of the district, when those claiming such damage are in no wise claiming under such proceedings or under any party thereto. *Newby v. Comrs.,* 163 N. C., 26 cited and distinguished. *Leary v. Comrs.,* 25.

2. *Same — Drainage Commissioner — Negligence — Unauthorized Acts.*—The commissioners of a drainage district are without authority to extend its canal beyond the limits of the district in such manner as to divert the flow of the water to the damage of the lands of the

WATER AND WATER-COURSES—*Continued.*

proprietor situate beyond its limits; and they are individually liable for such damages as are caused by their unlawful or negligent acts in so doing, *Ibid.*

3. *Water and Water-courses—State Grants—Navigable Waters—Riparian Owner—Wharves—Statutes.*—The owner of lands adjoining navigable waters can only acquire a qualified right to, or easement in, the use of such waters and the soil covered thereby, under the provisions of Revisal, sec. 1696, restricted to the erection of wharves on the side of deep water in front of the shore, etc., and incidental to the ownership of the riparian lands, and not independently thereof. *R. R. v. Way*, 774.

4. *Same—Incidental to Ownership—Extinguishment—Reëntry.*—Where the riparian owner of shore lands upon navigable waters has entered upon the lands covered by the waters to deep water, and acquired the right to build a wharf, etc., under the provisions of Revisal, sec. 1696, and a strip of land along the shore line has been reclaimed and acquired by another, the original grant of easement by the State is extinguished, and the land so reclaimed becomes vacant and is again subject to entry under the provisions of the statute. See *s. c.*, 169 N. C., p. 1. The rights of riparian owners in land covered by navigable waters discussed by WALKER, J. *Ibid.*

WHARVES. See Water and Water-Courses, 3.

WIDOWHOOD. See Taxation, 4.

WIFE. See Deeds and Conveyances, 14.

WILLS. See Appeal and Error, 9; Removal of Causes, 3; Instructions, 8; Partition, 2; Trusts, 2; Estates, 7.

WILLS.

1. *Wills—Trials—Evidence—Questions for Jury.*—In an action to set aside a will for mental incapacity and undue influence, testimony of a witness which tends to contradict his former evidence favorable to the mental condition of the testator is competent, the truth of the matter being for the jury to determine, and it is also competent for him to testify from his own knowledge as to the mental capacity of the testator to make the will. *In re Staub's Will*, 138.

2. *Wills—Evidence—Contradictory Testimony—Undue Influence.*—In an action to set aside a will for mental incapacity and undue influence, it is competent for propounder's witness to state, on cross-examination, that the testator was at the time entirely under the dominion, direction, and control of a religious denomination which is the principal beneficiary under the will, and, as corroboration of substantive evidence of mental incapacity, the dependent condition of testator's family. *Ibid.*

3. *Wills—Mental Incapacity—Undue Influence—Trials—Evidence—Questions for Jury.*—In an action to caveat a will there was conflicting evidence of mental incapacity and undue influence; that the wife of the deceased was dependent, that his daughter had supported the family except for a small portion of the deceased's income from his

WILLS—*Continued.*

property; that the testator devised only a small amount of personal property and $2,500 in real estate to his family, and $20,000 to the Christian Scientist Church, which dominated his actions and of which he was a member. *Held*, sufficient for the jury under proper instructions. *Ibid.*

4. *Same—Instructions—Burden of Proof.*—The instructions given by the court to the jury in this action to caveat a will, defininining the right of the testator to dispose of his property as he pleased, applying the various phases of the testimony to the issues of mental incapacity and undue influence, defining the former, and placing the burden of proof on the caveator, are approved. *Ibid.*

5. *Wills — Interpretation — "Lawful Heirs" — Children — Contingent Interests—Defeasible Fee—Estates.*—A will should be construed as a whole and to give effect to every part; and in a devise to a granddaughter, S., of a certain house and lot, but should she die without lawful heirs, to certain named of the testatrix's other grandchildren, to construe the word "heirs" as general heirs, and vest the fee simple in S., would be to render other terms of the will meaningless; and construing the will to arrive at the intent of the testatrix, it is *Held*, that the word "heirs" meant "children," and that S. took a defeasible fee, to be divested if she die without leaving children surviving her. *Bizzell v. Building Association*, 159.

6. *Same—Lapsed Devise—Intestacy.*—A devise to S. of certain lands in fee, defeasible upon her death without children, in which event to go to those of her brothers, by name, one of whom died in the testatrix's lifetime without having married, and S. and her other two brothers are now living and the sole heirs at law of the testatrix: *Held*, the testatrix died intestate as to the contingent interest of the deceased brother of S., one-third of which would vest in S.; and pending the happening of the event which would divest the title of S. to the other two-thirds, she cannot make a good and indefeasible fee-simple title to the entire property. *Ibid.*

7. *Wills — Probate — Caveat — Proceedings in Rem—Collateral Attack—State Courts.*—In this State the proceeding for probate of a will is not an adversary suit *inter partes*, but a proceeding *in rem* in which the jurisdiction of the court, in the exercise of probate powers, is exclusive; and an adjudication of probate or an issue involved therein, may not be assailed or questioned in any independent or collateral proceeding. *Powell v. Watkins*, 244.

8. *Wills—Costs—Court's Discretion—Appeal and Error.*—Where the will of the testator has been caveated and the will sustained, and it appears that the estate consisted of lands, the costs of the proceedings are not considered as debts owed by the decedent, under the general rule that residuary legatees are first to be paid; and the taxing of such costs against the estate proportioned among the devisees is a matter within the discretion of the trial judge, which will not be disturbed on appeal. Revisal, sec. 1268. *In re Winston's Account*, 270.

9. *Wills — Caveat — Surveys — Costs — Executors and Administrators.*— Where certain land contiguous to the lands of other devisees are de-

WILLS—*Continued.*

vised, without direction in the will for a survey or partition or for perfecting the title, the cost of survey and registration of deeds should be borne by the devisees of the lands, and it is not a proper charge against the estate to be paid by the executor. *Ibid.*

10. *Wills—Codicils—Interpretation.*—A codicil to a will should be construed as in explanation or alteration thereof, or as adding to or subtracting something from the will of which it is a part. *Albright v. Albright*, 351.

11. *Wills—Heirs—Interpretation.—The words "heirs," "heirs of the body,"* or "bodily heirs" have under the statute the same significance, and the rule holding them to designate the class of persons who, by law, take the property by inheritance or succession from one another is more insistent as applied to conveyances *inter vivos* than to testamentary dispositions. *Ibid.*

12. *Same—Intent—Children.*—Though the words "heirs," "heirs of the body," or "bodily heirs" have a legal signaficance, and may under our statutes carry the estate in fee simple when appearing after the name of the grantee, this construction will not obtain when it clearly appears from interpreting a will as a whole that the testator intended they should have different meaning from the technical one. *Ibid.*

13. *Same—Contingent Limitations—Defeasible Fee.*—A devise of an estate in a will to a son, A., and his heirs, with codicil, "I further change the text of my will to the extent that the word 'heirs' shall mean and be construed by my executors as 'bodily heirs,' so that if one of my children shall die without leaving bodily heirs, it is my will that that child's part in the distribution of my estate shall be equally divided among my grandchildren who are the bodily heirs named in the above will": *Held*, the devise to A. was a fee-simple estate, defeasible upon his dying without leaving children. *Ibid.*

14. *Wills—Interpretation — Intent — Personalty.*—Where the word "heirs" in a will is used in connection with the testator's disposition of his realty, the words in a codicil thereto which refers to it as a "disposition of personalty" is not controlling as to the intent of the testator. *Ibid.*

15. *Wills—Interpretation—Contracts.*—Where a paper-writing begins with the usual formality and declares itself to be the will of the testator, before making disposition of his property, and thereafter the testator revokes therein all former wills which he had made, and it is duly subscribed and witnessed in accordance with the requirements for a will, it does not lose its character as such, or assume that of a contract, because of an unsigned provision that the beneficiary agrees to support the testator "as long as he lives"; and this clause may be disregarded as surplusage, when the instrument has been retained by the testator. *In re Edwards' Will*, 369.

16. *Same—Validity Upheld.*—Where a paper-writing will operate as a will and not as a contract, it will be upheld as the former. *Ibid.*

17. *Wills—Devises—Statutes—Forms.*—The power to devise is purely statutory, requiring no special form to give the intention of the testator effect as his will. *Ibid.*

WILLS—*Continued.*

18. *Wills—Probate—Evidence.*—Evidence is sufficient for the probate of a paper-writing purporting to be a will which tends to show that the subscribing witnesses went to the house of the deceased with an attorney, the deceased said he wanted them to witness his will, which was lying on a table in the room, then signed it, saying it was his will, requested the witnesses to sign it, the signing by the deceased and the witnesses being in the presence of each other. *In re Broach's Will*, 520.

19. *Wills — Probate — Impeaching Evidence — Burden of Proof—Trials.*—Where the formal execution of a paper-writing purporting to be a will has been proven, it is prima facie the will of the deceased, devolving upon the caveators the production of impeaching evidence. *Ibid.*

20. *Wills—Mental Capacity—Evidence—Witnesses—Opinions—Trials.*—In proceedings to caveat a will a witness may be asked of his own knowledge whether in his opinion the deceased possessed sufficient mental capacity to make the will at the time, know his property, his relatives, the claims they had upon him, and to whom he wanted to give his property. *Ibid.*

21. *Same — Instructions — Intelligence.*— Where the court has properly charged upon mental capacity of the deceased to make a will, a further charge that it is not required that he should have had a high degree of intelligence is without error. *Ibid.*

22. *Wills—Undue Influence—Wife—Husband and Wife.*—Undue influence sufficient to set aside a will must be more than that arising from affection and kindness, but must partake of the nature of fraud; and such will not be inferred from the fact alone that the deceased had devised his property to his wife, who was with him at the time when he executed the paper-writing, and attending him during his sickness, or the fact that hers was a strong and his a weak will. *Ibid.*

23. *Wills—Caveat — Parties — Evidence — Presumptions.*—Where a paper-writing is sought to be set aside for undue influence of the wife of the deceased, a requested instruction that the failure of the wife to testify was a strong circumstance tending to prove its invalidity, is properly refused, there being no parties to a *devisavit vel non. Ibid.*

24. *Wills—Signature—Execution—Evidence—Request.*—Where there is evidence that a paper-writing has been signed by the deceased and duly attested by the witnesses, and that the deceased declared it to be his will, a requested instruction that there was no evidence that the will was prepared at his request is properly refused. *Ibid.*

25. *Wills—Caveat—Burden of Proof—Presumptions—Instructions.*—In proceedings to caveat a will, the burden is upon the caveator to show undue influence, if such is relied on to set aside the writing; and his prayer for instruction that if the person benefited procured the same or advised the terms of the instrument, it would raise a presumption of undue influence, and the jury should so find unless explained to their satisfaction, is properly refused. *Ibid.*

26. *Wills — Mental Capacity — Evidence—Circumstance—Blank Space.*—A paper-writing purporting to be a will which appoints the deceased's

WILLS—*Continued.*

wife as executor and guardian of minor children, should there be any at the time of his death, and in another section leaves a blank space for the appointment of an executor and guardian in the event the wife predeceased him, cannot be construed as an anomaly of his appointing her as guardian for the children after her death, and a circumstance affecting the question of the deceased's mental capacity. *Ibid.*

27. *Wills—Caveat—Admissions—Burden of Proof.*—Upon trial of *devisavit vel non* the burden of showing the affirmative of the issue is upon caveator. *In re Arledge's Will*, 563.

28. *Wills—Spoliation—Personal Action—Probate—Caveat.*—A personal action for damages will lie against wrong-doers in destroying a part of a will wherein certain legacies had been left to the plaintiffs, and which they are unable to establish as a will, the measure of damages being the value of such legacies; and the action being for spoliation and suppression, it is not necessary that the will should be proven in common form and attacked by a caveat to set it aside. The court, after stating precedents, also applied the maxim, there is "no wrong without a remedy." *Dulin v. Bailey*, 608.

29. *Wills—Executors—Power of Sale—Trusts—Naked Title—Heirs at Law.* Where the testatrix names three of her sons as executors of her will, directing that they shall lay off certain of her lands into lots and sell the same in lots of such size as they deem best, with provision that any of the testatrix's children could purchase before the sale in accordance with a specified method of valuation, to be charged against such child so buying in the distribution of the estate, and with further direction that the testatrix's children should express their opinion as to the management of the estate, the majority to decide what is reasonable: *Held*, the executors under the terms of the will are given a naked power of sale, with the legal title in the heirs, subject to be divested upon a legal or proper execution of the power. *Barbee v. Penny*, 653.

30. *Same—Deeds and Conveyances — Contracts — Beneficiaries—Parties—Appeal and Error—Costs.*—Where the executors of a will are given only the naked power of sale of certain lands of the testatrix, and the title is vested in the testatrix's children, whose wishes in the adminstration of the estate are to be ascertained in a certain manner and regarded, and the executors have entered into a certain agreement with another for the sale of the lands at a certain price, for certain commissions of sale, etc., and then bring suit to set aside this contract as a cloud upon the title to the lands, alleging that the heirs at law had demanded such action on their part, and the defendant insists upon the specific performance of the contract, and also demands damages for its breach, alleging that the executors were clothed under the terms of the will with authority to make it, which the plaintiffs deny: *Held*, the children of the testatrix, the beneficiaries under the trust, are necessary parties to the action and entitled to set up matters of benefit or disadvantage under the contract of sale; and it being necessary that they should be parties so that the final decree as to title will conclude them, on appeal to the Supreme Court, the case will be remanded to that end. The costs of appeal in this case, are taxed equally against both parties. *Ibid.*

WILLS—*Continued.*

31. *Wills—Trials—Change of Issues—Prejudice—Instructions—Mental Capacity.*—Where in an action to caveat a will the trial judge has stated that he will submit three issues, as to the execution of the will, mental capacity of testator, and undue influence, and it is admitted that the will was executed, and there was no evidence of undue influence: *Held*, it was not prejudicial to the caveators that the court only submitted the usual issue relating to the execution and validity of the will. The charge as to the degree of mental capacity required is approved. *In re Fleming's Will*, 840.

WITNESSES. See Reference, 3; Evidence, 11; Wills, 20; Insurance, 11; Appeal and Error, 41; Courts, 12; Court's Discretion, 1.

Witnesses — Evidence Impeaching — Contradiction—Appeal and Error.—Testimony which tends to impeach a witness, and brought out for that purpose, is held not incompetent in this case as contradictory evidence. *S. v. Davidson*, 944.

WOMEN. See School Districts, 2.

WRITTEN CLAIM. See Carriers of Goods, 9.

WRITTEN DEMAND. See Carriers of Goods, 20, 31, 32.

WRONGDOER. See Contracts, 15.

WRONGFUL DEATH. See Executors and Administrators, 2.

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